UNITED NATIONS

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.

DRA@EN ERDEMOVI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Payam Akhavan

Counsel for the Appellant:

Mr. Jovan Babi}

I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal") is seised of an appeal lodged by Dra`en Erdemovi} ("the Appellant") against the Sentencing Judgement rendered by Trial Chamber I[1] on 29 November 1996 ("Sentencing Judgement")[2]. By this Sentencing Judgement, the Trial Chamber sentenced the Appellant to 10 years' imprisonment, following his guilty plea to one count of a crime against humanity, for his participation in the execution of approximately 1,200 unarmed civilian Muslim men at the Branjevo farm near the town of Pilica in eastern Bosnia on 16 July 1995, in the aftermath of the fall of the United Nations 'safe area' of Srebrenica.

2. The relevant facts, so far as this appeal is concerned, may be set out as follows. The Appellant was transferred into the custody of the International Tribunal on 30 March 1996 in connection with the Prosecutor's investigations into serious violations of international humanitarian law allegedly committed against the civilian population in and around Srebrenica in July 1995. Prior to his transfer, the Appellant had been detained since 2 March 1996 by the authorities of the Federal Republic of Yugoslavia in connection with their investigations into the same events. On 29 May 1996, Trial Chamber II requested the Federal Republic of Yugoslavia to defer to the International Tribunal all investigations and criminal proceedings respecting serious violations of international humanitarian law alleged to have been committed by the Appellant in and around Srebrenica in July 1995[3].

3. The Appellant was indicted on 29 May 1996 on one count of a crime against humanity and on an alternative count of a violation of the laws or customs of war. The Indictment alleged the following facts:

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[1] Judges Jorda (Presiding), Odio Benito and Riad.
[2] Sentencing Judgement, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-T, T.Ch. I, 29 Nov. 1996 ("*Sentencing Judgement*").
[3] Decision in the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal addressed to the Federal Republic of Yugoslavia in the Matter of Dra`en Erdemovi}, Case No. IT-96-22-D, T. Ch. II, 29 May 1996.

1. On 16 April 1993, the Security Council of the United Nations, acting pursuant to Chapter VII of the United Nations Charter, adopted resolution 819, in which it demanded that all parties to the conflict in the Republic of Bosnia and Herzegovina treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act. Resolution 819 was reaffirmed by Resolution 824 on 6 May 1993 and by Resolution 836 on 4 June 1993.

2. On or about 6 July 1995, the Bosnian Serb army commenced an attack on the UN "safe area" of Srebrenica. This attack continued through until 11 July 1995, when the first units of the Bosnian Serb army entered Srebrenica.

3. Thousands of Bosnian Muslim civilians who remained in Srebrenica during this attack fled to the UN compound in Poto~ari and sought refuge in and around the compound.

4. Between 11 and 13 July 1995, Bosnian Serb military personnel summarily executed an unknown number of Bosnian Muslims in Poto~ari and in Srebrenica.

5. Between 12 and 13 July 1995, the Bosnian Muslim men, women and children, who had sought refuge in and around the UN compound in Poto~ari were placed on buses and trucks under the control of Bosnian Serb military personnel and police and transported out of the Srebrenica enclave. Before boarding these buses and trucks, Bosnian Muslim men were separated from Bosnian Muslim women and children and were transported to various collection centres around Srebrenica.

6. A second group of approximately 15,000 Bosnian Muslim men, with some women and children, fled Srebrenica on 11 July 1995 through the woods in a large column in the direction of Tuzla. A large number of the Bosnian Muslim men who fled in this column were captured by or surrendered to Bosnian Serb army or police personnel.

7. Thousands of Bosnian Muslim men who had been either separated from women and children in Poto~ari or who had been captured by or surrendered to Bosnian Serb military or police personnel were sent to various collection sites outside of Srebrenica including, but not limited to a hangar in Bratunac, a soccer field in Nova Kasaba, a warehouse in Kravica, the primary school and gymnasium of "Veljko Luki}-Kurjak" in Grbavci, Zvornik municipality and divers fields and meadows along the Bratunac-Mili}i road.

8. Between 13 July 1995 and approximately 22 July 1995, thousands of Bosnian Muslim men were summarily executed by members of the Bosnian Serb army and Bosnian Serb police at divers locations including, but not limited to a warehouse at Kravica, a meadow and a dam near La`ete and divers other locations.

> 9. On or about 16 July 1995, DRA@EN ERDEMOVI] and other members of the 10th Sabotage Detachment of the Bosnian Serb army were ordered to a collective farm near Pilica. This farm is located northwest of Zvornik in the Zvornik Municipality.
>
> 10. On or about 16 July 1995, DRA@EN ERDEMOVI] and other members of his unit were informed that bus loads of Bosnian Muslim civilian men from Srebrenica, who had surrendered to Bosnian Serb military or police personnel, would be arriving throughout the day at this collective farm.
>
> 11. On or about 16 July 1995, buses containing Bosnian Muslim men arrived at the collective farm in Pilica. Each bus was full of Bosnian Muslim men, ranging from approximately 17 to 60 years of age. After each bus arrived at the farm, the Bosnian Muslim men were removed in groups of about 10, escorted by members of the 10th Sabotage Detachment to a field adjacent to farm buildings and lined up in a row with their backs facing DRA@EN ERDEMOVI] and members of his unit.
>
> 12. On or about 16 July 1995, DRA@EN ERDEMOVI], did shoot and kill and did participate with other members of his unit and soldiers from another brigade in the shooting and killing of unarmed Bosnian Muslim men at the Pilica collective farm. These summary executions resulted in the deaths of hundreds of Bosnian Muslim male civilians.[4]

4. At his initial appearance on 31 May 1996, the Appellant pleaded guilty to the count of a crime against humanity. The Appellant added this explanation to his guilty plea:

> Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you are sorry for them, stand up, line up with them and we will kill you too". I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me. That is all I wish to add.[5]

The Trial Chamber accepted the Appellant's guilty plea and dismissed the second count of a violation of the laws or customs of war.

5. At the close of the initial appearance, the Trial Chamber ordered a psychiatric and psychological evaluation of the Appellant. The panel of three experts filed its report on 26 June 1996, concluding that the Appellant was suffering from post-traumatic stress disorder and that his

[4] Indictment, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22, 29 May 1996, pp. 1 – 3.
[5] Transcript, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-T, 31 May 1996, p. 9 ("*Trial Transcript")*.

mental condition at the time did not permit his trial before the Trial Chamber[6]. Consequently, the Trial Chamber postponed the pre-sentencing hearing and ordered a second evaluation of the Appellant to be submitted in three months' time. This second report was filed on 17 October 1996 and concluded that the Appellant's condition had improved such that he was now "sufficiently able to stand trial"[7].

6. In the meantime, the Appellant had been cooperating with the investigators of the Office of the Prosecutor and, in July 1996, testified at the hearing pursuant to Rule 61 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules") in the case of *Prosecutor v. Radovan Karad`i} and Ratko Mladi}*[8]. The transcript of the Appellant's testimony in that case was added to the trial record with the consent of the parties[9].

7. The Trial Chamber held a pre-sentencing hearing on 19 and 20 November 1996, for which it had asked the parties to make submissions on "the general practice regarding prison sentences and mitigating and aggravating circumstances"[10].

8. In his testimony before the Trial Chamber, the Appellant described in detail the facts alleged in paragraphs 9 to 12 of the Indictment (*see* paragraph 3, *supra*). The Trial Chamber summed up his testimony on these facts as follows:

> On the morning of 16 July 1995, Dra`en Erdemovi} and seven members of the 10th Sabotage Unit of the Bosnian Serb army were ordered to leave their base at Vlasenica and go to the Pilica farm north-west of Zvornik. When they arrived there, they were informed by their superiors that buses from Srebrenica carrying Bosnian Muslim civilians between 17 and 60 years of age who had surrendered to the members of the Bosnian Serb police or army would be arriving throughout the day.
>
> Starting at 10 o'clock in the morning, members of the military police made the civilians in the first buses, all men, get off in groups of ten. The men were escorted

[6] *Sentencing Judgement, supra n. 2,* para. 5.
[7] *Ibid.,* para. 8.
[8] Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v. Radovan Karad`i} and Ratko Mladi},* Case Nos. IT-95-5-R61, IT-95-18-R61, T.Ch. I, 11 July 1996.
[9] *Trial Transcript, supra n. 5,* 19 Nov. 1996, p. 57.
[10] *Sentencing Judgement, supra n. 2,* para 9.

> to a field adjacent to the farm buildings where they were lined up with their backs to the firing squad. The members of the 10th Sabotage Unit, including Dra`en Erdemovi}, who composed the firing squad then killed them. Dra`en Erdemovi} carried out the work with an automatic weapon. The executions continued until about 3 o'clock in the afternoon.
>
> The accused estimated that there were about 20 buses in all, each carrying approximately 60 men and boys. He believes that he personally killed about seventy people. [11]

And further on:

> Dra`en Erdemovi} claims that he received the order from Brano Gojkovi}, commander of the operations at the Branjevo farm at Pilica, to prepare himself along with seven members of his unit for a mission the purpose of which they had absolutely no knowledge. He claimed it was only when they arrived on-site that the members of the unit were informed that they were to massacre hundreds of Muslims. He asserted his immediate refusal to do this but was threatened with instant death and told "If you don't wish to do it, stand in the line with the rest of them and give others your rifle so that they can shoot you." He declared that had he not carried out the order, he is sure he would have been killed or that his wife or child would have been directly threatened. Regarding this, he claimed to have seen Milorad Pelemis ordering someone to be killed because he had refused to obey. He reported that despite this, he attempted to spare a man between 50 and 60 years of age who said that he had saved Serbs from Srebrenica. Brano Gojkovi} then told him that he did not want any surviving witness to the crime.
>
> Dra`en Erdemovi} asserted that he then opposed the order of a lieutenant colonel to participate in the execution of five hundred Muslim men being detained in the Pilica public building. He was able not to commit this further crime because three of his comrades supported him when he refused to obey.[12]

8. The Appellant also testified as to his personal situation and circumstances leading up to[13] and following[14] the crime. In addition, two pseudonymed witnesses testified on behalf of the Defence as to the Appellant's character.

[11] *Ibid*., para. 78.
[12] *Ibid*., paras. 80 - 81.
[13] *Ibid*., para. 79.
[14] *Ibid*., para. 81.

9. The Prosecutor called one witness, Jean-René Ruez, an investigator in the Office of the Prosecutor, who testified as to the locations of several execution sites disclosed to him by the Appellant, information which was corroborated by the investigations of the Office of the Prosecutor. In particular, he testified that investigations had confirmed the existence of a mass grave at the Branjevo farm near Pilica, where the Appellant claimed he committed the crime in question. Investigations also confirmed that a massacre may have occurred in a public building in Pilica where, according to the Appellant's testimony, about 500 Muslims were executed on or about 16 July 1995[15].

10. The Trial Chamber, having accepted the Appellant's plea of guilty to the count of a crime against humanity, sentenced the Appellant to 10 years' imprisonment. This term of imprisonment was imposed by the Trial Chamber having regard to the extreme gravity of the offence and to a number of mitigating circumstances.

(a) The extreme gravity of the crime

The Trial Chamber took the view that the objective gravity of the crime was such that "there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present"[16].

It also took into account the subjective gravity of the crime, which was underscored by the Appellant's significant role in the mass execution of 1,200 unarmed civilians during a five-hour period, in particular, his responsibility for killing between 10 and 100 people[17].

It is to be noted that the Trial Chamber also took the view that no consideration could be given to any aggravating circumstances when determining the sentence to be imposed for these crimes because of the extreme gravity *per se* of crimes against humanity[18].

[15] *Ibid*., para. 77.
[16] *Ibid*., para. 31.
[17] *Ibid*., para. 85.
[18] *Ibid*., para. 45.

(b) The mitigating circumstances

As regards the mitigating circumstances contemporaneous with the crime, that is the "state of mental incompetence claimed by the Defence [and] the extreme necessity in which [the Appellant] allegedly found himself when placed under duress by the order and threat from his hierarchical superiors as well as his subordinate level within the military hierarchy"[19], the Trial Chamber considered that these were insufficiently proven since the Appellant's testimony in this regard had not been corroborated by independent evidence[20].

With regard to the mitigating circumstances which followed the commission of the crime, the Trial Chamber took into account the Appellant's feelings of remorse, his desire to surrender to the International Tribunal, his guilty plea[21], his cooperation with the Office of the Prosecutor[22], and "the fact that he now does not constitute a danger and the corrigible character of his personality"[23].

The Trial Chamber also accepted, as mitigating factors, the Appellant's young age, 23 years at the time of the crime, and his low rank in the military hierarchy of the Bosnian Serb army[24].

[19] *Ibid.*, para. 86.
[20] "The Trial Chamber would point out, however, that as regards the acts in which the accused is personally implicated and which, if sufficiently proved, would constitute grounds for granting mitigating circumstances, the Defence has produced no testimony, evaluation or any other elements to corroborate what the accused has said. For this reason, the Judges deem that they are unable to accept the plea of extreme necessity." *Ibid.*, para. 91.
[21] *Ibid.*, para. 96 - 98.
[22] *Ibid.*, para. 99 - 101.
[23] *Ibid.*, para. 111.
[24] *Ibid.*, paras. 92 - 95.

II. THE APPEAL

A. Grounds of Appeal

11. The Appellant, in the Appellant's Brief filed by Counsel for the Accused Dra`en Erdemovi} against the Sentencing Judgement, filed on 14 April 1997 ("Appellant's Brief"), asked that the Appeals Chamber revise the Sentencing Judgement:

(a) by pronouncing the accused Dra`en Erdemovi} guilty as charged, but excusing him from serving the sentence on the grounds that the offences were committed under duress and without the possibility of another moral choice, that is, in extreme necessity, and on the grounds that he was not accountable for his acts at the time of the offence, nor was the offence premeditated,

or, in the alternative,

(b) "[by upholding] the Appeal and, taking into consideration all the reasons stated in the Appeal and the mitigating circumstances stated in the Sentencing Judgement, [by revising] the Sentencing Judgement . . . by significantly reducing the sentence of the accused Dra`en Erdemovi}."[25]

12. The grounds of appeal invoked by the Appellant can be summarised as follows:

(a) The Trial Chamber committed an error of fact occasioning a miscarriage of justice when it asserted in the Sentencing Judgement that "[t]he second location is the Pilica public building in the Zvornik municipality where, according to the statement of the accused at the hearing, about 500 Muslims were executed by members of the 10th

[25] Appellant's Brief, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-A, 14 Apr. 1997, p. 24 ("*Appellant's Brief*").

Sabotage Unit"[26], of which the Appellant was a member[27]. There is no evidence that the 10th Sabotage Unit participated in this execution.

(b) The Trial Chamber committed an error of fact occasioning a miscarriage of justice in believing the Appellant's statement "that he participated in the shooting of Muslims, but [in not believing] his assertion that he was acting under duress because of an uncompromising order from his military superiors, and that the other moral choice for him was death, his own and that of his family, so that his actions were not voluntary but the will of his commanding officers"[28].

In particular, the Trial Chamber erred in requiring corroboration of the Appellant's assertion that he was acting under duress, although it accepted his uncorroborated statement that he participated in the shooting of Muslims[29]. Thus, the Trial Chamber's assessment of the Appellant's testimony "is both inconsistent and unfair"[30].

(c) The Trial Chamber erred in law by not accepting the Appellant's argument that he committed the offence whilst under duress or in a situation of extreme necessity and, in particular, "that the order given to the accused Erdemovi} on 16 July 1995 by his superior officer had such an effect on his will that he objectively lost control over his behaviour and his personality was shattered"[31], such that the accused had no 'moral alternative' but to commit the offence "contrary to his will and intention"[32].

[26] *Sentencing Judgement, supra n. 2,* para. 77.
[27] *Appellant's Brief, supra n. 25,* p. 4.
[28] *Ibid., p.5.*
[29] *Ibid.*
[30] Appellant's Brief in Reply, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-A, 21 May 1997, para. 2.
[31] *Appellant's Brief, supra n. 25,* p. 15.
[32] *Ibid.,* p. 17.

In light of this, the Appellant "should have been pronounced guilty of the acts committed, but a sentence should not have been handed down"[33] because of the law regarding a soldier's responsibility in the execution of superior orders, the duress exerted on the Appellant and the absence of moral choice available to him when he committed the offence, the credibility of his testimony, and the fulfilment of all the requirements of "extreme necessity as a generally accepted category in national legislations [and] international criminal law"[34].

(d) The Trial Chamber committed an error of fact occasioning a miscarriage of justice in finding that "no conclusions as to the psychological condition of the accused at the moment of the crime can be drawn"[35] from the two reports of the expert medical commissions on the psychiatric and psychological evaluation of the accused, submitted to the Trial Chamber on 26 June and 17 October 1996, nor from the accused's testimony[36]. Further, to the extent that there may have been insufficient evidence of the Appellant's mental state at the time the offence was committed, it was incumbent on the Trial Chamber, in the interests of justice, to request the expert panel to make such a determination and the Trial Chamber's failure to do so constitutes an error within the meaning of Article 25 of the Statute of the International Tribunal ("Statute").

13. The Prosecution's position in relation to the above grounds of appeal as set out in the Respondent's Brief filed on 28 April 1997 ("Respondent's Brief") and in the appellate hearings is, in brief, as follows:

(a) On the first ground, the Prosecution asserts that the Trial Chamber did not state at any point in the Sentencing Judgement that the Appellant had participated in the execution of 500 Muslims at the Pilica public building in the Zvornik municipality, that the Trial Chamber referred to this event as part of its description of the events that

[33] *Ibid.*, p. 19.
[34] *Ibid.*, p. 19.
[35] *Sentencing Judgement*, *supra n. 2,* para. 88.
[36] *Appellant's Brief, supra n. 25,* pp. 19 - 23.

followed the fall of the Srebrenica enclave, and further that this incident was considered by the Trial Chamber "in order to verify the authenticity of the Appellant's testimony, not as a means of aggravating his culpability"[37]. Thus, according to the Prosecution, the Trial Chamber did not take this incident into account as an aggravating circumstance in the determination of the sentence against the Appellant[38].

(b) On the second ground, the Prosecution asserts that the assessment of the probative value of the evidence is subject to broad discretionary appreciation of the Trial Chamber which it exercised in a fair and consistent manner[39]. In particular, the Prosecution submits that when the Trial Chamber stated that it required corroboration of the Appellant's statement by independent evidence[40], it was not stating an evidentiary rule but rather was expressing its "intimate conviction" as to its satisfaction with respect to the state of the evidence[41].

(c) On the third ground, the Prosecution submits that the Trial Chamber "was correct in holding that the Appellant did possess freedom of moral choice in the execution of Muslims at Branjevo farm and that his testimony did not satisfy the relevant elements for granting mitigating circumstances for extreme necessity arising from duress and superior orders. Further, the Trial Chamber did consider superior orders in mitigation of the sentence because of the subordinate level of the Appellant in the military hierarchy"[42].

(d) On the fourth ground, the Prosecution asserts that the burden was on the Appellant to adduce evidence in support of the claim that at the time of the crime he was suffering from diminished mental capacity. Since the Appellant did not submit any

[37] Respondent's Brief, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-A, 28 Apr. 1997, s. B.1.2. ("*Respondent's Brief")*.
[38] *Ibid*., s. B. 1.
[39] *Ibid*., s. B. 2.
[40] *Sentencing Judgement*, *supra n. 2*, para. 87.
[41] Transcript, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-A, 26 May 1997, pp. 130 – 132 ("*Appeals Transcript")*.
[42] *Respondent's Brief*, *supra n. 37*, s. B. 3.

such evidence, the Prosecution claims, it is inappropriate for him to invoke an error of fact or of law as it was not a matter for the Trial Chamber to obtain such evidence[43].

(e) Finally, the Prosecution argues that the 10-year prison sentence imposed by the Trial Chamber is not manifestly excessive so as to justify interference by the Appeals Chamber, "having regard to the gravity of the offense, the circumstances of the Appellant's participation in the crime, and the helplessness of the victims of the crime"[44]. In particular, the Prosecution submits that the Appellant has not shown that the severity of the penalty handed down by the Trial Chamber is disproportionate in relation to other sentences handed down for this type of offence[45].

B. Application to Introduce Additional Evidence

14. The Appellant, in the Appellant's Brief, made a proposal that the Appeals Chamber "obtain the following additional evidence for the appeals hearing", ostensibly pursuant to Rule 115 of the Rules, by:

(a) appointing "a distinguished professor of ethics who shall give a scientific opinion and position regarding the possibility of the moral choice of an ordinary soldier who is faced with committing a crime when following the orders of a superior at time of war"; and

(b) receiving an additional mental evaluation of the accused by the same panel of experts which conducted the psychological examination prior to the sentencing hearing, this time on the question of the "mental condition of the accused Erdemovi} at the time the offence was committed, in line with the reasons stated in the appeal"[46].

[43] *Ibid.*, s. B. 4; *Appeals Transcript, supra n. 41,* p. 118.
[44] *Respondent's Brief, supra n. 37,* s. B. 5.
[45] *Ibid.*
[46] *Appellant's Brief, supra n. 25,* pp. 23-24.

15. Rule 115 reads:

> (A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial.
> . . .
>
> (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

Having regard to the provisions of Rule 115, the Appeals Chamber would reject the Appellant's motion to adduce the additional evidence for the following reasons. The evidence is not, in the view of the Appeals Chamber, relevant for the determination of this appeal and there is, therefore, no need to authorise the presentation of the additional material in the interests of justice. In any event, if the Defence believed that the evidence was of assistance to its case, it should have brought this evidence to the attention of the Trial Chamber for the purposes of the Sentencing Hearing. The appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing. Further, the Appellant has filed no affidavit or other material to indicate the substance of any statement which either the "distinguished professor of ethics" or the panel of experts would present to the Appeals Chamber. So much then for this application.

C. The Scope of the Appeals Chamber's Judicial Review: Issues Raised Proprio Motu and Preliminary Questions

16. The Appeals Chamber has raised preliminary issues *proprio motu* pursuant to its inherent powers as an appellate body once seised of an appeal lodged by either party pursuant to Article 25 of the Statute. The Appeals Chamber finds nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties. The preliminary issues revolve around the question of the validity of the plea of guilty entered by the Appellant. This is a question to be decided *in limine*. In pursuance of its *proprio motu* examination of the validity of the Appellant's

guilty plea, the Appeals Chamber addressed three preliminary questions to the parties in a Scheduling Order dated 5 May 1997:

> (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?
>
> (3) Was the acceptance of a guilty plea valid in view of the mental condition of the accused at the time the plea was entered? If not, was this defect cured by statements made by the accused in subsequent proceedings?[47]

[47] Scheduling Order, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-A, A. C., 5 May 1997.

III. REASONS

17. In answering the preliminary questions surrounding the validity of the Appellant's plea, the members of the Appeals Chamber differ on a number of issues, both as to reasoning and as to result. Consequently, the views of each of the members of the Appeals Chamber on particular issues are set out in detail in Separate Opinions which are attached to this Judgement and merely summarised here.

18. The Appeals Chamber, for the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah, unanimously finds that the Appellant's plea was voluntary.

19. For the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah and in the Separate and Dissenting Opinion of Judge Li, the majority of the Appeals Chamber finds that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings. Consequently, the majority of the Appeals Chamber finds that the guilty plea of the Appellant was not equivocal. Judge Cassese and Judge Stephen dissent from this view for the reasons set out in their Separate and Dissenting Opinions.

20. However, the Appeals Chamber, for the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah, finds that the guilty plea of the Appellant was not informed and accordingly remits the case to a Trial Chamber other than the one which sentenced the Appellant in order that he be given an opportunity to replead. Judge Li dissents from this view for the reasons set out in his Separate and Dissenting Opinion.

21. Consequently, the Appellant's application for the Appeals Chamber to revise his sentence is rejected by the majority. The Appeals Chamber also unanimously rejects the Appellant's application for acquittal.

IV. DISPOSITION

THE APPEALS CHAMBER

(1) Unanimously **REJECTS** the Appellant's application that the Appeals Chamber should acquit him;

(2) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **REJECTS** the Appellant's application that the Appeals Chamber should revise his sentence;

(3) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **FINDS** that the guilty plea entered by the Appellant before Trial Chamber I was not informed;

(4) By three votes (Judges McDonald, Li and Vohrah) to two (Judges Cassese and Stephen) **FINDS** that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings and that, consequently, the guilty plea entered by the Appellant before Trial Chamber I was not equivocal;

(5) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **HOLDS** that the case must be remitted to a Trial Chamber, other than the one which sentenced the Appellant, so that the Appellant may have the opportunity to replead in full knowledge of the nature of the charges and the consequences of his plea; and

(6) **INSTRUCTS** the Registrar, in consultation with the President of the International Tribunal, to take all necessary measures for the expeditious initiation of proceedings before a Trial Chamber other than Trial Chamber I.

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

_____
Antonio Cassese
Presiding

Judges Cassese, Li and Stephen append Separate and Dissenting Opinions to this Judgement.

Judges McDonald and Vohrah append a Joint Separate Opinion to this Judgement.

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

[Seal of the Tribunal]

IN THE APPEALS CHAMBER

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PROSECUTOR

v.

DRAZEN ERDEMOVIC

SEPARATE AND DISSENTING OPINION OF JUDGE CASSESE

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Payam Akhavan

Counsel for the Appellant:

Mr. Jovan Babic

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

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

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

I. THE NOTION OF A GUILTY PLEA

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

A. General Remarks

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

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

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

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

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

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

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

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

national legislation of the State of residence or alleged residence. The Commission rejected this argument , stating that:

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

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

4. The second consideration militating in favour of using great circumspection before transposing national law notions into international law is inextricably bound up with the very subject-matter under discussion. A note of warning about importing national concepts “lock, stock and barrel” into the international field, was sounded by such eminent international judges as McNair[5] and Fitzmaurice[6]. Both judges were referring to private law concepts. Their view should *a fortiori* apply to criminal law. International criminal procedure results from the gradual decanting of national criminal concepts and rules into the international receptacle . However, international criminal procedure does not originate from a uniform body of law. It substantially results from an amalgamation of two different legal systems , that obtaining in common-law countries and the system prevailing in countries of civil-law (although for historical reasons, there currently exists at the international level a clear imbalance in favour of the common-law approach). It is therefore only natural that international criminal proceedings do not uphold the philosophy behind one of the two national criminal systems to the exclusion of the other; nor do they result from the juxtaposition of elements of the two systems. Rather, they combine and fuse, in a fairly felicitous manner, the adversarial or accusatorial system (chiefly adopted in common-law countries) with a number of significant features of the inquisitorial approach (mostly taken in States of continental Europe and in other countries of civil-law tradition). This combination or amalgamation is unique and begets a legal logic that is qualitatively different from that of each of the two national criminal systems: the philosophy behind international trials is markedly at variance with that underpinning each of those national systems. Also the Statute and Rules of the International Tribunal, in outlining the criminal proceedings before the Trial and Appeals Chambers, do not refer to a specific national criminal approach, but originally take up the accusatorial (or adversarial) system and adapt it to international proceedings, while at the same time upholding some elements of the inquisitorial system.

It follows that - unless expressly or implicitly commanded by the very provisions of international criminal law - it would be inappropriate mechanically to incorporate into international criminal proceedings ideas, legal constructs, concepts or terms of art which only belong, and are unique, to a specific group of national legal systems, say, common-law or civil-law systems. Reliance upon one particular system may be admissible only where indisputably imposed by the very terms of an

international norm, or where no autonomous notion can be inferred from the whole context and spirit of international norms.

5. The third reason discouraging a mechanical importation of notions from national law into international criminal proceedings is that such a process may alter or distort the specificity of these proceedings. International trials exhibit a number of features that differentiate them from national criminal proceedings. All these features are linked to the fact that international criminal justice is dispensed in a general setting markedly different from that of national courts: international criminal courts are not part of a State apparatus functioning on a particular territory and exercising an authority of which courts partake. International criminal courts operate at the inter-State level. They discharge their functions in a community consisting of sovereign States. The individuals over whom these courts exercise their jurisdiction are under the sway and control of sovereign States . Many important consequences follow from this state of affairs. Here I shall confine myself to stressing only the most striking one: an international criminal court has no direct means at its disposal of enforcing its orders, summonses, and other decisions; to compel individuals under the sovereignty of a State to comply with its injunctions, it must rely on the cooperation of that State. To lose sight of this fundamental condition, and thus simply transplant into international law notions originating in national legal systems, might be a source of great confusion and misapprehension. The philosophy behind all national criminal proceedings , whether they take a common-law or a civil-law approach, is unique to those proceedings and stems from the fact that national courts operate in a context where the three fundamental functions (law-making, adjudication and law enforcement) are discharged by central organs partaking of the State's direct authority over individuals. That logic cannot be simply transposed onto the international level: there, a different logic imposed by the different position and role of courts must perforce inspire and govern international criminal proceedings.

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

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

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

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

7. The system, laid down in Article 20, paragraph 3, of the Statute and enunciated in Rule 62 of the Rules, of pleading guilty or not guilty to the charges set out in the indictment against an accused, is clearly drawn from the criminal procedure of common-law countries. This practice does not have a

direct counterpart in the civil-law tradition, where an admission of guilt is simply part of the evidence to be considered and evaluated by the court. However, notwithstanding its origin in a particular national setting, the true import and scope of this notion may be grasped without necessarily referring to the legislation and case-law of common- law countries.

8. It is apparent from the whole spirit of the Statute and the Rules that, by providing for a guilty plea, the draftsmen intended to enable the accused (as well as the Prosecutor) to avoid a possible lengthy trial with all the attendant difficulties . These difficulties - it bears stressing - are all the more notable in international proceedings. Here, it often proves extremely arduous and time-consuming to collect evidence. In addition, it is imperative for the relevant officials of an international court to fulfil the essential but laborious task of protecting victims and witnesses . Furthermore, international criminal proceedings are expensive, on account of the need to provide a host of facilities to the various parties concerned (simultaneous interpretation into various languages; provision of transcripts for the proceedings , again in various languages; transportation of victims and witnesses from far-away countries; provision of various forms of assistance to them during trial, etc.). Thus, by pleading guilty, the accused undoubtedly contributes to public advantage . At the same time, the accused may find his pleading guilty beneficial to his own condition. Firstly, it may help him to salve his conscience and atone for his wrongdoing. Secondly, he will avoid the indignity and the possible demoralisation of undergoing a trial, as well as the psychological ordeal he would have to go through during examination and cross-examination of witnesses (and possibly also of himself as a witness); he will also eschew the public exposure that may ensue from trial , and the adverse consequences for his social position and the life of his family and relatives. Thirdly, the accused may expect that the court will recognise his cooperative attitude by reducing the sentence it would have imposed had there not been a plea of guilty: in other words, the accused may hope that the court will be more lenient in recognition of his admission of guilt.

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

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

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

10. It follows from the above that the guilty plea must be voluntary, that is to say not obtained by threats, inducements or promises. A guilty plea implies that the accused relinquishes his right to a proper trial, namely to proceedings in which he is presumed innocent until his guilt is proved beyond a reasonable doubt and in which he would be entitled to examination and cross-examination of witnesses as well as all the judicial safeguards laid down in Article 21 of the Statute. Therefore, such a waiver of a fundamental right must of necessity be free and voluntary . This conclusion is borne out by an important fact: both the Statute and the Rules deliberately do not make provision for plea bargaining - or, at least, of any endorsement or acknowledgement by the Chambers of out-of-court plea bargaining . This means, among other things, that the framers of the Statute and the Rules aimed at averting those distortions of the free will of the accused which may be linked to plea

bargaining.

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

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

Another consequence following from the principles set out above is that the guilty plea must not be ambiguous or equivocal. The accused cannot be allowed on the one hand to admit to his guilt and by the same token nullify this plea by claiming that he acted in self-defence, or under a mistake of fact, or for some other reason which would exculpate him. In this case the accused, while affirming that he has committed a crime, would in the same breath deny his responsibility. The rejection of such a guilty plea as invalid proves necessary not only on grounds of legal logic (a court cannot entertain a plea that is inherently contradictory). There is also another, and even more compelling reason for dismissing a guilty plea tainted by the flaw in question. Whenever all the aforementioned requirements for a valid guilty plea are met, a court, with a view to then proceeding to determine the penalty , can accept a plea that the person has indeed committed a crime. For reasons of public advantage, the court can assume that the "self-incrimination" is valid and move on to the sentencing stage. This skipping of the trial stage is not however admissible with regard to the existence or non-existence of a defence involving the absence of *mens rea* or at any rate constituting an excuse or a justification . Whether or not such a defence can be urged *in casu* must be proved in court , through trial proceedings, for if the specific defence is substantiated in court , it follows that the accused is not guilty and must be acquitted.

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

II. DURESS

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

A. Introduction

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

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

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

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

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

B. Notion And Requirements Of Duress

14. Duress, namely acting under a threat from a third person of severe and irreparable harm to life or limb, entails that no criminal responsibility is incurred by the person acting under that threat. Duress is often termed "necessity", both in national legislation and in cases relating to war crimes or crimes against humanity. I too will have occasion to use these two terms as equivalent. However, as rightly pointed out in the British Manual of Military Law, from a technical viewpoint, necessity proper also

covers situations other than those where one is faced with threats or compulsion of a third party, for instance the condition where a person "in extremity of hunger kills Sanother personC to eat him"[9]. In other words, necessity is a broader heading than duress, encompassing threats to life and limb generally and not only when they emanate from another person .

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

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

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

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

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

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

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

17. It is worth insisting on the fourth requirement just mentioned, in order to highlight its particular relevance to war-like situations. According to the case -law on international humanitarian law, duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law[12].

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

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

Before I enunciate the reasons for my dissent, I should briefly recall that the Office of the Prosecutor (the "Prosecution") and the majority of the Appeals Chamber take a different view of the international legal regulation of duress in cases involving the killing of innocent persons. According to the Prosecution a customary rule, or exception, has evolved in international law specifically excluding the applicability of duress as a defence to such crimes. By contrast, the majority of the Appeals Chamber holds the view that no such special rule has come into being; however they contend that in the absence of such a rule one ought to apply general policy considerations ; the result of this application is the same as the one reached by the Prosecution through a different path: also for the majority of the Appeals Chamber duress cannot be admitted as a defence for crimes involving killing, but might only be urged in mitigation.

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

1. The Prosecution's contention

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

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

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

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

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

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

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

20. My objections to the Prosecution's submissions are based (i) on the case-law invoked by the

Prosecution and (ii) on the case-law it does not invoke.

21. As for the case-law relied upon by the Prosecution, let me start with a minor objection. It is simply not correct to contend that the military tribunals of the Occupying Powers referred to by the Prosecutor "were jurisdictions of equal authority " constituted under Control Council Law No. 10, which has acquired customary international law status; consequently, that their decisions would have more weight than those of national jurisdictions on the issue at stake[19]. Contrary to the Prosecution's submissions, the three British military tribunals were instituted under the Royal Warrant of 14 June 1945 and the Regulations for the Trial of War Criminals appended thereto[20]. They consequently were of national jurisdiction. Similarly, the Canadian military tribunal which decided *Hölzer et al.* was set up under the War Crimes Regulations (Canada)[21] and was, therefore, also of national jurisdiction. Both the British and Canadian tribunals applied their own national law on matters not covered by international criminal law, such as duress[22]. By contrast, the United States Military Tribunal II, sitting at Nürnberg - which heard the *Einsatzgruppen* case - was established under Control Council Law No. 10. Therefore, of the Tribunals referred to, this alone can be regarded as having an international character - at least, as far as its origin was concerned. Besides, on matters not covered by that Law, it applied German law (the law of the defendants) besides referring to Soviet law (the law of the territory where most crimes had been committed, or *lex loci delicti commissi*).

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

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

23. As the Prosecutor admitted, the *Jepsen*[23] case stands for the proposition that duress may be a defence even where the underlying offence involves the killing of innocents. This case related to the killing of six internees by Jepsen, a Dane who worked as a guard in a German concentration camp. In April 1945, as the Allied troops were approaching, the German authorities ordered that the internees be transferred to another camp, those who were fit on foot, those who were ill by train. Jepsen was one of the guards escorting the train . During the transfer there were various air raids and a large number of internees died, many of illnesses or starvation. At one point it was ordered that 52 internees still alive should be shot "to avoid typhus". Jepsen participated in the shooting by killing six internees. Although in his deposition made under oath he had not mentioned duress[24], during the trial proceedings, and then before sentencing, he claimed that the German *Obermaat* Engelmann who had given the order to kill all the internees, had compelled him at gunpoint to participate in shooting the internees[25]. His defence counsel pleaded among other things the state of necessity (*Notstand*) as provided for in Section 54 of the German Criminal Code[26]. The Judge-Advocate, in his summing-up, stated that duress could be invoked in the case, provided the requisite conditions were met[27]. The court found Jepsen guilty but, as the Judge-Advocate put it, since there was "an element of doubt as to whether or not SheC acted under some degree of compulsion ", he was sentenced to life imprisonment rather than to death[28]. As I shall emphasise below (*see* paragraph 43), what appears to be particularly relevant in this case are the specific factual circumstances under which the alleged duress occurred, namely the inevitability of the victims' deaths.

24. Let us now move to the *Stalag Luft III* case, decided by a British Military Tribunal, sitting at

Hamburg, Germany[29]. The 18 accused, all members of the SS, had separately participated in the killing of 50 members of the RAF who, after escaping from a prisoner of war camp (*Stalag Luft III*) had been recaptured by the German Criminal Police (*Kripo*). Some of the accused urged among other things, that they had acted under duress: had they not obeyed the secret order of Himmler to kill all the escapees, they would have been put to death and be subjected to the so-called *Sippenhaft* (liability of all members of a family for the crimes of one member)[30]. The Judge-Advocate, in his summing-up, mentioned this plea of duress and, as a point of reference, started by quoting "our legal Bible", namely *Archbold's Criminal Law*, according to which, in case of killing, duress is no legal excuse. However , he then went on to consider the "more helpSfulC" sources under international law , citing the international jurist, Sir Hersch Lauterpacht, who stated that: "SSCuch a degree of compulsion as must be deemed to exist in the case of a soldier or officer exposing himself to immediate danger of death as the result of a refusal to obey an order excludes *pro tanto* the accountability of the accused *"*. (Emphasis added.) He qualified this by saying:

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

Thus, the notion of excluding duress where it is a question of saving one's own life at the expense of others was mooted by Lauterpacht, but he did not pronounce upon its merits except to say that it should not "lightly be dismissed". Rather , as is clear from the further extracts of Lauterpacht cited with approval by the Judge-Advocate, Lauterpacht left open the possibility of duress as a defence where the accused was "acting under the immediate impact of fear of drastic consequences "[32]. Thus the Judge-Advocate did not unequivocally exclude the plea as a defence to unlawful killing; in fact, he expounded both the relevant British law and the rather ambivalent state of international law, as set out by Lauterpacht[33]. Crucially, then - and contrary to the Prosecutor's submissions - the *Stalag Luft III* case does not stand for the proposition that duress cannot be a defence to the killing of innocents. It did not, therefore, overrule the *Jepsen* case on this point.

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

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

> Now the question that arises here is that it will - I say inevitably - of course be the defence of some or all of these officers in the dock that they were as much under

> compulsion as the private soldiers who formed the execution platoon. That, of course, is a matter for you, and for you alone, to decide, and if, of course , you find that they were, well then you will acquit them". (Emphasis added .)

The prosecutor went on to say:

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

Although the prosecutor anticipated at the opening of the trial that a defence of duress or compulsion might be raised, none of the accused did so[38]. Therefore, when, in his summing-up, the Judge-Advocate ruled out the applicability of the defence of duress for killing, this was an *obiter dictum*[39]. The Judge-Advocate's direction was also a very narrow one, as it was based on a single decision of a British court - the *Dudley and Stephens* case[40]. In the event, the tribunal found three defendants not guilty while the other two were sentenced to six months' imprisonment[41].

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

26. The next case to be considered, since it was referred to in argument by the Prosecution, is *Hölzer et al.*, decided on 6 April 1946 by a Canadian Military Court sitting at Aurich, Germany, and applying Canadian law[42]. In March 1945 three Canadian airmen abandoned their disabled aircraft near Opladen , in Germany, and were captured by German soldiers. One of the Canadians, who was wounded, was subsequently killed by the three German accused. These raised the defence of superior orders, as well as that of duress, claiming that they had been compelled at gunpoint by Lieutenant Schaefer (not among the accused) to kill the wounded airman[43]. Hölzer's defence counsel insisted on this plea of duress, both in his Opening Address and in his Closing Address. He relied generally on international law[44], but on the issue of duress he quoted German law and in particular Articles 52 and 54 of the German Criminal Code [45]. Also the defence counsel for the other two accused insisted on this plea[46].

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

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

> [N]either add[ed] to or creat[ed] new international law, but rather govern[ed] matters of procedure and evidence, upon which subjects international law is silent, and every State is entitled to make such provisions as it deems necessary and expedient .[50]

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

27. The opposite view was however taken in the *Einsatzgruppen* case by the United States Military Tribunal II sitting at Nürnberg[52]. As I pointed out before, this Tribunal, unlike all the other ones cited so far, acted under Control Council Law No. 10, and therefore its decisions carry more weight than the ones by national courts acting under national legislation. Indeed, as Control Council Law No. 10 can be regarded as an international agreement among the four Occupying Powers (subsequently transformed, to a large extent, into customary law), the action of the courts established or acting under that Law acquires an international relevance that cannot be attributed to national courts pronouncing solely on the strength of national law. However, as some issues such as that of duress were not covered by Control Council Law No. 10, the question arose of which law was applicable . In the *Einsatzgruppen* case the defence counsel for the lead defendant Ohlendorf submitted in his opening statement that the question of duress (or necessity , as he termed it) was to be looked at on the basis of three legal systems: United States law (as the law of the State administering justice in the case at issue), German law (as the law of the defendant) and Soviet law (as the law of the place where the alleged crimes had been committed)[53]. He then applied the three legal systems and concluded that necessity was applicable [54]. The Military Tribunal, in dealing with the plea of duress, cited both Soviet law and German law[55], and held that duress could be urged as a defence even in case of unlawful killing , provided certain requirements were met. It is worth quoting the most important passage of the judgement:

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

the order." (Emphasis added.)[56]

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

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

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

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

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

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

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

considered available *in casu*.

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

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

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

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

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

33. Another case where the court did not exclude the application of duress to killing of innocents, although it ruled that the specific circumstances at issue did not justify the plea, is *Müller et al.,* brought first before the Belgian Military Court of Brussels[65] and then the Belgian Court of Cassation[66]. The accused were charged, *inter alia,* with war crimes in connection with the execution of hostages. Upon conviction, one appellant, Mehden, complained to the Court of Cassation that the first instance court had not dealt with his plea based on coercion . The court rejected this ground of appeal holding that: "STChe decision of the lower Court states without ambiguity that all the accused acted freely".

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

As stated, the applicability of these defences [constraint or necessity] as relieving from

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

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

34. Other cases where the possibility of raising duress as a defence to a charge of killing innocent people was conceded by the court, although it failed in those cases on the facts, include *Touvier* and *Papon*, by French courts[68], *Priebke*, by an Italian court[69], *Retzlaff et al.* by a Soviet court[70], as well as a string of German cases[71] and a case recently dealt with by a Military Court of Belgrade[72].

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

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

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

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

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

The same stand was taken by the Court of Cassation in two other cases, both concerning military officers who, after refusing to command an execution squad, had been threatened with shooting: in both cases the court held that such a situation was covered by duress[77]. In *Srà et al.*, Srà had commanded the execution squad charged with shooting a captured partisan and the other two accused had been members of such squad. With regard to Srà the court quashed the decision of the Special Court of Assize of Como convicting the accused of killing because, while setting out facts which could justify recourse to duress, it had failed to provide any legal reasoning justifying its refusal[78]. In this connection the Court of Cassation emphasised that it was apparent from the evidence examined by the trial court that when Srà had refused to execute the order of his colonel, the colonel had threatened that he himself would be shot; this threat was subsequently confirmed by the captain (Srà's direct superior), to whom Srà had reported. Hence, the Court of Cassation, holding that the factual requirements for duress might be met, remitted the case to another trial court, the Court of Assize of Milan. This court found that all defendants had acted under duress and acquitted them[79].

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

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

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

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

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

Thirdly, almost all of these cases concern execution squads or execution groups and duress was

upheld with regard to minor executants, whereas it was ruled out with respect to those who had issued orders or to senior officials who, following orders from the highest authorities, had in their turn ordered the execution of innocent persons.

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

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

Also in another case (*S. and K.)*, brought before the *Landgericht* of Ravensburg, the court exercised its jurisdiction pursuant to Control Council Law No. 10. In this case one of the accused, S., a member of the Gestapo, in April 1945 had participated in the shooting of three Germans detained in a Gestapo prison . The head of the prison, an SS *Hauptscharführer*, had ordered S. and other two prison guards to take the three prisoners out of the prison into a forest and there shoot them from behind. Each prison guard was ordered to shoot one detainee . The head of the prison followed them closely in order to check whether they duly executed his orders. The court found that although S's action could not be defined as *Mord* but only as *Totschlag* (intentional killing), he had acted under duress (*Notstand*). S. had been ordered twice to take part in the killing , and the order had been accompanied by the threat that any refusal to obey would entail death. According to the court, the defendant therefore faced an inevitable serious threat to his life and limb, as a result of which his freedom of choice was suppressed and an "alien will" was imposed upon him. The court also emphasised on the one hand that the head of the prison was a "violent brute" and, on the other , that S. had no alternative to the execution of the order, in particular he could not escape. S. was consequently acquitted[86].

In a third case as well (*K. and L*.), the tribunal (the Court of Assize of Aachen) pronounced on the basis of Control Council Law No. 10. This case is particularly important because, before discussing duress, the court inquired into the relevant applicable law, with particular reference to international law (by contrast, the other courts had applied the German law on duress without first asking themselves whether this was justified under Control Council Law No. 10). The facts of the case are as follows: in September 1944 in Aachen, a head of the Gestapo (called Ba.), while investigating cases of pillage and unauthorised stay of persons within the communal area, had come across a German civilian (the undertaker Salvini) who had appeared suspicious. Upon his refusal to provide his name and whereabouts Salvini had been severely beaten by a group of Gestapo members; thereafter Ba., pistol in hand, had ordered two members of the Border police acting under the control of the Gestapo (K. and another) to execute Salvini. K. had been accused by the prosecutor of a crime against humanity consisting in the intentional killing (*Totschlag)* of Salvini. As the defence

counsel had pleaded duress, the court set about ascertaining what the applicable law was. It first excluded that one could simply apply German criminal law: as the court was acting pursuant to Control Council Law No. 10 and this Law substantially constituted international law, the court pointed out that the solution was to be found in this body of law. It then developed a complex and rather contorted reasoning that can be summarised as follows : (1) the Statute and the judgement of the International Military Tribunal at Nürnberg as well as Control Council Law No. 10, while excluding superior orders as a defence , did not rule out necessity; (2) since however no express regulation of duress was to be found in that Law, recourse was to be had to the general principles of criminal law of the four Allied Powers that had enacted the Law; such recourse showed that continental European as well as Anglo-American law did not deny duress as a defence to subordinates obeying superior orders; however, Anglo-American law ruled out duress as an exculpatory cause for very serious crimes and demanded for such cases "self-sacrifice"; (3) nevertheless, neither the text nor the spirit of the Law upheld the Anglo-American views, and this was borne out by the drafting history (*Entstehungsgeschichte)* of the Law: clearly the "restrictive attitude" (*einschränkende Stellungnahme)* of Anglo-American law was not recognised and upheld by international rules; (4) faced with no indication in international law about the legal regulation of duress, except for the fact that the Anglo-American attitude was not adopted, a court of law could not but apply the "generally recognised rules of criminal law"; proceeding on the premise that the not-generally recognised restrictive limitations of Anglo-American law should be disregarded, such generally recognised rules provided that duress was admissible any time there was a serious , imminent and unavoidable threat to life or limb; (5) this regulation was in accordance with the relevant penal provisions of German law (Sections 52 and 54 of the German Criminal Code)[87]. The court then applied the concept of duress to the case at issue, and found that K. had acted under compulsion for his life and was therefore to be acquitted[88].

Another case decided upon on the strength of Control Council Law No. 10 concerned crimes against humanity in the form of euthanasia against Germans (case *M. et al.).* A number of persons had been accused of participating in the implementation of the so-called euthanasia programme in 1939-40 in some areas of Germany. Most defendants were found guilty. Five of them had pleaded duress. The Court of Assize of Tübingen, to which the case had been brought, in its decision of 5 July 1949 first noted that "according to the prevailing opinion, from which there is no reason to depart, also in the case of crimes in violation of Control Council Law No. 10 it is possible to rely upon the general causes for exclusion of guilt provided for in Sections 52 and 54 of the German Criminal Code"[89]. The court then acquitted two accused (W. and H.) because they had acted under coercion (*Nötigung*) [90]. The judgement was upheld by the Supreme Court of Tübingen on 14 March 1950[91].

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

Some cases related to the killing in Germany of foreign civilians or prisoners of war by members of the SS or of Gestapo or at least members of German police or military units acting under the control of the Gestapo. By way of example I shall mention the *Z. et al.* case. On 31 March 1949 in Kassel the head of a group of policemen acting as members of a *Volkssturmkommando*, was ordered by a *Sturmbannführer* of the SS to execute 78 Italian civilian workers who had been arrested for pillaging a train containing victuals for the army. The head of the policemen passed on the order of execution to his group and the order was carried out. The Court of Assize of Kassel found that although the order was illegal , six of the seven defendants were to be acquitted of the crime of intentional killing (*Totschlag)* both because they were not aware of the illegal nature of the order (they believed that a proper trial had preceded the order of execution) and because at any rate they

had acted under coercion (*Nötigung),* in that they feared they would themselves be shot if they did not carry out the order[92]. This finding was confirmed by the *Oberlandesgericht of* Hessen, in a decision of 4 May 1950[93]. In a number of other cases courts took a similar stand[94].

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

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

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

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

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

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

40. I referred above to the Prosecution's contention that an exception has evolved in customary international law excluding duress as an admissible defence in offences involving the taking of innocent lives. This contention can only find support in one Canadian case (*Hölzer et al.,* mentioned in paragraph 26, *supra*) as well as the military regulations of the United Kingdom and the United States (paragraph 29, *supra*). With these elements of practice one should contrast the contrary,

copious case-law I have just surveyed as well as the legislation to the contrary of so many civil-law countries (*see* note 63, *supra*)[102]. In my opinion, this manifest inconsistency of State practice warrants the dismissal of the Prosecution's contention: no special customary rule has evolved in international law on whether or not duress can be admitted as a defence in case of crimes involving the killing of persons.

41. As I pointed out above, the majority of the Appeals Chamber has reached this same conclusion, although through different arguments. However - and here I disagree with the majority as well - the Appeals Chamber majority does not draw from the absence of that special rule the only conclusion logically warranted: that one must apply, on a case-by-case basis, the general rule on duress to all categories of crime, whether or not they involve killing.

I shall delve below into what I regard - with respect - as the flaws in the majority's view. For now I shall elaborate on the logical conclusion I have just enunciated . This conclusion is that even in case of war crimes and crimes against humanity involving killing, if confronted with the defence of duress, an international criminal court must apply, as a minimum, the four criteria enunciated above (*see* paragraph 16, *supra*), namely (1) a severe threat to life or limb; (2) no adequate means to escape the threat; (3) proportionality in the means taken to avoid the threat ; (4) the situation of duress should not have been self-induced.

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

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

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

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

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

Secondly, it is a relevant consideration that the crime would have been committed in any case by a person other than the one acting under duress. This is borne out by a comparison of two different sets of cases. In cases such as *Hölzer et al.*, where the accused did not raise any issue that the victims would have died in any event, and where he therefore raised duress simply as a choice between his life or that of his victim, the defence has been refused in principle , applying the classical formula that you are not entitled to save your own life at the expense of others (*see* paragraph 26, *supra*). However, where the accused has been charged with participation in a collective killing which would have proceeded irrespective of whether the accused was a participant, the defence has in principle been allowed. In such cases, if duress failed as a defence, this was because the courts were not satisfied that duress had in fact been exerted on the accused - not because the remedy was disproportionate to the harm to be avoided. As far as the proportionality requirement is concerned, in all these cases the harm caused by not obeying the illegal order would not have been much greater than the harm which would have resulted from obeying it. This notion was manifestly the underlying idea in all the cases where duress was upheld by Italian and German courts after the Second World War (*see* paragraphs 35 -39, *supra*)[104]. Arguably, the same reasoning was applied by the Judge-Advocate in the *Jepsen* case when he accepted that, in principle, duress could be a defence where the underlying offence is killing, because, on the accused's version of the facts, he could do nothing to save the lives of the victims and by refusing to obey the order would have only added the forfeiture of his life to theirs. However, the court, i.e., the jury, evidently did not believe Jepsen's account and convicted him (*see* paragraph 23, *supra*).

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

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

for duress be applied particularly strictly in the case of killing of innocent persons .

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

46. Furthermore, a trial court adjudicating a plea of duress might also want to take into account another factor, namely whether and to what extent the person assertedly acting under duress willed the commission of the offence. For this purpose the court might enquire whether the person allegedly acting under duress confessed at the earliest possible opportunity to the act he had committed and denounced it to the relevant authorities. If the person at issue refrained from so doing , the inference might be warranted that he acquiesced in, and thus willed, the act which he perpetrated under duress[109].

6. Concluding considerations

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

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

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

Let us consider another case, a variation of an example drawn from proceedings which have taken place before this very International Tribunal. An inmate of a concentration camp, starved and beaten for months, is then told, after a savage beating, that if he does not kill another inmate, who has already been beaten with metal bars and will certainly be beaten to death before long, then his eyes will , then and there, be gouged out. He kills the other inmate as a result. Perhaps a hero could accept a swift bullet in his skull to avoid having to kill, but it would require an extraordinary - and perhaps impossible - act of courage to accept one's eyes being plucked out. Can one truly say that the man in this example should have allowed his eyes to be gouged out and that he is a criminal for not having done so? This example, and one can imagine still worse, is one of those rare cases, in my opinion, where duress should be entertained as a complete defence. Any answer to the question of duress has to be able to cope with such examples which the war in Yugoslavia - and wars

throughout the world - have generated and, regretfully, will continue to generate[110].

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

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

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

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

In any event, even assuming that no clear legal regulation of the matter were available in international law, arguably the Appeals Chamber majority should have drawn upon the law applicable in the former Yugoslavia. In the former Yugoslavia and in the present States of the area the relevant criminal law provides that duress (called "extreme necessity") may amount to a total defence for any crime, whether or not implying the killing of persons[112]. A national of one of the States of that region fighting in an armed conflict was required to know those national criminal provisions and base his expectations on their contents. Were *ex hypothesi* international criminal law really ambiguous on duress or were it even to contain a gap, it would therefore be appropriate and

judicious to have recourse - as a last resort - to the national legislation of the accused, rather than to moral considerations or policy-oriented principles . In the specific instance under discussion, where the State at stake is one of the former Yugoslavia, this approach would also be supported by the general maxim *in dubio pro reo* (which in this case should be *in dubio pro accusato).*

D. Application To The Judgement Under Appeal

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

More particularly, in applying the conclusions of law which I have reached above , in my view the Trial Chamber to which the matter is remitted must first of all determine whether the situation leading to duress was voluntarily brought about by the Appellant. In particular, the Trial Chamber must satisfy itself whether the military unit to which he belonged and in which he had voluntarily enlisted (the 10th Sabotage Unit) was purposefully intent upon actions contrary to international humanitarian law and the Appellant either knew or should have known of this when he joined the Unit or, if he only later became aware of it, that he then failed to leave the Unit or otherwise disengage himself from such actions. If the answer to this be in the affirmative, the Appellant could not plead duress. Equally, he could not raise this defence if he in any other way voluntarily placed himself in a situation he knew would entail the unlawful execution of civilians.

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

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

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

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

51. In addition, bearing in mind that, as stated above, the lower the rank of a serviceman the greater his propensity to yield to compulsion, the Trial Chamber, in determining whether or not Appellant acted under duress, should also take into account his military rank. Furthermore, the Trial Chamber should consider whether Appellant confessed at the earliest possible opportunity to the act he had

committed and denounced it to the relevant authorities. If he did so, this might contribute to lending credibility to his plea of duress.

Done in English and French, the English being authoritative.

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Antonio Cassese

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

[Seal of the Tribunal]

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1 - *See, e.g., Panevezys-Saldutiskis Railway*, P.C.I.J., Series A/B, no. 76, p. 16; *Barcelona Traction* case, I.C.J. Reports 1970, p. 33, para. 36.
2 - *See, e.g., Nottebohm* case, I.C.J. Reports 1955, p. 13 ff.
3 - P.C.I.J., Series B, No. 10, p. 20. The Court had started off by considering "whether the Convention contains any express or implicit reference to national legislation for the purpose of determining what persons are to be regarded as 'established'" (*ibid.*, p. 19). After noting that no express reference could be found, the Court wondered whether the Convention made an implicit reference to national legislation. In this connection the Court pointed out that "[I]t does not necessarily follow that, by reason of the nature of the situation contemplated in the Convention, there must be an implied reference to national legislation. Whereas the national status of a person belonging to a State can only be based on the law of that State, and whereas, therefore, any convention dealing with this status must implicitly refer to the national legislation, there is no reason why the local tie indicated by the word 'established' should be determined by the application of some particular law. It may very well be that the Convention contemplated a mere situation of fact, sufficiently defined by the Convention itself without any reference to national legislation. The Court is of opinion that this is the case as regards the condition implied by the word 'established' in Article 2 of the Convention. . . . It is hardly likely that the intention was to fix the criterion by means of a reference to 'national legislation'." (*Ibid.*, pp. 19-20.)
4 - Translation mine. Original French text in *U.N. Reports of International Arbitral Awards*, vol. XIII, p. 398.
5 - See his separate opinion in the *South West Africa* case, I.C.J. Reports 1950, pp. 148-49.
6 - See his separate opinion in the *Barcelona Traction* case, *supra*, n. 1, pp. 66-67.
7 - Art. 21 (Rights of the accused):
". . .
(2) In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
(3) The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
(4) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
(a) - (f) . . .
(g) not to be compelled to testify against himself or to confess guilt."
8 - A terminological point: the key issue for consideration here is whether under international law duress may be a complete defence to a charge of crimes against humanity or war crimes when the underlying offence is the killing of an innocent human being. This is the phrase used by the Prosecutor in the Respondent's Brief of 28 Apr. 1997 and it reflects the offence with which the Appellant is charged. It is worth mentioning, however, that the indictment against the Appellant charges him with a crime against

humanity (murder) and, alternatively, a violation of the laws or customs of war (murder). The term "murder" is not defined in the Statute, nor in common Article 3 of the 1949 Geneva Conventions which prohibits "murder". The definition of "murder" also varies from one national jurisdiction to another; some jurisdictions, e.g. the State of Pennsylvania in the United States of America, even recognise as many as three different degrees of murder. For the purposes of this Opinion, the issue is whether duress may be a defence to the killing of innocents. I do not consider that, as far as this issue is concerned, it makes any difference whether one refers to such an offence as "killing", "unlawful killing", or "murder" provided that it is understood that it is the killing of innocents without lawful excuse or justification (except, possibly, the defence of duress) with which we are concerned. Similarly, for our purposes it is not material whether a person is accused of murder, manslaughter, etc., as a principal or as an accessory.

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

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

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

12 - In addition to the *Einsatzgruppen* case, supra n. 10, and *Trial of Erhard Milch* ("the *Milch* case"), *Trials of War Criminals*, vol. III, p. 964 (respectively in *Law Reports*, vol. VIII, p. 91 and vol. VII, p. 40), both decided by United States courts sitting at Nürnberg, some cases brought after the Second World War before German courts are particularly significant in this respect, for those courts also acted on the strength of Control Council Law No. 10 - an international instrument which to a large extent has become part of customary law. Thus, in a case decided by the German Supreme Court in the British Zone, the two accused had been members of the National-Socialist party, one being Colonel (*Standartenführer*) of the SA, the other a committee member of the NSDAP (Nazi party). They had participated in attacks on synagogues on 10 Nov. 1938 (*Kristallnacht*) and in arson. They claimed that they acted upon superior orders and in addition under duress (*Notstand*). The Court dismissed the claim, pointing out that: "As an old member of the [National-Socialist] Party T. knew the programme and the fighting methods of NSDAP. If he nevertheless made himself available as official *Standartenführer*, he had to count from the start that he would be ordered to commit such crimes. Nor, in this condition of necessity for which he himself was to blame, could he have benefited from a possible misapprehension of the circumstances that could have misled him as to the condition of necessity or compulsion (*see Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. 1, 1949, p. 201 (translation mine). See also the following German cases: decision of 17 Feb. 1949 of the Oberlandesgericht of Freiburg im Breisgau (text in *Höchstrichterliche Entscheidungen. Sammlung der Oberlandesgerichte und der Obersten Gerichte in Strafsachen*, vol. II, pp. 200-03) as well as the decision of 5 Sept. 1950 by the German Supreme Court in the British occupied zone (ibid., vol. 1, pp. 129-30).

A number of cases brought before the Italian Court of Cassation can also be mentioned: *see, e.g.*, the decision of 24 Sept. 1945 in the *Spadini* case (in *Rivista penale*, 1946, p. 354), the decision of 10 May 1947 in the *Toller* case (*ibid.*, 1947, p. 920), the decision of 24 Feb. 1950 in the *Fumi* case (*ibid.*, 1950, vol. II, p. 380). The same position has been recently taken by the Court of Appeal of Versailles in the *Touvier* case (decision of 2 June 1993). The Court held that: "[N]o justification, be it founded on the state of necessity or on the defence of a third party, can be legitimately invoked by an official of the Militia such as Touvier who, by virtue of his office, was naturally under the obligation to satisfy the requirements of the Nazi authorities. The very nature of this occupation, which he freely chose, implied regular cooperation with operations such as the SD or the Gestapo" (unpublished text, translation mine).

13 - See Respondent's Brief on Preliminary Questions as Required by the Scheduling Order of 5 May 1997,

filed, *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-A, 20 May 1997, pp. 2-8; Transcript, *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-A, (*"Appeals Transcript"*) 26 May 1997, pp. 16-23.
14 - *See Trial of Max Wielen and 17 Others, Proceedings of a Military Court held at Hamburg* (*"Stalag Luft III"* case) (1 July 1947 - 1 Sept. 1947), judgement of 2-3 Sept. 1947 (files WO 235/424-32 in Public Record Office, Kew, Richmond), (I have filed with the International Tribunal's library those sections of the Proceedings that I mention in this Opinion); *Law Reports*, vol. XI, p. 31.
15 - *See Trial of Valentin Feurstein et al., Proceedings of a Military Court held at Hamburg* (4-24 Aug. 1948), Public Record Office, Kew, Richmond, file no. WO 235/525. (*"Feurstein et al."*) (I have filed with the International Tribunal's library those sections of the Proceedings that I mention in this Opinion); *Law Reports*, vol. XV at p. 173.
16 - *See Record of Proceedings of the Trial by Canadian Military Court of Robert Hölzer and Walter Weigel and Wilhelm Ossenbach held at Aurich, Germany*, (*"Hölzer et al."*) 25 Mar.- 6 Apr. 1946, vol. 1. (I am grateful to the Canadian Department of National Defence - Office of the Judge-Advocate-General - for providing me with copy of these records, that are now on file in the International Tribunal's library.)
17 - *See Jepsen* case, *supra*, n. 10.
18 - *See Einsatzgruppen* case, *supra*, n. 10.
19 - *Appeals Transcript, supra*, n. 13, p. 53.
20 - Text in *Telford Taylor, Final Report of the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council No. 10*, Washington, 1949, p. 254 ff.
21 - P.C. 5831 of 10 Sept. 1945.
22 - However *Stalag Luft III* also referred to international law as expounded by H. Lauterpacht: *see infra*, para. 24.
23 - *Jepsen case, supra*, n. 10.
24 - *Ibid.*, file WO 235/229, pp. 222-24.
25 - It should be noted that the two versions he gave of the episode were markedly different. In the course of trial proceedings, the accused was asked by his defence counsel what happened when he refused to obey the *Obermaat* Engelmann's order to shoot the internees. He answered that the *Obermaat* said "Well, you are an SS man . . . . And the SS is always so brutal and rough". According to Jepsen, he also said "This order stands just as much for you as for all others" and "If you do not take part [in the shooting] you will also immediately be shot on the spot" (*ibid.*, pp. 233-51, at 250). By contrast, after conviction and before being sentenced, Jepsen stated: "I have nothing to do with the whole transport and Engelmann held the pistol to my chest, counted to three and said if by the time he had counted to three I did not go over to help to shoot the internees he would shoot me" (*ibid.*, p. 363.)
26 - *Ibid.*, pp. 338-41. Section 54 of the German Criminal Code substantially corresponded to Section 35(1) of the German Criminal Code currently in force. Section 54 of the 1871 German Criminal Code provided that: "Apart from a case of self-defence, an act does not constitute a crime if it was committed in a situation of necessity for which the perpetrator was not responsible and which was not otherwise avoidable in order to avert a present danger to his own, or one of his close relatives' life or limb" (translation mine).
27 - "Duress can seldom provide a defence; it can never do so unless the threat which is offered as a result of which the unlawful act is perpetrated is a threat of immediate harm of a degree far far greater than that which would be created if the order were obeyed. . . . If you are contemplating that possibly this threat of death may provide a defence then let me ask you not to give effect to it unless you think that he [i.e. the accused] really was in danger of imminent death and that the evil threatened him was on balance greater than the evil which he was called upon to perpetrate" (*ibid.*, pp. 357-59).
28 - *Ibid.*, p. 363.
29 - *Stalag Luft III* case, *supra*, n. 14.
30 - *Ibid.*, file 235/429, p. 22.
31 - Sir Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 British Yearbook of International Law, (1944).
32 - "[T]he fact of superior orders . . . will not shield acts committed in pursuance of orders so glaringly offending against fundamental conceptions of law and humanity as to remove them from the orbit of any possible justification, including that of immediate danger to the person charged with the execution of the orders; it will not excuse crimes committed in obedience to unlawful orders in circumstances in which the person executing the crime was not acting under the immediate impact of fear of drastic consequences or summary martial justice following upon a refusal to act" (emphasis added): *See* transcript of the forty-eighth day of the trial, *Stalag Luft III* case, *supra*, n. 14, pp. 4-5.
33 - In this respect, the report of the *Stalag Luft III* case which appears in vol. XV of the *Law Reports* is misleading in that it mentions the Judge-Advocate's quotation from Archbold as if this were the *ratio*

decidendi of the case, but without mentioning that this was merely a quotation, nor that the Judge-Advocate went on to cite, with approval, another source which took a different approach.
34 - *Stalag Luft III* case, *supra*, n. 14, summing-up of the Judge-Advocate, p. 12 ff.
35 - In the case under discussion, the prosecutor, in his closing statement, mentioned duress and cited "the law of England"; however, he did not exclude its applicability to the case at issue on the ground that it involved killing; rather, he ruled out duress because in his view no compulsion had actually been exercised on the accused and in addition almost none of them had taken "a subordinate part" in the killing of the escapees. (*Ibid.*, transcript of the forty-seventh day of the trial, pp. 40-42.) It was also significant that all but one of the accused were members of the SS; hence, the voluntary membership of a criminal organization exception, referred to above, would have applied. (*See ibid.*, closing statement of the prosecutor, p. 40.)
36 - *Feurstein et al, supra*, n. 15.
37 - *See ibid.*, transcript of the first day of the trial, p. 4.
38 - Two of the accused (Knesebeck and von Menges) raised the defence of superior orders in relation to the Führer Order. (*See ibid.*, exhibit No. 38 and exhibit No. 39.)
39 - The Judge-Advocate stated: "[The] defence of 'duress and coercion' is not a defence in law. You are not entitled, even if you wished to save your own life, to take the life of another. There I may remind you of a case which is known as the Mignonette case [i.e., the *Dudley and Stephens* case], and in which a number of shipwrecked sailors, seeing no hope of reaching land, decided to kill one of their companions and to eat him. Lots were drawn, and in the end this object was carried out and one of these companions found his death in that way. Fortunately or unfortunately for these sailors, they were picked up and duly brought to trial . . . and they raised just this defence. They said: 'If we had not killed our companion, and had not eaten him, all of us would have starved and none of us would have been alive today'. This defence, Gentlemen, was rejected by the Court, and it was said that you must not take another's life in order to save your own" (*ibid.*, file WO 235/525, p. 6).
40 - *R. v. Dudley and Stephens*, (1884) 14 QBD 273, also known as the *Mignonette* case. Moreover, although the case is often held up as authority that necessity is no defence to killing, the court held in that case that the killing of the victim was not, as a matter of fact, necessary. As Lord Coleridge, C.J., pointed out: "They might possibly have been picked up the next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act" (emphasis added). In other words, that it was necessary to kill the victim was, at the time, pure speculation on the part of the accused. It is interesting to note that a fairly similar occurrence, the killing and eating of their companions by 15 shipwrecked survivors on the raft of the *Méduse* in 1816, had a different judicial outcome in France. No prosecution was initiated for such killing and eating, but criminal proceedings were instituted in 1817 against the ship's captain for causing the shipwreck and abandoning the ship. *See* P. Moriaud, *Du délit nécessaire et de l'état de nécessité*, 1889, pp. 9-10; E. Sermet, *L'état de nécessité en matière criminelle*, 1903, p. 23; H. de Hoon, *"De l'état de nécessité en droit pénal et civil"*, *Revue de droit belge*, 1911, pp. 30-31; Ph. Masson, L'affaire de la Méduse - le naufrage et le procès, 1972, especially p. 111 ff. *See also* Schadewaldt, *L'odyssée du "Radeau de la Méduse"*: *Un exemple classique de "l'état de nécessité", Revue internationale de criminologie et de police technique*, 1969, no. 2, p. 119 ff.; J. Graven, *L'"état de nécessité" justificatif des naufragés. À propos du Radeau de La Méduse*, *ibid.*, p. 135 ff.
41 - *Feurstein., supra*, n. 15, pp. 26-28.
42 - *See Hölzer et al., supra*, n. 16.
43 - Hölzer averred in his sworn statement that Schaefer had "pulled his pistol, held it against [him] and said 'Do you want to, or don't you want to?'"; when Hölzer gave the impression that his pistol had jammed, the lieutenant again "threatened [him] with his pistol" (see ibid., vol. II, p. 26). His defence counsel stated before the Court that Hölzer had been forced to shoot after his life had been threatened by Schaeffer (ibid., vol. I, pp. 289-99).
44 - *Ibid.*, p. 295.
45 - *See ibid.*, Opening Address, vol. II, pp. 1-4; Closing Address, vol. I, pp. 289-90, 291-92, 304.
46 - Weigel's and Ossenbach's defence counsel relied upon duress in less forceful terms and only in passing (see *Ibid.*, vol. I, p. 304; see also p. 312).
47 - *Ibid.*, vol. I, p. 315.
48 - The Judge-Advocate stated the following: "The threats contemplated as offering a defence are those of immediate death or grievous bodily harm from a person actually present[,] but such defence will not avail in crimes of a heinous character or if the person threatened is a party to an association or conspiracy such as the Court might find existed in this case. As to the law applicable upon the question of compulsion by threats, I would advise the Court that there can be no doubt that a man is entitled to preserve his own life and limb,

and on this ground he may justify much which would otherwise be punishable. The case of a person setting up a defence that he was compelled to commit a crime is one of every day. There is no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person can never be justified. . . . Accordingly, if the Court does find that Hölzer fired after being subjected to dire threats on his own life, on which there is conflicting testimony, even then he is not excused upon the above mentioned fundamental principles, but it more properly goes in mitigation of punishment" (emphasis added), *Ibid.*, vol. I, pp. 345-46. The Judge-Advocate relied upon British cases to support his proposition (see *Ibid.*, p. 346).

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

50 - *Ibid.*, p. 338.

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

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

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

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

55 - *Ibid.*, pp. 462-63, pp. 471-72.

56 - *Ibid.*, p. 480.

57 - *See supra*, para. 21.

58 - Although the Tribunal did not cite any specific provision of German law when dealing with the issue of duress, it repeatedly mentioned German provisions when discussing the more general question of superior orders (which it sometimes conflated with duress); *see Trials of War Criminals, supra*, n. 10, pp. 471-73, 483-88.

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

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

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

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

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

64 - Original text in *Verhandlungen des Reichstages. I Wahlperiode 1920, Band 368. Anlagen zu den Stenographischen Berichten Nr 2254 bis 2628*, Berlin, p. 2586; English translation (slightly revised by me) in 16 A.J.I.L. 1922, pp. 722-23. Section 52(1) of the 1871 German Criminal Code (which has been replaced

by Sections 34 and 35 of the Criminal Code currently in force) provided: “An act does not constitute a crime if the perpetrator was compelled to commit the act by irresistible force or by a threat related to a present danger to his own, or one of his close relatives’, life or limb which could not be otherwise averted” (translation mine).
65 - 31 Jan. 1949. *See Annual Digest and Reports of Public International Cases*, 1949, pp. 400-03.
66 - 4 July 1949. *Ibid.*
67 - 36 I.L.R., 318, at p. 340.
68 - For *Touvier, see* excerpt from the judgement of the Court of Appeal of Versailles of 2 June 1993, quoted *supra*, n. 12. It should be noted that the Court of Appeal summarised as follows the Defendant's claim that he had acted in a "state of necessity: . . . Touvier relies unhesitatingly on the pressures exerted by the Germans to claim a state of necessity susceptible of constituting a justification . . .” The Court of Appeal's decision was confirmed by the Court of Cassation (decision of 21 Oct. 1993) (see *Bulletin Criminel* (1993), No. 307, pp. 770-74). With regard to the *Papon* case (Papon had been accused among other things of complicity in the extermination of Jews) in its judgement of 18 Sept. 1996, the *Chambre d'accusation* of the Bordeaux Court of Appeal stated that: "Maurice Papon's plea of duress cannot succeed. Indeed, although the German demands may have been expressed with energy and determination, and in certain cases accompanied by threats of reprisals against French police officers, it cannot be concluded from the investigation that the pressures so exerted were of an intensity as to constitute duress abolishing the free will of Maurice PAPON". (Translation mine: p. 151 of the unpublished transcript, *Cour d'appel de Bordeaux, Chambre d'accusation, Arrêt du 18 septembre 199*6, no. 806).
69 - The *Priebke* case was decided by the Military Tribunal of Rome on 1 Aug. 1996 (the judgement was filed on 30 Sept. 1996). Priebke was charged with participation in the execution of 335 civilians in 1944. Before the Rome Tribunal he argued that he had been unable to refuse the order because, *inter alia*, the Captain who commanded the operation said to the other subordinate officers “that those who did not want to take part in the shooting had no other choice than to stand alongside the prisoners and die with them" (translation mine from the typewritten unpublished text, p. 21, which I have deposited with the International Tribunal's library). The Tribunal dismissed this version of the facts, while recognising that it could, nevertheless, afford a complete defence to the charges if it were proven. Observing that, had the accused, in fact, faced such an imminent threat of death, he would no longer have been under a duty to refuse the order as he would have been acting in a state of necessity, the Tribunal went on to say: "In this event [of imminent threat of death] he could have backed down from refusing to obey the order and participated in the executions only in order to save his own life, claiming the defence of state of necessity, which is provided for in all legal orders, including German law; indeed, in this case, no person could have expected Priebke to act as a hero and to sacrifice his own life in order to avoid participating in the inhumane execution. Thus, in all of the possibilities with which we have dealt, Priebke could have had a way out: this way out, however, certainly could not be that of obeying a manifestly unlawful order, except in case of imminent danger to his life; as such a danger was never realistically made apparent in this case, it follows that he has full responsibility for the entire massacre, as an accomplice, with the other executioners [*a titolo di concorso con gli altri esecutori*]" (emphasis added) (translation mine, *Ibid.*, pp 80-81).
By a decision of 6 Nov. 1996 the Court of Cassation quashed the judgement of the Rome Military Tribunal on procedural grounds (the Court upheld the request that the President of the Tribunal be disqualified). The Rome Military Tribunal, to which the case was remitted, joined it with the case against another German officer accused of participating in the execution, K. Hass. In its judgement of 22 July 1997, filed on 15 Sept. 1997 (*Hass and Priebke*) the court rejected on the facts the defence of duress (*stato di necessità*). After noting that the defendants claimed that they “had killed only to escape the danger of being brought before SS courts”, the court averred that, contrary to the allegations of the defendants, in point of fact neither Colonel Kappler nor Captain Schutz ever threatened the defendants to kill them in case of non-execution of their orders. The court goes on to say that “it would be utterly unreasonable to state that the defendants were threatened, as it were, implicitly by the very structure of the SS, to which they had voluntarily adhered and within which they had reached positions of high authority”. The court then concludes: “Lastly, only for the sake of completeness should one add that, at any rate, another obstacle stood insurmountably in the way of the applicability of the defence of duress, namely the clear disproportion between the danger *ex hypothesi* threatening the accused and the offence that they had allegedly been compelled to perpetrate” (translation mine, pp. 55-57 of the typewritten text, kindly provided by the Rome Tribunal’s President, and deposited with the International Tribunal’s Library). The significance of this last proposition (manifestly an *obiter dictum*) is not clear; in particular it is not apparent to what the “lack of proportionality” refers: does it concern the possible death (by killing) of the defendants on the one side, and their participation in the

execution, on the other? Or does it instead relate to the fear by the defendants to be court-martialled by an SS court, on the one side, and their participation in the execution, on the other?
70 - *See* the *Retzlaff et al.* case, decided on 18 Dec. 1943 by a Soviet military court sitting in Kharkov. The defendants, three German officers and a Soviet driver, had been accused of atrocities in the town of Kharkov during the German military occupation of that town. In their final statements, all the defendants pleaded that they had been compelled to commit atrocities because of the general dictatorial nature of the Nazi regime; had they failed to execute orders, they would have been sentenced to death (*The People's Verdict. A full Report of the Proceedings at the Krasnodar and Kharkov Atrocity Trials*, London-New York, without date, pp. 118-20). However, although defence counsel asked that the life of the defendants be spared, in its Judgement the Military Tribunal sentenced all the accused to death by hanging (*Ibid.*, p. 124).
71 - *See*, for instance, the *Wernicke and Wieczorek* case, decision of the Berlin Supreme Court (*Kammergericht*) of 24 Aug. 1946, in *Justiz und NS-Verbrechen, Sammlung Deutscher Strafurteile wegen National-sozialistischer Tötungsverbrechen 1945-1966*, vol. I, 1968, p. 42; the so-called *Euthanasie* case, decision of the District Court of Frankfurt am Main of 21 Dec. 1946, *ibid.*, pp. 158-59, upheld by the Court of Appeal of Frankfurt am Main by decision of 17 Aug. 1947, ibid., pp. 179-80; *Kaufmann G. et al.* case, decision of the District Court of Frankfurt am Main of 30 Jan. 1947, *ibid.*, pp. 255-57, upheld by decision of the *Oberlandesgericht* (Court of Appeal) of 16 April 1948, ibid., p. 15; decision of the District Court of Frankfurt am Main of 21 Mar. 1947 in the *Adolf Wahlmann et al.* case, *ibid.*, pp. 352-55, upheld by the Court of Appeal by its decision of 20 Oct. 1947, ibid., pp. 373-74; decision of 5 Apr. 1950 of the District Court of Frankfrut am Main in the *Heinrich Baab* case, *ibid.*, vol. VI, p. 396; decision of 27 May 1955 of the District Court of Frankfurt am Main in the *Dr. Gerhard P.* case, *ibid.*, vol. XIII, p. 187; decision of 14 Nov. 1955 of the District Court of Weiden/Opf. in the Nies Adolf case, *ibid.*, p. 429; decision of the District Court of Weiden of 29 May 1956 in the *Dr. Fischer Hermann* case, *ibid.*, pp. 754-58; decision of the District Court of Ulm of 29 Aug. 1958 in the *Bernhard Fischer-Schweder et al.*, *ibid.*, vol. XV, pp. 246-51; decision of the District Court of Berlin of 9 Mar. 1960, in the *Fritz Franz Hermann Knop et al.* case, *ibid.*, vol. XVI, pp. 369-70; decision of 10 May 1961 of the District Court of Tübingen in the *Hans Richard Wiechert et al.* case, *ibid.*, vol. XVII, p. 395; decision of 22 Dec. 1965 of the District Court of Detmold in *Karl Dietrich* case, *ibid.*, vol. XXII, pp. 482-83.
72 - See the Sablic et al. case, decided on 26 June 1992 by the Military Court of Belgrade. One of the defendants, Cibari}, had been accused of a war crime against civilians, pursuant to Article 142, para 1 of the Yugoslav Criminal Code, in that he had allegedly killed four civilians, upon order of another defendant, Sabli}. Before the court Cibari}'s defence counsel argued that: "[Cibari}] executed the married couple and two women by order of the defendant Sabli} and a military policeman, who threatened him that he had to obey everything that had been ordered or 'your head is off'" (unpublished text; unofficial translation, p. 37). The Court, however, both rejected the plea of duress and sentenced Cibari} to death (*ibid.*, pp. 126, 130-31).
73 - The *Repubblica Sociale Italiana* (RSI) was established on 1 December 1943 in northern and central Italy but gradually shrank as a result of the victorious thrust of the Allies and the Italian resistance movement, so that eventually it only wielded authority over most of northern Italy. It came to an end on 25 April 1945. Under international law the RSI can be regarded as a *de facto Government* fighting against the Italian Royal Government and the "Committee for the National Liberation of Northern Italy" (CLNAI), which embraced various groups of Italian partisans and had been recognised by the Italian Royal Government as their representatives in the North. Alternatively, the RSI could be regarded as a puppet Government under such a strong German military control that its organs could be considered as acting on behalf of Germany. Accordingly, one could either characterise the armed conflict between the resistance movement and the Royal Government, on the one side, and the RSI, on the other, as a civil war, or one could prefer to speak of an international conflict between the Italian Government (incorporating the various groups of partisans) and the Allies, on the one side, and Germany and the RSI, on the other. Be that as it may, what matters from our viewpoint is that (as reported by a great authority, M. S. Giannini, *Repubblica sociale italiana, Enciclopedia del diritto*, vol. XXXIX, (1988) p. 901) the opposing military authorities proceeded to an exchange of notes to the effect that either party regarded the military units of the other as combatants under the laws of warfare and therefore applied those laws *inter se*.
74 - The case was first brought before the Court of Assize of Vercelli, which sentenced the two accused to 20 years' imprisonment. On appeal, the Court of Cassation on 18 December 1946 quashed the sentence on procedural grounds as well as, with regard to Captain Bernardi, on the ground that the decision failed to provide any reasons on the issue of duress (*stato di necessità*). The case was therefore remitted to the Court of Assize of Turin which, on 25 March 1947, sentenced the two to 16 years' imprisonment. The accused lodged an appeal with the Court of Cassation, contending that, on the basis of the facts as proved by the trial court, the Court of Cassation should uphold the defence of duress.

75 - *See* the text of the unpublished hand-written judgement of the Court of Assize of Turin, pp. 3-12 (this text has been kindly provided by the Public Record Office of Turin, and is deposited with the International Tribunal's library). The court made a careful and detailed examination of the facts and concluded that, in point of fact, the defendants could not invoke duress (*stato di necessità*).
76 - Duress is provided as a complete defence to any charges by Art. 54(1), of the Italian Criminal Code, whereby: "No one shall be punished for acts committed under the constraint of necessity to preserve himself or others from the present danger or a serious personal harm, which is not caused voluntarily nor otherwise avoidable, and provided that the acts committed are proportionate to the threatened harm" (translation mine). The Court held that the injury threatened by the superior authorities was to be regarded as serious; in this connection, after recalling the aforementioned threats of the *prefetto*, the Court stressed that (i) the *prefetto* was well known for being "a violent and cruel person and a persecutor of anti-fascists", (ii) the two defendants had in fact been in contact with members of the resistance movement to whom they had provided information and weapons, hence their marked reluctance to shoot the three partisans; (iii) in view of the fact that at that period military courts were under the strong influence and authority of *prefetti*, the utterances of the *prefetto* to Captain Bernardi could not but constitute a serious threat; (iv) under the circumstances, it was impossible for the two defendants to try and prevaricate or at any rate somehow shun the order. The Court held that duress "does not require a condition of such absolute compulsion as to cause inability to understand and to will, as if the person under duress lost any control over himself and became a simple instrument of others' will. . . . Duress leaves intact all the elements of criminal imputability. The person at issue acts with a diminished freedom of determination, but acts voluntarily in order to escape an imminent and inevitable serious danger to his body and limb." (Translation mine. Text of the headnote in *Rivista penale*, 1947, pp. 921-22. I have primarily used the unpublished hand-written text of the Court of Cassation's decision of 14 July 1947, kindly provided by the Central Public Record Office in Rome; copy of such text has been filed with the International Tribunal's library).
77 - *See* decision 6 Nov. 1947, *Srà et als.* case, in *Giurisprudenza completa della Corte Suprema di Cassazione, sez. pen.*, 1947, No. 2557, p. 414; decision of 17 Nov. 1947, *Masetti* case, in *Massimario della Seconda Sezione della Cassazione*, 1947, p. 416, no. 2569. In both cases only the headnotes have been published. I have used the original hand-written text of both decisions, kindly provided by the Rome Central Public Record Office (copy has been filed with the International Tribunal's library).
78 - It should be added that the Court of Cassation quashed the decision of the Special Court of Assize also because it failed to prove that the three defendants had been aware of and intended to execute a partisan.
79 - *See* the unpublished hand-written text of the judgement of 28 September 1948 (this text had been kindly provided by the Appellate Court of Assize of Milan, and is deposited with the International Tribunal's library). While the Court of Cassation had remitted the case on two grounds, one concerning all three defendants (the previous trial court had not provided any legal reasoning on the issue of whether the defendants were aware that the person they shot was a partisan), the other one only concerning defendant Srà (the lack of any legal reasoning on the issue of duress), the Court of Assize of Milan held that the second ground was the preliminary one, for it could be dispositive of the matter in that it actually concerned all three defendants. It therefore pronounced on this ground and concluded that duress was available to the three accused.
80 - On 11 October 1946 the Special Court of Assize of Forlì had sentenced Masetti to 30 years' imprisonment for commanding the execution squad responsible for the killing of two partisans. The Court of Cassation found that the trial court had mixed up the issue of superior order with that of duress; it then held that the trial court had also been inconsistent because it had first established and set out all the factual requirements necessary for duress and had then concluded that the accused was guilty. It therefore remitted the case to the Court of Assize of L'Aquila. With regard to duress, the court noted that the trial court had established the following facts: upon receiving the order to execute the partisans, Masetti had refused to obey, as a consequence of which "a row broke out, with shouts and threats, between the battalion commander and Masetti"; the threat against Masetti and the ensuing state of necessity in which he was put, were all the more serious as he had been chosen by the German military authorities (which in fact had imposed upon the commander of the Italian battalion the order to execute the partisans) because he was the youngest officer in his battalion, hence the most vulnerable" (pp. 3-4 of the hand-written text).
81 - *See* decision of the Court of Assize of L'Aquila of 15 June 1948 (unpublished; copy of the hand-written original has been kindly provided by the Registry of the Court of Appeal of L'Aquila and has been deposited with the library of the International Tribunal). After carefully examining the evidence, the court among other things stressed that the accused had been coerced to command the execution squad also because of the physical compulsion of a German officer who, with his unit, prevented him from shunning the order to

execute the two partisans, and actually forced him to take part in the execution.
82 - *Ibid.*, p. 8 of the unpublished text (translation mine).
83 - On the vicissitudes of Control Council Law No. 10, *see* among others, H. Ostendorf, *"Die - widersprüchlichen - Auswirkungen der Nürnberger Prozesse auf die westdeutsche Justiz", Strafgerichte gegen Menschheitsverbrechen - Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen*, G. Hankel and G. Stuby (eds.), Hamburg 1995, p. 75. *See also* H. Meyrowitz, *La Répression par les Tribunaux Allemands des Crimes Contre l'Humanité et de l'Appartenance à une Organisation Criminelle*, 1960, pp. 114 and 118.
84 - In German criminal law *Totschlag* means intentional killing, whilst *Mord* means intentional killing characterised by either base motives or certain aggravating circumstances (e.g. cruelty).
85 - Text in *Justiz und NS-Verbrechen*, vol. I, 1968, pp. 605-21; the part on duress is at pp. 620-21. The decision was upheld by *Oberlandesgericht* of Hamm on 15 Apr. 1948 (*ibid.*, pp. 622-28).
86 - Decision of 21 May 1948, *ibid.*, vol. II, 1969, p. 521 ff., at 526-27. The decision was upheld by the *Oberlandesgericht* of Tübingen, on 30 Nov. 1948 (*ibid.*, p. 528 ff.) which upheld in particular the finding on duress, although it pointed out that this finding was superfluous, since the trial court had already held that S. lacked the "required knowledge of the illegality (*das erforderliche Bewusstsein der Rechtswidrigkeit*) of his action" (pp. 533-34). It should be noted that the *Tribunal supérieur* of the French military authorities quashed both decisions on 6 Dec. 1950, for violation of Control Council Law No. 10 (it would seem that the reasons for the quashing were that the two German courts had determined whether the relevant facts constituted offences under German criminal law instead of applying the provisions of Control Council Law No. 10 on crimes against humanity). The *Tribunal supérieur* consequently remitted the case to the *Landgericht* of Rottweil for retrial. This court, however, decided to discontinue the proceedings, because meanwhile Regulation no. 154 of the French High Commissioner of 1 June 1950, providing for that power of the *Tribunal supérieur*, had been repealed by Regulation no. 171 of 31 Aug. 1951 (see the text of the decision of 18 Feb. 1952 by the *Landgericht* of Rottweil, *ibid.*, p. 535).
87 - Decision of 6 Jan. 1949, *ibid.*, vol. III, 1969, pp. 721-23. The whole text of the decision is at pp. 713-24.
88 - *Ibid.*, p. 723.
89 - *Ibid.*, vol. V, 1970, p. 103.
90 - *See ibid.*, vol. V, 1970, p. 89 ff.; the relevant parts are at pp. 103-05 and 123.
91 - *See ibid.*, p. 123.
92 - *See ibid.*, vol. V, 1970, pp. 507-11 (the part on compulsion is at p. 510).
93 - *See ibid.*, pp. 512-16, especially p. 515.
94 - *See e.g.* the decision of the District Court of Kassel of 8 Feb. 1950, ibid., vol. VI, p. 129, upheld on 10 Aug. 1950 by the Supreme Court of Hessen, ibid., pp. 132-39. See also the decision of the District Court of Bochum of 4 Dec. 1950, ibid., vol. VII, pp. 742-46; the decision of the Court of Assize of Mönchen-Gladbach of 20 Nov. 1951, ibid., vol. IX, p. 99 ff.; the decision of the Court of Assize of Dortmund of 4 Apr. 1952, ibid., vol. IX, pp. 517, 525, 529-39; the decision of the same court of 29 Apr. 1952, ibid., p. 589 ff.; the decision of the Court of Assize of Osnabrück of 7 Oct. 1959, ibid., vol. XVI, p. 57 ff.
95 - *See, e.g.*, the decision of the District Court of Frankfurt/Main of 25 Aug. 1950, ibid., vol. VII, pp. 285-87 (of the two accused, who had allegedly participated in the extermination programme in the Sobibor camp, one was sentenced to life imprisonment, the other was acquitted because he thought that he found himself in a situation otherwise inevitable of danger for his life). *See also* the decision of the District Court of Mönchen-Gladbach of 15 Nov. 1951, ibid., vol. IX, pp. 70-71; the decision of 5 July 1952 of the Court of Assize of Stuttgart on Buchenwald, confirmed by the *Bundesgerichtshof* on 19 Feb. 1952, ibid., vol. IX, pp. 780 and 782 respectively; the decision of 18 July 1952 of the Court of Assize of Hagen, confirmed by the *Bundesgerichtshof* on 3 Dec. 1953, ibid., vol. X, pp. 40-44; the decision of the Court of Assize of Düsseldorf of 3 Sept. 1965 on Treblinka, *ibid.*, vol. XXII, pp. 210-12.
96 - *See Warsaw Ghetto* case, the decision of the Court of Assize of Dortmund of 31 Mar. 1954, *ibid.*, vol. XII, 1974, pp. 340-41.
97 - *See ibid.*, pp. 346-48. The court stressed in particular that at the time the accused were under the special jurisdiction of SS and police courts and knew that such courts imposed the most severe sentences in case of disobedience; in addition, when they had first been deployed in Warsaw, the company had been obliged to watch the sentencing to death and execution of two members of the police battalion they had replaced; furthermore, some of the accused had been made to attend the proceedings of an SS and police special court, manifestly with a view to scaring and warning them. The court also emphasised that the defendants had no alternative: they could neither shun the order by escaping, nor could they refuse to obey by reporting ill, nor had they any other way of avoiding participation in the execution. It should be noted that the decision was upheld by the *Bundesgerichtshof*, decision of 21 Sept. 1955 (4 StR 225/55), quoted ibid., p. 351, note 1.

98 - *See ibid.*, vol. XIV, 1976, p. 563 ff. The part concerning duress (*Notstand*) is at pp. 616-23. The decision was upheld, at least with regard to the three accused A., G. and Z., by the *Bundesgerichtshof*, by its decision of 13 Mar. 1959 (4 StR 438/58, Lfd no. 486), cited *ibid.*, p. 625, note 1.
99 - *Ibid.*, p. 623 (translation mine).
100 - *See e.g.* the decision of the Court of Assize of Giessen of 27 Apr. 1959, *ibid.*, vol. XV, pp. 742-46; the decision of the Court of Assize of München of 21 July 1961, *ibid.*,vol. XVII, pp. 704-05; the decision of the Court of Assize of Freiburg in Breisgau of 12 July 1963, *ibid.*, vol. XIX, pp. 467-69; decision of the Court of Assize of Kempten of 27 Feb. 1964, *ibid.*, vol. XIX, pp. 752-54.
101 - It is well known that serious doubts may be expressed about whether, in actual reality, German members of police or of the military were threatened by their superiors with death and not simply, in most instances, with transfer to the Eastern front or disciplinary punishment. Accounts of eye-witnesses tend to show that the latter situation materialised. See e.g. P. Levi, *The Drowned and the Saved*, 1988, pp. 13-17, 42-43, 50-51; cf. also D. Rousset, *L'univers concentrationnaire*, 1965, pp. 149-50. Recent historical research tends to corroborate these testimonies. See e.g. D.J. Goldhagen, *Hitler's Willing Executioners - Ordinary Germans and the Holocaust*, 1996, pp. 239-80, 375-415. Furthermore, one should more generally bear in mind the critical appraisal of the German case-law of such a distinguished German author as H. Ostendorf, *"Die - widersprüchlichen - Auswirkungen der Nürnberger Prozesse aud die westdeutsche Justiz", op. cit*, pp. 73-95.
102 - This case-law also proves that Lord Salmon was wrong when, in delivering the Privy Council's advice in *Abbot v. The Queen*, he contended that the invocation of duress for war crimes involving the killing of innocents "has always been universally rejected" (*Abbot v. The Queen* [1976] 3 All E.R. at 146).
103 - In both cases the question at issue concerned some German industrialists who, within the "slave labour programme" set up by the German authorities, had utilised tens of thousands of civilians deported from other countries as well as concentration camp inmates and prisoners of war. They had been accused (as principals or accessories) of having participated in the enslavement and deportation of foreign civilians on a gigantic scale. In particular, they had been accused of having exploited such labourers under inhumane conditions. The United States Tribunals found that some of the defendants had acted under duress and acquitted them of this charge (for the *Flick* case *see Trial of Friedrich Flick and Five Others, Trials of War Criminals*, vol. VI, pp. 1197 and 1201; for the *Farben* case, *see United States v. Carl Krauch, ibid.*, vol. VIII, p. 1175). Another United States Tribunal, in the *Krupp* case came to the opposite conclusion, but only in point of fact (*see United States v. Alfried Krupp, ibid.*, vol. IX, pp. 1439-48).
104 - In the *Priebke* case (judgement of 1 Aug. 1996), too, where duress was, again, admitted in principle, but not *in casu*, the theory upon which it was admitted was that the victims of the execution would have been killed in any event even if Priebke himself had refused to participate in their execution (*see* judgement of 1 Aug. 1996, *supra*, n. 69).
105 - *See*, for example, the *Stalag Luft III* case, *supra*, n. 14, as well as two German cases cited *supra*, at paras. 37-38, namely *S. and K.* and *Warsaw Ghetto*.
106 - *See* the three Italian cases cited *supra*, at para. 35, as well as *Wetzling et al.* cited *supra*, at para. 38.
107 - As put by Judge Cory for the majority: "The lower the rank of the recipient of an order the greater will be the sense of compulsion that will exist and the less will be the likelihood that the individual will experience any real moral choice. It cannot be forgotten that the whole concept of the military is to a certain extent coercive. Orders must be obeyed. The question of moral choice will arise far less in the case of a private accused of a war crime or a crime against humanity than in the case of a general or other high-ranking officer". *R. v. Finta*, [1994] 1 S.C.R., at 838.
108 - The prosecutor pointed out that the five accused were all officers of varying rank, who had simply set in motion the machinery for the shooting of four prisoners of war, although they had not themselves been part of the execution squads. He then said that, since the soldiers making up an execution squad could not be held responsible, the question at issue was whether the officers as well could be held not criminally liable. (Opening statement of the prosecutor, in *Feurstein et al., supra*, n. 15, file WO 235/525, p. 4).
See also "Report to the President of June 6, 1945", in Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, where he says, when discussing superior orders: "There is doubtless a sphere in which the defence of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out . . . . But the case may be greatly altered where one has discretion because of the rank or the latitude of his orders". (Emphasis added.)
109 - *Cf. Einsatzgruppen case, supra*, n. 10, p. 481.
110 - Nor is it an answer to this to say that the inmate in this example would never be brought to trial. It is

true that in common-law countries where there is a doctrine of prosecutorial discretion, a prosecutor will typically decide not to take the matter to trial if there is strong evidence of duress. Thus many cases where the defence might have been upheld simply do not reach the trial stage. But this supports rather than vitiates the proposition that a person in this situation who acts under duress is not a criminal whom society demands should be prosecuted and punished.

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

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

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

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

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.

DRAZEN ERDEMOVIC

SEPARATE AND DISSENTING OPINION OF JUDGE LI

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Payam Akhavan

Counsel for the Appellant:

Mr. Jovan Babic

1. In this appeal of Drazen Erdemovic, (the "Appellant"), my view is different from that of some of my learned colleagues in two respects; first, whether duress, or obedience to superior order under threat of death, can be a complete defence to the massacre of innocent civilians, and second, whether this case should be remitted to the Trial Chamber. As these two questions are important from the standpoint of law, this Separate and Dissenting Opinion is written to give reasons for my view.

I. WHETHER DURESS CAN BE A COMPLETE DEFENCE TO THE MASSACRE OF INNOCENT CIVILIANS

2. With regard to this question, there is neither applicable conventional nor customary international law for its solution.

3. National laws and practices of various States on this question are also divergent, so that no general principle of law recognised by civilised nations can be deduced from them. This is shown by the fact that there are legal systems admitting duress as a general and complete defence, while other legal systems admit it as a mere mitigating circumstance. For instance, the laws and practices of France and Germany belong to the first category, and those of Poland and Norway belong to the second category.

A. France

Article 122-2 of the French Criminal Code of 1992 provides:

> No person is criminally responsible who acted under the influence of a force or compulsion which he could not resist.[1]

B.Germany

Section 35(1) of the German Penal Code of 1975 (amended as of 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 the danger. In the latter case, his punishment may be mitigated in conformity with section 49(1).

C. Poland

Article 5 of the Polish Law Concerning the Punishment of War Criminals of 11 December 1946 prescribes:
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.

D. Norway

Article 5 of the Norwegian Law on the Punishment of Foreign War Criminals of 15 December 1946 is couched in the following terms:
Necessity and superior order cannot be pleaded in exculpation of any crime referred 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 laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted.

4. As no general principle of law can be found on the question, recourse is to be had to the decisions of Military Tribunals, both international and national, which apply international law. In this regard, the Judgement of the International Military Tribunal at Nürnberg of 1946 should be mentioned in

the first place. In discussing Article 8 of the Charter of the International Military Tribunal it says:

> The provision of this Article is in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a 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 in the criminal law of most nations, is not the existence of the order, but whether a moral choice was in fact possible.[2]

However, the moral choice test, although put forward by the International Military Tribunal, was never applied by it, and being a little vague, has been differently interpreted by various authors. Therefore, it cannot be entirely relied upon for the solution of the question. Both the decisions of the United States Military Tribunals at Nürnberg in the subsequent proceedings under Control Council Law No. 10 and those of Military Tribunals and/or Courts set up by various other allied countries for the same purpose, must also be consulted.

5. From a study of these decisions the following principles can be obtained: as a general rule, duress can be a complete defence if the following requirements are met, (a) the act was done to avoid an immediate danger both serious and irreparable, (b) there was no other adequate means to escape, and (c) the remedy was not disproportionate to evil. To this general rule there is an important exception: if the act was a heinous crime, for instance, the killing of innocent civilians or prisoners of war, duress cannot be a complete defence, but can only be a ground of mitigation of punishment if justice requires.

6. The general rule is deduced from the *Flick*[3], *I. G. Farben*[4], and *Krupp*[5] cases. In these cases, the accused were German industrialists charged, *inter alia*, with employing forced labour. They pleaded duress, alleging that they were obliged to meet the industrial production quotas laid down by the German Government and that in order to do so it was necessary to use forced labour supplied by that Government because no other labour was available, and that had they refused to do so they would have suffered dire, harmful and irresistible consequences. The Judgements of the United States Military Tribunals admitted the plea as a complete defence, because the crime of employing forced labour was not a heinous one.

7. On the other hand, the exception is illustrated by the *Hölzer*[6], *Feurstein*[7], and *Jepsen*[8] cases.

In the trial of Robert Hölzer before a Canadian Military Court at Aurich, Germany, 1946, the accused claimed that he had acted under superior order which amounted to coercion or duress. The Judge-Advocate gave the court the following advice:

> The Court may find that Hölzer fired the shot at the flyer under severe duress from Schaefer, actually at pistol point . . . . The threats contemplated as offering a defence are that of immediate death or grievous bodily harm from a person actually present, but such defence will not avail in crimes of a heinous character . . . . As to the law applicable upon the question of compulsion by threats, I should advise the Court that there can be no doubt that a man is entitled to preserve his own life and limb, and on this ground he may justify much which would otherwise be punishable. . . . There is no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person can never be justified.
>
> Lord Hale lays down the stern rule:

> "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 committed the fact; for he ought rather to die himself than kill an innocent man".
> Accordingly, if the court do find that Hölzer fired after having been subjected to dire threats on his own life, even then, he is not excused upon the above-mentioned fundamental principles, but it more properly goes in mitigation of his punishment.[9]
>
> So the accused was sentenced to death.

The same principle was applied in the Judgements in the *Jepsen* case by a British Military Court at Luneberg, 1946, and the *Feurstein* case by a British Military Court at Hamburg, 1948.

8. In my view, both the rule and the exception are reasonable and sound, and should be applied by this International Tribunal. However, as this appeal case is concerned with the applicability of the exception, a few more words should be said about it.

In the first place, the main aim of international humanitarian law is the protection of innocent civilians, prisoners of war and other persons *hors de combat*. As the life of an innocent human being is the *sine qua non* of his existence, so international humanitarian law must strive to ensure its protection and to deter its destruction. Admission of duress as a complete defence or justification in the massacre of innocent persons is tantamount to both encouraging the subordinate under duress to kill such persons with impunity instead of deterring him from committing such a horrendous crime, and also helping the superior in his attempt to kill them. Such an anti-human policy of law the international community can never tolerate, and this International Tribunal can never adopt.

Second, the present municipal laws of various countries regarding the propriety or necessity of recognising the exception to the rule, as shown above, are divergent. On the one hand, the legal systems of the British Commonwealth and some civil-law systems admit the exception. On the other hand, some other civil-law systems do not provide for it. In such circumstances, this International Tribunal cannot but opt for the solution best suited for the protection of innocent persons.

9. In support of the argument that duress can be a complete defence to the massacre of innocent civilians the *Einsatzgruppen*[10] case is referred to. The facts of this case are that the accused Ohlendorf and 23 other persons were commanders or subordinate officers of special SS units called *Einsatzgruppen*, who accompanied the German Army in its invasion of Soviet Russia during the Second World War and exterminated Jews, gypsies, insane people, communist functionaries and so-called "Asiatic inferiors and asocials", who were civilians or prisoners of war. These SS Units caused the death of approximately one million of such persons in the German-occupied territories of Russia. The principal charge of this case was murder to which the plea of duress was raised by the accused.

10. In its Judgement the United States Military Tribunal at Nürnberg stated the following:

> But it is stated that in military law even if the subordinate realises that the act he is called upon to perform is a crime, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real, and inevitable. No court will punish a man

> who, with a loaded pistol at his head, is compelled to pull a lethal lever. Nor need the peril be that imminent in order to escape punishment.[11]

However, the above statement is merely a dictum. Further, the plea of duress was rejected on the grounds that "if the mental and moral capacities of the superior and subordinate are pooled in the planning and execution of an illegal act, the subordinate may not subsequently protest that he was forced into the performance of an illegal undertaking"[12]. As a result all the accused were convicted. Ohlendorf and many others were sentenced to death by hanging, while others were sentenced to life or 10 to 20 years' imprisonment. So this case does not settle the law concerning duress in cases of heinous crimes.

11. Furthermore, it is argued that in the present case even if the Appellant had refused to execute the order under the threat of death, all the innocent Muslims would also have been exterminated by all the other members of his Unit, so that his act should be justified on this ground. The absurdity of this argument is apparent, because it would justify every one of the criminal group who participated in the joint massacre of innocent persons. Moreover, there is absolutely no authority for such a proposition.

12. From the above considerations my conclusion on this question is that duress can only be a mitigating circumstance and is not a defence to the massacre of innocent persons. This view agrees with and is in support of the Joint Separate Opinion of Judges McDonald and Vohrah.

II.WHETHER THIS CASE SHOULD BE REMITTED TO A TRIAL CHAMBER

13. I am of the opinion that the remittal of this case to the Trial Chamber is erroneous in law, because it is clear that the Appellant in pleading duress only asserts it as a ground of mitigation of punishment and not as a ground of complete defence or justification, so that the plea of guilty is unambiguous. This is sufficiently proved by the following facts.

14. During an interview with a journalist, Mr. Janukovic, shortly after his transfer to The Hague, the Appellant was asked whether he was aware that he might be held responsible for the killing of certain Muslim civilians if he were to confess this crime before the International Tribunal. He replied in the affirmative and said that he accepted full responsibility for what he had done[13]. From this statement it is clear that the Appellant had no intention of claiming duress as a ground for the justification of his crime.

15. After the Appellant pleaded guilty, the Presiding Judge of the Trial Chamber explained to him very clearly the legal consequences of his guilty plea as follows:

> If you plead not guilty, you will be entitled to a trial during which, of course, with your lawyer, you will contest the charges and allegations presented against you by the Prosecutor; but, since the accused pleaded guilty, from this point on you have given up the right to a trial to determine whether or not you are guilty.[14]

On hearing this explanation, the Appellant adhered to his plea of guilty, demonstrating once again that he intended to plead duress as a ground for mitigation of punishment.

16.In this appeal, counsel for the Appellant applied to this Chamber for the following remedies:

> (a) to pronounce the accused guilty of the crime, but remit his sentence on the grounds of extreme necessity; or
> (b) to impose a more lenient penalty than the one imposed by the Trial Chamber.

It is clear that the remedies sought show that the Appellant's plea of duress is intended as a ground of mitigation of punishment, and therefore does not render the guilty plea ambiguous.

17.Finally, in the hearing of this Appeals Chamber on 26 May 1997, counsel for the Appellant made the following statements:

> My client has asked me . . . to request from this [Appeals] Chamber not to reverse and remand this case for retrial. He thought that this Chamber should once again consider all these facts that I presented and to re-evaluate all the mitigating circumstances and our opinion is that it is possible to take this appeal into account and to reduce his sentence[15].
> If I am to accept the position of my client, which I have to, I would ask this Chamber to accept this as a mitigating circumstance and to reduce the sentence[16].
> I refer now to a minimum sentence which is imposable according to the Yugoslav Criminal Code, and that is the sentence of five years' imprisonment[17].

Nothing can be clearer than these statements. They show the Appellant's true intention which was to plead duress only as a means to the mitigation of punishment, and not as a complete defence. Had counsel adopted the strategy of treating this plea also as a ground of complete defence, then the Appeals Chamber would have been, in law, duty-bound to disregard it, as counsel himself has admitted that he had to accept the position of his client. Then, there is absolutely no reason to hold the guilty plea ambiguous and invalid, and remit the case to the Trial Chamber.

18. But it is said that an act classified as a crime against humanity will be punished more severely than when it is classified as a war crime, because a crime against humanity is said to be a crime not only against the persons who are killed, but also "against humanity as a whole". It is argued that from an interpretation of Article 5 of the Statute of this International Tribunal, the same conclusion can be drawn. As the Appellant pleaded guilty to the more serious crime, it is probable that he had not been informed of the difference between these two crimes and had thus been placed in a disadvantageous position. So it is necessary to send the case back to the Trial Chamber.

19. With respect to these arguments, I submit, in the first place, that the gravity of a criminal act, and consequently the seriousness of its punishment, are determined by the intrinsic nature of the act itself and not by its classification under one category or another. Take the present case: the Appellant killed seventy to one hundred innocent Muslim civilians. Whether his criminal act is classified under crimes against humanity or war crimes, the harm done to individuals and society is exactly the same, neither an iota more nor less. Then, why should he be punished more severely if his criminal act is subsumed under crimes against humanity and not war crimes?

20. Second, it is groundless to assert that a crime against humanity is necessarily more serious than a war crime. Let us compare the crime against humanity of the Appellant with a war crime of another person who is charged under Article 3(c) of the Statute of this International Tribunal for bombardment of an undefended town, causing the death of one million civilians. Can we say that the

crime against humanity committed by the Appellant is more serious than this war crime?

This is because all the war crimes listed in Article 3 of the Statute of this International Tribunal are not lesser offences, but are particularly grave offences against the laws of war. Indeed, Dinstein has pointed out the popular fallacy misconceiving that every violation of the laws of war is necessarily a war crime[18]. And owing to their particularly grave nature, obviously they cannot be less serious offences than crimes against humanity. Of course, crimes against humanity have the characteristics of being committed systematically or on a large scale. However, war crimes can also be committed in such a manner. For instance, prisoners of war may be killed systematically or on a large scale, as they were habitually and atrociously executed by the Nazi regime in the Second World War.

21. Third, the crime against humanity has its origin in the Charter of the International Military Tribunal of Nürnberg annexed to the London Agreement of 8 August 1945, concluded by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis. As is well known, Article 6(a), (b) and (c) provides for crimes against peace, war crimes and crimes against humanity for the jurisdiction of the International Military Tribunal.

Prior to the Second World War, there were in international law only war crimes and no crimes against humanity. War crimes must be committed during war and principally against the combatants and prisoners of war of the other belligerent nation and the civilians in occupied territory. But, before and during that war, the Nazi regime and its agents, besides committing massive and monstrous traditional war crimes, also committed many horrendous atrocities against its own nationals, particularly German Jews and anti-Nazi German politicians and intelligentsia. These atrocities, according to the international law before that war, were not war crimes and therefore could not be within the jurisdiction of the International Military Tribunal at Nürnberg. However, they were so shocking to the conscience of mankind that the Allied Governments were determined to punish the offenders. This is the sole reason why the Charter, in addition to war crimes, provides for a further category of crimes against humanity and confers on the International Military Tribunal the jurisdiction over these crimes. Hence Article 6(c) of the Charter expressly provides that "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not a violation of the domestic law of the country where perpetuated"[19], constitute crimes against humanity.

Nevertheless, it must be pointed out that the Charter, in providing for crimes against humanity, does not create a crime more serious than a war crime, for the same acts of "extermination, enslavement, deportation, and other inhumane acts against any civilian population", which constitute crimes against humanity according to Article 6(c) of the Charter, if committed during war by the belligerent forces of one state against the nationals of another state, constitute war crimes. Likewise, the same "persecutions on political, racial or religious grounds", which constitute crimes against humanity according to the same provision of the Charter as above-mentioned, if committed during war against the civilian population of enemy country, also constitute war crimes. These war crimes can be found in the 1863 Lieber Code, the 1899 and 1907 Hague Conventions and the 1864 and 1929 Geneva Conventions long before the adoption of the Charter[20]. It must be emphasised that as the criminal acts pertaining to these two crimes were exactly the same in the Charter, their seriousness cannot but be exactly the same.

Therefore, the Judgement of the International Military Tribunal at Nürnberg on the one hand declared emphatically that "to initiate a war of aggression . . . is not only an international crime, it is the supreme international crime, differing only from other war crimes in that it contains within itself

the accumulated evil of the whole", while on the other hand uttered not a single word asserting that crimes against humanity were more serious in nature than war crimes, although many accused were convicted of both crimes. This shows that the International Military Tribunal at Nürnberg treated both crimes on the same level.

22. Fourth, soon after the London Charter, Article II(c) of Control Council Law No. 10, of 20 December 1945, provides that war crimes, crimes against peace and crimes against humanity can be punished by death. Once again it shows that war crimes are not less serious than crimes against humanity. Furthermore, in the practical application of this provision by the United States Military Tribunal at Nürnberg, the 24 accused condemned to death were all found guilty of war crimes as well as, in certain cases, crimes against peace, and crimes against humanity. But no accused was condemned to death for committing crimes against humanity without being found guilty of war crimes. In the *Justice Trial*[21] decided by the United States Military Tribunal, the accused Oswald Rothaug was found guilty of crimes against humanity, and despite the fact that the Military Tribunal found no mitigating circumstances, was sentenced to life imprisonment rather than death. This constitutes irrefutable proof that the Military Tribunal considered that the crimes against humanity committed by the accused were even less serious than war crimes.

23. Fifth, recently, the United States War Crimes Act of 1996[22], which provides that the offender of a grave breach of the Geneva Conventions of 1949[23] causing the death of the victim shall be subject to the penalty of death, also shows that a war crime is not less serious than a crime against humanity.

24. Sixth, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[24], adopted by the General Assembly of the United Nations on 26 November 1968 and entering into force on 11 November 1970, does not consider crimes against humanity more serious than war crimes.

The Preamble to this Convention emphasises, *inter alia*, that "war crimes and crimes against humanity are among the gravest crimes in international law", and that "the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among people and the promotion of international peace and security."[25]

> Article 1 of this Convention provides:
>
> No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:
>
> (a) war crimes as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3(1) of 13 February 1946 and 95(1) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims.
> (b) Crimes against Humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3(1) of 13 February 1946 and 95(1) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhumane acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if

> such acts do not constitute a violation of the domestic law of the country in which they were committed.[26]

25. Seventh, that the seriousness of crimes against humanity is equal to that of war crimes is further shown by the Yugoslav Criminal Law[27]. According to the provisions of Articles 141 - 143 of the said law concerning the crime of genocide, and war crimes against the civilian population and the wounded and the sick, the penalties for these crimes are the same: from five to twenty years of imprisonment.

26. Eighth, it is not true to say that a crime against humanity is one against the whole of mankind. This has been explained very convincingly by Schwelb in the following terms:

> The word "humanity" (*l'humanité*) has at least two different meanings, the one connoting the human race or mankind as a whole, and the other, humaneness, i.e., a certain quality of behaviour. It is submitted that in the Charter, and in the other basic documents which will be discussed in this article, the word "humanity" is used in the latter sense. It is, therefore, not necessary, for a certain act, in order to come within the notion of crimes against humanity, to affect mankind as a whole. A crime against humanity is an offence against certain general principles of law which, in certain circumstances, become the concern of the international community, namely, if it has repercussions reaching across international frontiers, or if it passes in magnitude or savagery any limits of what is tolerable by modern civilisations[28].

27. From what is said above my final conclusion on this question is: the Appellant's plea of guilty is unambiguous and valid, because his plea of duress from the inception up to the present has been consistently intended to ask for mere mitigation of punishment. As the mitigating circumstances have been ascertained by the Trial Chamber in the Sentencing Judgement[29], the Appeals Chamber should grant the request of the Appellant and re-evaluate his case in order to reach a decision as to whether the sentencing of the Appellant by the Trial Chamber was fair and just. Consequently, the decision to remit the case to the Trial Chamber is erroneous in that it serves no useful purpose and only prolongs the proceedings. It must be pointed out that the retardation of the procedure is contrary to the requirement of trial without undue delay prescribed in Article 21, paragraph 4(c), of the Statute of this International Tribunal for the protection of the rights of the accused.

The futility of remittal to a Trial Chamber will be as plain as a pikestaff if we think of the result of the retrial even if the Appellant changes his plea of guilty into that of not guilty. As the Trial Chamber must follow the majority determination of the Appeals Chamber that duress can be merely a mitigating circumstance in the case of massacre of innocent civilians, what other result can be expected from the remittal and trial?

_____

Haopei Li
Judge

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

[Seal of the Tribunal]

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1. *N'est pas pénalement responsable la personne qui a agi sous l'empire d'une force ou d'une contraint laquelle elle n'a pu résister.*
2. Trial of the German Major War Criminals (Proceedings of the International Military Tribunal, Sitting at Nuremberg, Germany 1947), (H.M. Stationery Office, London, 1950) Part 22, at p. 447.
3. *Trial of Friedrich Flick and Five Others*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (U.S. Govt Printing Office, Washington D.C., 1950) (*"Trials of War Criminals"*) vol. VI, pp. 1200 - 02.
4. *United States v. Carl Krauch, ibid.*, vol. VIII, pp. 1176 - 79.
5. *United States v. Alfried Krupp, ibid.*, vol. IX, pp. 1435 - 48.
6. *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, p. 1.
7. *Trial of Valentin Feurstein and Others, Proceedings of a Military Court held at Hamburg* (4 - 24 Aug. 1948), Public Record Office, Kew, Richmond, file n. 235/525; Law Reports of Trials of War Criminals, U. N. War Crimes Commission, (H.M. Stationery Office, London, 1949), (*"Law Reports"*), vol. XV, p. 173.
8. *Trial of Gustav Alfred Jepsen and Others, Proceedings of a War Crimes Trial held at Luneburg* (13 - 23 Aug. 1946), judgement of 24 Aug. 1946, (Public Record Office, Kew, Richmond); *Law Reports*, vol. XV, p. 172.
9. *Hölzer, supra n. 6*, pp. 345 - 46.
10. *Trial of Otto Ohlendorf et al.*, ("*Einsatzgruppen* case"), *Trials of War Criminals*, vol. IV, p. 3.
11. *Ibid.*, p. 480.
12. *Ibid.*
13. Prosecutor's Brief on Aggravating and Mitigating Factors, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T, 11 Nov. 1996, p. 36, n. 24.
14. Transcript, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T, 31 May 1996, pp. 6 - 7.
15. *Ibid.*, 26 May 1997, p. 125.
16. *Ibid.*, p. 128.
17. *Ibid.*, p. 124.
18. Yoram Dinstein, *International Criminal Law*, 20 Israeli Law Review (1985) p. 206, n. 9.
19. Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), London, 8 Aug. 1945, 85 U.N.T.S. 251.
20. *See* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff, Dordrecht, 1992), p. 7 at 178.
21. *Trial of Joseph Alst"tter and Others, Trials of War Criminals*, vol. III, pp. 1143 - 56.
22. Codified as 18 U.S.C. para. 2401.
23. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 75 U.N.T.S. 970; Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug. 1949, 75 U.N.T.S. 971; Convention relative to the Treatment of Prisoners of War, 12 Aug. 1949, 75 U.N.T.S. 972; Convention relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 U.N.T.S. 973.
24. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 Nov. 1968, 8 International Legal Materials (1969), p. 68.
25. *Ibid.*
26. *Ibid.*
27. Federal Republic of Yugoslavia (Serbia and Montenegro) 1993.
28. Egon Schwelb, *Crimes against Humanity*, 23 British Yearbook Of International Law (1946), p. 195.
29. Sentencing Judgement, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T, T.Ch. I, 29 Nov. 1996. Done in English and French, the English text being authoritative.

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.

DRAZEN ERDEMOVIC

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 Babic

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 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 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;

(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.

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). . . .
> >
> > (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.

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 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 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 ERDEMOVIC: 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 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.
>
> 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:

> 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.
>
> 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 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 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 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].

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. Tadic* ("*Tadic* 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 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].

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

25. In the Sentencing Judgement issued in *Prosecutor v. Tadic,* 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 Dusko Tadic 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 Du{ko Tadic 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 Du{ko Tadi} to ten years imprisonment;[31]
>
> For cruel treatment as a violation of the laws or customs of law, the Trial Chamber sentences Du{ko Tadic to nine years imprisonment.

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 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?

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 *Blackstones Criminal Practice* that

> [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.

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.

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 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 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].

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].

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 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 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 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*[64] case before the Court of 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 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].

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:

> 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 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:

> 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, 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 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 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].

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 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.

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 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."

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.
>
> (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].

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].

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:

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:

> 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.
>
> 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:

> 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].

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 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].

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 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 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 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 *Lynchs* 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

> "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

In *Hales 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]

(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].

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 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 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 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 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 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 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:

> [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. 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 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 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].

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 Appellants sentence, the Trial Chamber appeared to require corroboration of the Appellants 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.

Gabrielle Kirk McDonald

Lal Chand Vohrah

Dated this seventh day of October 1997
The Hague
The Netherlands

[Seal of the Tribunal]

1. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *U.N.T.S.* 331
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.
5. Virginia Morris & Michael P. Scharf, *An Insiders Guide to the International Criminal Tribunal for the Former Yugoslavia*, (Transnational Publishers, New York, 1995), vol. 2, pp. 531-532.
6. *See* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic,* Case No. IT-94-1-A, A.Ch., 2 Oct. 1995, para. 46
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*.
11. *Sentencing Judgement, Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T, T.Ch.I, 29 Nov. 1996 *("Sentencing Judgement")*, para. 98.
12. *Trial Transcript,* Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-T, T.Ch.I, 31 May 1996 ("Trial Transcript"), pp. 11-12.
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 Halsburys 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.
15. Trial Transcript, 31 May 1996, pp. 6-7
16. *Ibid*.,20 Nov. 1996, pp. 61-62.
17. *Ibid.,* 31 May 1996, p. 3.
18. *Ibid.*
19. *Ibid.*, p. 6.
20. Appeals Transcript, *Prosecutor v. Drazen Erdemovic,* Case No. IT-96-22-A, A.Ch., 26 May 1997 ("Appeals Transcript"), pp. 36-37.
21. Trial Transcript, 31 May 1996, pp. 7-8.
22. *Sentencing Judgement,* paras. 19, 28.
23. Immanuel Kant, "Eternal Peace", reproduced in C.J. Friedrich (ed.), *The Philosophy of Kant: Immanuel Kants Moral and Political Writings* (The Modern Library, New York, 1949), p.448.
24. Opinion and Judgment, *Prosecutor v. Tadic*, Case No. IT-94-1-T, T.Ch.II, 17 May 1997, paras. 624-659.
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*.
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).
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. Tadic,* Case No. IT-94-1-T, T.Ch.II, 14 July 1997.
31. *Ibid*., para. 74.
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.
36. *Blackstones Criminal Practice* (Blackstone Press Ltd., London, 1995), at para. D9.23.

37. Appeals Transcript, 26 May 1997, p. 82.
38. *Sentencing Judgement*, para. 17.
39. *Ibid*., para. 19.
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".
41. Prosecution Brief on the Preliminary Questions, *Prosecutor v. Drazen Erdemovi}*, 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.
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.
49. *See Arp v. State*, 97 Ala. 5, 12 So. 201 (1893); *State v. Nargashian*, 26 R.I. 299, 58 A. 953 (1904).
50. *Oppenheims International Law: A Treatise* (Sir Hersch Lauterpacht ed., Longmans, London, 7th ed., 1952), vol. II at pp. 571-72.
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.
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 dappel de Bordeaux, Chambre daccusation, Arrêt du 18 septembre 1996*, no. 806. (Translation by Judge Cassese.)
58. *Retzlaff et al., The Peoples Verdict, A Full Report of the Proceedings at the Krasnodar and Kharkov German Atrocity Trials* (London-New York, without date), p. 65.
59. *Sablic 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.
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.
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.

71. *Trial of Frederick Flick and Five Others* ("*Flick*" case), *Trials of War Criminals*, vol. VI, p. 1188.
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.
76. *Justice* case, *supra* n. 74, vol. III, p. 968.
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.
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.
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.
86. "*Nest pas pénalement responsable la personne qui a agi sous lempire dune force ou dune contraint à laquelle elle na 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 ny a pas dinfraction lorsque laccusé ou le prévenu était en état de démence au moment du fait, ou lorsquil a été contraint par une force à laquelle il na 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.
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.
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.
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, 994), p. 481.
104. 19 Dec. 1889/39; Stand: 743/1995
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. Drazen Erdemovic*, 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).
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)).
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. 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.
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.
122. The Japanese Ministry of Justice, *Criminal Statutes* (translation) (Tokyo, without date of publication).
123. R. H. Folsom, and J. H. Minan (eds.), *Law in the Peoples 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.
126. *Negarit Gazeta*, (Addis Ababa, 1957), Proclamation No. 158 of 1957.
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 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.
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.
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 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.
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.
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).
153. Lord Hale, *Pleas of the Crown*, (1800) vol. 1, p. 51.
154. *Blackstones 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.
158. Appeals Transcript, 26 May 1997, p. 69.
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.
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.
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.
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.
168. *See* Lord MacKay s formulation of the rationale behind the English law s rejection of duress as a defence to murder in *Howes* 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.
171. Appeals Transcript, 26 May 1997, pp. 84-85.
172. *State v. Goliath*, SALR (1972) (3) 465.
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).
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.
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.
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.
180. *See Prosecutor v. Tadic, supra* n. 24, at paras. 535-539.

UNITED NATIONS

	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:	19 November 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**

Date: **19 November 1997**

PROSECUTOR

v.

DRA@EN ERDEMOVI]

CORRIGENDUM TO 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 Babi}

JUDGE MCDONALD AND JUDGE VOHRAH, *proprio motu,*

Considering their Joint Separate Opinion in the case of Dra`en Erdemovi} issued on 7 October 1997,

Noting that there are certain typographical errors in the said Joint Separate Opinion which are suitable for rectification,

FOR THESE REASONS:

(1) DECIDE that, in the said Joint Separate Opinion, at page 18 (Registry page A406), paragraph 21, tenth line from the bottom of that paragraph

For "Opinion and Judgement of 14 July 1997"

Read "Opinion and Judgement of 7 May 1997";

(2) DECIDE that, in the said Joint Separate Opinion, at page 18 (Registry page A406), footnote 24

For "T.Ch.II, 17 May 1997"

Read "T.Ch.II, 7 May 1997";

(3) DECIDE that, in the said Joint Separate Opinion, at page 34 (Registry page A390), paragraph 48, first line of that paragraph

For "paragraph 62"

Read "paragraph 47";

(4) DECIDE that, in the said Joint Separate Opinion, at page 40 (Registry page A384), paragraph 57, twenty-third line of that paragraph

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

it is never a question"

Read "Waldock observed in his *General Course on Public International Law*[82] that

as Lord McNair pointed out in the *South-West Africa Case* [I.C.J. Rep. 1950 at p. 148], it is never a question";

(5) DECIDE that, in the said Joint Separate Opinion, at page 40 (Registry page A384), footnote 82

For "*South-West Africa Case*, I.C.J. Rep. (1950) at p. 148"

Read "106 *Hague Recueil* 54 (1962-II)";

(6) DECIDE that, in the said Joint Separate Opinion, at page 42 (Registry page A382), paragraph 59, under the heading "France", first line

For "Article 122-2 provides that:"

Read "Article 122-2 provides:"

(7) DECIDE that, in the said Joint Separate Opinion, at page 45 (Registry page A379), paragraph 59, under the heading "Norway", first line

For ", (amended as at 1 July 1994),"

Read "(amended as at 1 July 1994)";

(8) DECIDE that, in the said Joint Separate Opinion, at page 52 (Registry page A372), paragraph 61, under the heading "Morocco", last line

For "avoid [the commission of], the offence"

Read "avoid [the commission of] the offence";

(9) DECIDE that, in the said Joint Separate Opinion, at page 66 (Registry page A358), paragraph 75, fourth line from the bottom of that paragraph

For "establishes the International Tribunal"

Read "established the International Tribunal";

(10) DECIDE that, in the said Joint Separate Opinion, at page 69 (Registry page A355), paragraph 79, ninth line from the bottom of that paragraph

For "organised the execute of"

Read "organised the execution of";

(11) DECIDE that, in the said Joint Separate Opinion, at page 73 (Registry page A351), paragraph 85, twelfth line of that paragraph

For "to be hero"

Read "to be a hero".

Gabrielle Kirk McDonald

Lal Chand Vohrah

Dated this nineteenth day of November 1997

The Hague

The Netherlands

[Seal of the Tribunal]

UNITED NATIONS

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, President**
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**

THE PROSECUTOR

v.

DRA@EN ERDEMOVI]

SEPARATE AND DISSENTING OPINION OF JUDGE STEPHEN

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Payam Akhavan

Counsel for the Accused:

Mr. Jovan Babi}

1. In this appeal from he sentence of Trial Chamber I of this International Tribunal in the case of Dra`en Erdemovi} (the "Appellant"), the facts and circumstances of which appear in greater detail in other Opinions, there are a number of aspects which call for particular consideration. They all concern the Appellant's plea of guilty, a matter to which the Trial Chamber devoted considerable attention in the opening portions of its Sentencing Judgement of 29 November 1996[1].

2. The indictment of 29 May 1996 ("Indictment") charged murder as a crime against humanity and, in the alternative, murder as a violation of the laws or customs of war, the act of murder being the participation of the Appellant on 16 July 1995 as a member of a firing squad in the shooting and killing of large numbers of unarmed Bosnian Muslims in batches of ten over a period of some hours.

3. Notable features of the case were that not only was the Indictment based exclusively upon statements made by the Appellant to investigators from the Office of the Prosecutor of the International Tribunal but that the Trial Chamber had before it no evidence of the events forming the basis of the charges other than the Appellant's own testimony, which he gave at length on more than one occasion. To the extent that other evidence, apart from character evidence, was heard it consisted only of that of an investigator from the Office of the Prosecutor who had subsequently visited the scene and whose observations there and his later interviews with two survivors of the execution of the Bosnian Muslims confirmed generally the account given by the Appellant of the killings in which he had participated and of other events which took place on 16 July 1995, although it did not touch upon the circumstances in which the Appellant says that he was that day forced to become an active member of the firing squad.

4. On 31 May 1996, the Appellant was brought before the Trial Chamber, had the Indictment read over to him and was required to plead to the counts in the Indictment. On this occasion and throughout his subsequent appearances the Appellant was represented by counsel of his choice, Mr. Jovan Babi} of the Yugoslav Bar. The Appellant pleaded guilty to the first of the two alternative counts, that of a crime against humanity. That plea was accepted by the

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[1] Sentencing Judgement, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-T, T.Ch.I, 29 Nov. 1996 ("*Sentencing Judgement*").

Office of the Prosecutor ("Prosecution") and the alternative charge of a violation of the laws or customs of war was withdrawn.

5. I have had the advantage of reading the Joint Separate Opinion of their Honours Judge McDonald and Judge Vohrah in which they examine in detail three requirements for a valid plea of guilty, that it be voluntary, informed and unambiguous. I agree, with respect, in their conclusion that, while the requirement of voluntariness was satisfied in the present case, the requirement that the plea be an informed plea was not satisfied. I do so for the reasons expressed by their Honours, while at the same time appreciating the very real difficulties which confronted the Trial Chamber in the circumstances of this case in ensuring that the Appellant and his counsel, unfamiliar with the concept of guilty pleas and involved in the relatively arcane area of international humanitarian law, properly understood the consequences of the plea that was entered. Accordingly I would, on that ground alone, allow this appeal. However, I differ from their Honours on the third requirement to which they advert, that a guilty plea must be unambiguous, differing not with the requirement itself but with whether it was satisfied in the present case. In my view it was not; I regard the plea as ambiguous and this accordingly furnishes a further ground upon which I would allow this appeal. Its ambiguity arises from the view I take of the possible availa bility to the Appellant of a defence of duress, in light of his repeated statements which presented circumstances which could found such a defence.

By way of elaboration, I should shortly describe what occurred when the Appellant was initially called on to plead and, later, when on subsequent occasions, he appeared before the Trial Chamber.

6. Following his plea of guilty, the Prosecution summarized the facts alleged against the Appellant and the Appellant then stated that he agreed with everything that the Prosecution had said and said that he had more to add, namely:

> Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me "If you are sorry for them, stand up, line up with them and we will kill you too". I am not sorry for myself but for my family my wife and son who then had nine months, and I could not refuse because then they would have killed me. That is all I wish to add.[2]

[2] Transcript, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-T, 31 May 1996, at p. 9 ("*Trial Transcript*").

7. The Appellant when pleading appeared disturbed and, no doubt in consequence of his demeanour, the Trial Chamber ordered his psychiatric evaluation. This was duly undertaken, an expert medical commission being convened for that purpose. That commission reported to the Trial Chamber on 24 June 1996, concluding that the Appellant was suffering from post-traumatic stress of such severity that he was then insufficiently able to stand trial. It recommended a second examination in six to nine months' time.

8. On 4 July 1996, the accused again appeared before the Trial Chamber at a status conference in the course of which he was asked if he wished to change his plea of guilty or whether he adhered to it; he affirmed that he wished to continue to plead guilty. At that conference he also affirmed his willingness to testify in proceedings to be brought pursuant to Rule 61 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") relating to two other indictees, Radovan Karad`i} and Ratko Mladi}. On the following day, 5 July 1996, he accordingly testified before Trial Chamber I in such proceedings and in the course of doing so again described his participation in the firing squad on 16 July 1995 and said that when ordered by the commander of the squad, Brano Gojkovi}, to execute the first batch of prisoners he complied with that order

> but at first I resisted and Brano Gojkovi} told me if I was sorry for those people that I should line up with them; and I knew that this was not just a mere threat but that it could happen, because in our unit the situation had become such that the Commander of the group has the right to execute on the spot any individual if he threatens the security of the group or if in any other way he opposes the Commander of the group appointed by the Commander Milorad Pelemis.[3]

9. A second psychiatric evaluation of the Appellant was undertaken in October 1996, as a result of which the commission concluded in its report of 17 October 1996 that in his then current condition the Appellant was sufficiently able to stand trial.

10. Accordingly, on 19 and 20 November 1996 the Trial Chamber conducted a sentencing hearing, at the outset of which the relevant portion of the transcript of the status conference of 4 July 1996, in which the Appellant affirmed his plea of guilty, was read out. Later on 19 November and again on 20 November the Appellant testified at length about the events of

[3] Transcript, *Prosecutor v. Radovan Karad`i} and Ratko Mladi},* Case Nos. IT-95-5-R61, IT-95-18-R61, 5 July 1996, at p. 46.

16 July 1995. At the outset of his testimony on 19 November the Appellant repeated again that he did not wish to do what he had done but that he was under orders and had he not done so his family would have been hurt and nothing would have been changed. He subsequently testified that, when faced with being a member of a firing squad and before the first bus loaded with prisoners arrived,

> I said immediately that I did not want to take part in that and I said, "Are you normal? Do you know what you are doing?" But nobody listened to me and they told me, "If you do not wish to, if you – you can just go and stand in the line together with them. You can give us your rifle.[4]

11. At the conclusion of the sentencing hearing on 20 November 1996 the Appellant recounted a conversation that he had had with his counsel, Mr. Babi}, explaining why throughout he had adhered to his guilty plea, as follows:

> As Mr Babi} has said, in the Federal Republic of Yugoslavia I admitted to what I did before the authorities, judicial authorities, and the authorities of the Ministry of the Interior, like I did here. Mr Babi} when he first arrived here, he told me, "Dra`en, can you change your mind, your decision? I do not know what can happen. I do not know what will happen." I told him because of those victims, because of my consciousness, because of my life, because of my child and my wife, I cannot change what I said to this journalist and what I said in Novi Sad, because of the peace of my mind, my soul, my honesty, because of the victims and war and because of everything.
>
> Although I knew that my family, my parents, my brother, my sister, would have problems because of that, I did not want to change it. Because of everything that happened I feel terribly sorry, but I could not do anything. When I could do something, I did it. Thank you. I have nothing else to say.[5]

12. The question that immediately arises is whether the Appellant's plea of guilty, when coupled with his statement, subsequently elaborated, that he had acted in accordance with the order of his superior and under threat of immediate death if he did not obey the order given, resulted in such ambiguity in his plea of guilty as would require the Trial Chamber to enter a plea of not guilty and proceed to trial instead of accepting his guilty plea and proceeding to sentence.

13. The Trial Chamber was well aware that the circumstances gave rise to such a question and, at the outset of its Sentencing Judgement, gave its reasons for accepting the Appellant's plea

[4] *Trial Transcript, supra*, *n. 2*, 19 Nov. 1996, at p. 40.
[5] *Ibid*., 20 Nov. 1996, at p. 68.

of guilty. It adverted first to Article 7, paragraph 4, of the Statute of the International Tribunal ("Statute") which states that the existence of superior orders provides no defence but may be a ground for mitigation of sentence. It went on to recognize that if coupled with physical and moral duress these factors might not only mitigate the penalty but "depending on the probative value and force which may be given to them" could also constitute a defence as eliminating "the *mens rea* of the offence and therefore the offence itself". In such a case, it concluded, a plea of guilty would be invalidated. It accordingly turned to an examination of what it described as "the elements invoked".

In doing so it observed that, unlike the case of superior orders, the Statute provides no guidance regarding the availability of duress as a defence. This is, of course, correct; the Statute does not, with the sole exception of superior orders, advert at all to what defences are available. It is left to the International Tribunal in the trials it conducts to apply existing international humanitarian law.

14. The Trial Chamber accordingly reviewed decisions of post-Second World War military tribunals, noting that in a number of cases duress was regarded as a complete defence, the absence of moral choice occasioned by imminent physical danger being on occasions recognized as an essential component of duress as a defence. Those decisions, it noted, referred to three factors as essential features for duress to be accepted as a defence, namely the existence of an immediate danger, both serious and irreparable, the absence of any adequate means of escape and the fact that the remedy was not disproportionate to the evil. Reference was also made to two other factors, to an accused's voluntary participation in an enterprise that left no doubt as to its end results and to the respective ranks held by the giver and receiver of a superior order which was manifestly illegal.

15. The Trial Chamber then turned to the facts of the case before it and stated that the Appellant did not challenge the manifestly illegal nature of the order that he was allegedly given and that, according to the case law to which it had referred, in the case of a manifestly illegal order "the duty was to disobey rather than to obey", a duty which could "only recede in the face of the most extreme duress". The proceedings were conducted in the French language, being translated for the benefit of the Appellant and his counsel. The subsequent translation of this portion of the Sentencing Judgement into English, which renders the reference to the failure of the Appellant to challenge the illegal nature of the order as a failure to challenge "the manifestly

illegal order", is somewhat misleading. According to the only material before the Trial Chamber, the Appellant's statements earlier referred to, he certainly challenged the order in question though not specifically its illegal nature. It is his challenge and the threat that was the response to it which forms the whole basis upon which this question of duress arises.

16. Following those preliminary observations, the Trial Chamber then stated its conclusion regarding duress. This is best quoted in full, as follows:

> 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. In this case-by-case approach - the one adopted by these post-war tribunals - when it assesses the objective and subjective elements characterising duress or the state of necessity, it is incumbent on the Trial Chamber to examine whether the accused in his situation did not have the duty to disobey, whether he had the moral choice to do so or to try to do so. Using this rigorous and restrictive approach, the Trial Chamber relies not only on general principles of law as expressed in numerous national laws and case-law, but would also like to make clear through its unfettered discretion that the scope of its jurisdiction requires it to judge the most serious violations of international humanitarian law.
>
> 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.
>
> On the basis of the case-by-case approach and in light of all the elements before it, the Trial Chamber is of the view that proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided. Thus, the defence of duress accompanying the superior order will, as the Secretary-General seems to suggest in his report, be taken into account at the same time as other factors in the consideration of mitigating circumstances.
>
> In conclusion, the Trial Chamber, for all the reasons of fact and law surrounding Dra`en Erdemovi}'s guilty plea, considers it valid.[6]

17. As I understand it, the Trial Chamber expressed in this passage two reasons for regarding the Appellant's plea of guilty as valid and not bad for ambiguity, notwithstanding his repeated reference to being subject to duress, a matter which it acknowledged could in appropriate circumstances constitute a complete defence.

[6] *Sentencing Judgement, supra n.1,* para. 19 (footnotes omitted).

These two reasons were, in effect, cumulative. They were, first, that the Appellant had failed to produce such proof of duress as would satisfy the strict conditions associated with that defence and, secondly, that, since a crime against humanity was here in issue, the requirement of proportionality, which the Trial Chamber had earlier described as requiring that the remedy was not disproportionate to the evil, could not be satisfied.

18. With respect, I am unable to accept this reasoning. Put very briefly, the Trial Chamber's two reasons for accepting the plea of guilty were, in my view, mistaken for the following reasons. There could be no question for the Trial Chamber of the sufficiency or otherwise of proof of duress. At the stage of proceedings which had been reached when the Appellant's plea of guilty was entered, matters of proof, of evidence, did not arise; the Appellant had not been sworn, had neither given any evidence nor had had any opportunity to call any evidence as to guilt or innocence, something that could only occur at trial. Accordingly, it was self-evident that "proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided" and could not be expected to be; its absence could accordingly be no ground for regarding the plea of guilty as unambiguous. It is true that in the protracted course which the proceedings took, forced upon the Trial Chamber both by the initial psychiatric condition of the Appellant and by his role as a witness in Rule 61 proceedings against other indictees, he did in those Rule 61 proceedings and later during his sentencing hearing give sworn evidence (which, in effect, amounted to a reiteration of his initial statement but in greater detail) but by then his plea of guilty had long since been entered and all that remained to be done was to determine his sentence. Such evidence as he did give was given, and received by the Trial Chamber, on the footing of a guilty plea and as going only to the question of penalty.

19. As to the question of proportionality, that too is essentially a matter only to be determined on the evidence as a whole at trial. If, when it came to the giving of evidence, the evidence should prove to be consistent with the Appellant's repeated statements, namely that the choice open to him was not that of the victims' deaths or his own but, rather, that of their deaths or their deaths together with his own, the whole question of proportionality would necessarily be seen to be meaningless; there would be no question of weighing one life against another or others, the choice, if it can be described as a choice, would be between many lives or many lives plus one, his own. The Appellant was but one member of a firing squad and, according to his statements, no other member supported him when he made his protest. Nor is it more than speculation that if, as ethnically a Croat, as he was, in a unit of the Bosnian Serb army, he had

followed up his protest by handing over his weapon and joining the first group of Muslim civilians to be executed, the other members of the firing squad would have refused the order to execute them all. Even if any of them had refused, as, according to the Appellant, some did later when, after four hours of killing, the squad was next ordered to kill another five hundred civilians imprisoned in a nearby hall, there were other willing executioners at hand ready to kill and who did kill those five hundred. Indeed, during the initial four-hour-long killing of civilians the Appellant's firing squad was joined by members of another unit who not only joined in the task of execution but beat and brutalized the victims before executing them. It is surely difficult to suppose that an heroic act of self-sacrifice by the Croatian Appellant would have deflected the Bosnian Serb army from the task of extermination of Muslim civilians on which it was embarked.

20. The Trial Chamber, in accepting the Appellant's plea of guilty, referred to the right of an accused to adopt his own defence strategy, of which a plea of guilty could be one element. I appreciate that any trial court, faced with some degree of ambiguity between a guilty plea and what in addition an accused chooses to say at that time regarding his commission of the offence with which he is charged, cannot simply resolve the situation by, without more, entering a plea of not guilty. It must have regard to the right of an accused to adopt a particular strategy in determining the nature of his plea; he may conclude that he is best served by pleading guilty while insisting on adding, however inappropriately at that stage of proceedings, some reference to extenuating circumstances or what may amount to a denial of guilt, in the hope that this will mitigate his sentence, and this he must be free to do. The United States Supreme Court in the leading case of *North Carolina v. Alford* [7] considered in some detail this question of the right of an accused to have his plea of guilty accepted despite his assertion that he did not commit the crime alleged. By a majority it concluded that when the guilty plea could be seen to be an entirely reasonable one because of the strength of the prosecution case, evidence of which the trial court heard, coupled with the fact that conviction following a guilty plea would result only in a lengthy term of imprisonment whereas conviction at a trial would necessarily result in a death sentence, the plea of guilty could properly be received despite the apparent ambiguity between the plea and the accused's denial of guilt.

21. The present case is very different; the Trial Chamber had no material before it regarding the circumstances in which the Appellant killed the Muslim civilians other than his own

[7] *North Carolina v. Alford,* 400 U.S. 25 (1970).

descriptions of the event nor any evidence casting doubt upon the Appellant's statements bearing on duress, nor was the Appellant faced, before this International Tribunal, with any stark choice between imprisonment or death. It is apparent from what counsel for the Appellant stated in the hearing before this Appeals Chamber that the Appellant pleaded guilty against his advice, he having told the Appellant that there was no evidence that he had committed a criminal offence but that the Appellant insisted on pleading guilty because of a moral position that he took, arising from the fact that he did in fact participate in the execution of the Muslim civilians. This attitude on the Appellant's part is confirmed by the passages from the Appellant's statements which I have earlier quoted. As both the Appellant and his counsel affirmed, there had been no element of plea bargaining and there was nothing to suggest that his plea of guilty was any part of a strategy; it seems, rather, to have been an expression of his feeling of moral guilt, without his having any regard to the availability of a defence of duress.

22. The Sentencing Judgement provided the Trial Chamber with an opportunity of stating its reasons for accepting the Appellant's plea of guilty notwithstanding its recognition of the existence of duress as a possible defence to the charge to which he had pleaded guilty. In doing so it necessarily examined the only material before it, namely the Appellant's statements, but viewed its task as not merely that of determining whether they raised the possibility that, at trial, a defence of duress might be made out but rather of deciding whether proof of the specific circumstances which would fully exonerate the Appellant of his responsibility had been provided. In doing so it appears to have placed upon the Appellant the onus of proof and to have done so at the stage of plea and before any question of the giving of evidence had arisen. At that stage, the Appellant having already disclosed significant evidence of circumstances such as might, in the course of a trial, have formed sufficient basis for a defence of duress, the Trial Chamber should, in my view, have closed its necessarily brief examination of the available evidence and entered a plea of not guilty. The Trial Chamber would then have had the opportunity, at trial, of a more exacting and careful consideration of all the available evidence that would then be tendered and of the legal issues involved. Further, its expressed view that in the case of a crime against humanity there could be no full equivalence between the accused's life and that of a victim, coupled with its earlier conclusion that one essential condition for duress to be accepted as a defence was proportionality, no doubt also contributed to its acceptance of the guilty plea. As previously stated, I regard each of these approaches to the resolution of the question of whether the plea of guilty was ambiguous as mistaken. The statements of the Appellant did in my view clearly raise such ambiguity as to require the entry of a plea of not

guilty if indeed duress is, as a matter of international law, a defence available to an accused charged with murder as a crime against humanity.

23. Where ambiguity exists it is clear that it must be resolved. As was said recently by their Honours Justices Dawson and McHugh of the High Court of Australia in *Maxwell v. The Queen:*

> The plea of guilty must however be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. . . . If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered.[8]

This brings me, then, to that aspect of this appeal upon which I have the misfortune to differ from the Joint Separate Opinion of Judges McDonald and Vohrah, whether duress is in international law a defence to a charge of murder or any charge involving the taking of innocent life. The Prosecution contends that it is not and that, at most, duress can only be a mitigating circumstance. It submits that the overwhelming weight of material garnered from post-Second World War crimes trials establishes that duress can never be raised as a defence to a charge of murder. It acknowledges that the decisions on which it relies are very largely those of tribunals having common law origins but contends that while the common law has provided the source of the doctrine denying duress as a defence to murder, this does nothing to alter the fact that the doctrine is now well established as part of international law.

24. The Prosecution view that the great preponderance of such decisions do in fact establish that in international law duress is no defence to a charge of murder is, I believe, mistaken. His Honour Judge Cassese has dealt with this matter in great detail and I concur in his conclusion that on a close examination of the decisions the Prosecution's contention is not borne out. What the decisions do in my view demonstrate is that in relation to duress the strong tendency has been to apply principles of criminal law derived from analogous municipal law rules of the particular tribunal, and this despite the few divergencies from that tendency, as in the *obiter dictum* of the Judge-Advocate in the *Einsatzgruppen*[9] case and the observations of the Judge-Advocate in the *Stalag Luft III*[10] case. The post-Second World War military tribunals do not appear to have acted

[8] *Maxwell v. The Queen,* [1996] Aust. Highct. Lexis, p. 26 at 48 - 49.
[9] *Trial of Otto Ohlendorf et al.*, (*"Einsatzgruppen"* case), Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (U.S. Govt Printing Office, Washington D.C.,1950) (*"Trials of War Criminals"),* vol. IV, at p. 3.
[10] *Trial of Max Wielen and 17 Others ("Stalag Luft III"* case), Law Reports of Trials of War Criminals, U.N. War Crimes Commission (H.M. Stationery Office, London, 1949) (*"Law Reports"*), vol. XI, at p. 31.

in relation to duress in conscious conformity with the dictates of international law, as, for example, they have in their treatment of the doctrine of superior orders. It appears to me that it cannot be said that, in applying one principle or another to particular cases, the necessary *opinio iuris sine necessitatis* was present so as to establish any rule of customary international law.

25. I accordingly turn to those "general principles of law recognised by civilised nations", referred to in Article 38(1)(c) of the Statute of the International Court of Justice as a further source of international law. As Bogdan suggests in his article "General Principles of Law and the Problem of Lacunae in the Law of Nations"[11], no universal acceptance of a particular principle by every nation within the main systems of law is necessary before lacunae can be filled; it is enough that "the prevailing number of nations within each of the main families of laws" recognize such a principle. As was said in the *Hostage*[12] case, if a principle "is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified". The detailed examination of national criminal codes which has been made in the Joint Separate Opinion of Judges McDonald and Vohrah shows duress to be an available defence to a charge of murder in the great majority of those legal systems, other than those of the common law, which it examines. In those systems duress, however described, is, with some few exceptions, treated as a general defence and this can properly be regarded in those systems as an accepted general principle. The defence is not infrequently hedged around with qualifications, often, though not invariably, concerned with matters of proportionality but with no specific exception in the case of murder, although in some cases its exclusion might prove to be the consequence of the particular degree of proportionality invoked. It is in the common law systems that duress, although now, as a result of developments in this century, generally regarded as a defence to most criminal charges, is, at least in Commonwealth countries, said to be subject to an exception in the case of murder. However, as I hope to show, this limited exception, itself much criticized, has been based upon situations in which an accused has had a choice between his own life and the life of another as distinct from cases where an accused has no such choice, it being a case of either death for one or death for both.

26. Were it not for the common law's exceptional exclusion of murder (and in saying this I exclude the case of some American States to which I will later refer), there would, I think,

[11] Michael Bogdan, *General Principles of Law and the Problem of Lacunae in the Law of Nations*, 46 Nordic Journal of International Law, p. 37 at 46.
[12] *USA v. Wilhelm List and Others ("Hostage"* case*), Law Reports*, vol. VIII, p. 34 at 49.

accordingly be little doubt that duress, albeit hedged around with appropriate qualifications, should likewise be treated in international law as a general principle of law recognized by civilized nations as available as a defence to all crimes. Why this should be so, not only because of the approach of the civil law but also as a matter of simple justice, is perhaps best illustrated by an example, set in a domestic rather than an international humanitarian law context since the former has been the context in which the common law approach has developed.

Were a civilian, going about his lawful business, to be suddenly accosted by an armed man and ordered, under threat of immediate and otherwise unavoidable death and without explanation, then and there to kill a total stranger present at the scene and against whom he can have no conceivable animus, it would be strange justice indeed to deny that civilian the defence of duress. Yet if he obeys the order and kills that total stranger what else is it, according to the common law, but murder to which duress, his only defence, is no defence?

27. It could, of course, be said that such a civilian should not, in any rational system of law enforcement, be charged with murder in the first place. But that only demonstrates the consequence of excluding duress as a defence to murder; the uncertainty of prosecutorial discretion is substituted for a judicial determination of guilt or innocence. Again it might be said that, assuming that the particular criminal law system permitted it, there would in those circumstances and despite his conviction of murder be such mitigation of punishment as would ensure that he received only a light sentence or none at all; but that would be little better, he would bear all the stigma of conviction as a murderer. As a further alternative it might be said that he had no *mens rea* when he killed the victim and should be acquitted accordingly, but once questions of intent are introduced duress, which may be thought by some writers to negate *mens rea*, is thus introduced, as it were by the back door.

28. The above example is not, of course, that of the present Appellant; the example satisfies all the rigorous requirements which have been suggested as necessary in the case of duress as a defence, whereas it would be for the Judges at a trial to determine whether the present Appellant also satisfied those requirements. But the example does serve to suggest that the basis for the common law's absolute exclusion of duress in the case of murder requires close examination before being allowed to influence international law.

29. If, then, it is the common law exception of duress in case of murder that gives rise to doubt concerning duress in international law, what is, I believe, at least clear is the absence in the common law of any satisfying and reasoned principle governing the exclusion of duress in the case of very serious crimes including murder. In *Lynch v. D.P.P. for Northern Ireland*[13], Lord Edmund-Davies was, in my view, amply justified in his observation that an examination of both strict law and public policy as it affects the defence of duress: in English law "has disclosed a jurisprudential muddle of a most unfortunate kind". In similar vein Lord Brandon of Oakbrook, in *R. v. Howe*, said of the common law approach to duress: "It is not logical, and I do not think it can be just, that duress should afford a complete defence to charges of all crimes less grave than murder, but not even a partial defence to a charge of that crime"[14]. Again, in *R. v. Gotts*[15], Lord Lowry referred to the fact that both judges and textwriters had pointed out that the law on the subject of duress was both vague and uncertain, and cited from Stephen's *History of the Criminal Law of England* where, more than one hundred years earlier, it had been said that "hardly any branch of the law of England is more meagre or less satisfactory than the law on this subject" [16].

30. The position in English law regarding duress is of particular importance since in the past English decisions and texts have played a major role in influencing the development of the common law throughout the Commonwealth on this matter of duress. Indeed, as is pointed out in the judgements in *Lynch*'s case[17], a number of criminal codes throughout the Commonwealth have taken the form they do in relation to duress as a result of the report of the English Criminal Law Commissioners of 1879. The treatment of duress in those codes accordingly bears the marks of legal thought of over a century ago. Since then, as Lord Wilberforce points out in *Lynch*'s case[18], and as is again stated by him and by Lord Edmund-Davies in their joint judgement in *Abbott v. The Queen*[19], the attitude of the common law to duress has greatly altered. Whereas Stephen could state in 1883 that "compulsion by threats ought in no case whatever to be admitted as an excuse for crime though it may and ought to operate in mitigation of punishment in most though not in all cases"[20], duress is now accepted as an available defence in a great variety of crimes, the only apparent exceptions being the crimes of murder and some

[13] *Lynch v. D.P.P. for Northern Ireland,* [1975] AC p. 653 at 704.
[14] *R. v. Howe and others,* [1987] AC p. 417 at 438.
[15] *R. Gotts,* [1992] 2 AC p. 412 at 438.
[16] Sir J. Stephen, *History of the Criminal Law of England* (1883), vol. 2, at p. 105.
[17] *Lynch, supra n. 13,* at 684 per Lord Wilberforce and at 707 per Lord Edmund-Davies.
[18] *Ibid.,* at p. 680.
[19] *Abbott v. The Queen,* [1977] AC p. 755 at 771.
[20] Stephen, *op. cit.,* at pp. 107 – 08.

instances of treason, although as to murder there has, as I will show, been much differing of views.

31. It was the early English writers of authority on the criminal law who established the pattern of treatment of duress in relation to murder which spread throughout the jurisdictions of the then British Empire. Beginning with Lord Hale in 1800 in his *Pleas of the Crown*, subsequent writers of authority adopted his view that a person subjected to duress so that "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"[21] and hence could not only not rely upon duress as any defence but, according to Lord Hale, must also suffer "punishment of murder", which then, of course, was capital punishment; no question there of duress even as matter for mitigation. Lord Wilberforce observes in *Lynch*'s case, that writers of the last century would no doubt recognize that legal thought and practice has moved far since their time and points out that Lord Hale's reason for denying duress as any defence to charges including those of murder was that for a person subjected to duress "the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ or precept de *securitate pacis*"[22]. This reason, if ever a sound one for the adoption of a rule of domestic law, can be no sound basis for any rule of international law applicable to a situation of armed conflict.

32. It was upon "the great authority of Lord Hale" and that of later writers who followed him that Lord Coleridge C.J. relied in delivering the judgement of the court in the famous case of *R. v. Dudley and Stephens*[23] and indeed echoes of what Lord Hale had said one hundred and fifty years earlier even appear in a number of war crimes trials before British military tribunals following the Second World War[24].

33. What lies at the core of the common law exception regarding murder is Lord Hale's concept of equivalence, the evil involved in seeking to balance one life against another. That he could not accept; accordingly a person subjected to duress "ought rather to die himself than kill

[21] Lord Hale, *Pleas of the Crown*, (1800) vol. 1, at p. 51.
[22] *Lynch, supra n. 13,* at pp. 681 – 82.
[23] *R. v. Dudley and Stephens*, [1881 - 5] All ER, at p. 61.
[24] *See Trial of Valentin Feurstein and Others, Proceedings of a Military Court held at Hamburg* (4 – 24 Aug. 1948), Public Record Office, Kew, Richmond, file n. 235/525; *Law Reports,* vol. XV, at p. 173; *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, p. 1*; Law Reports,* vol. V, at p. 16.

an innocent" when the choice lies between one's own life and that of another. This concept permeates the writing of subsequent common law jurists, who never had to consider the situation in which the choice presented to an accused was not that of one life or another but that of one life or both lives, the very situation which, according to his statements, confronted the present Appellant.

34. The case of *R. v Dudley and Stephens*[25], one of necessity rather than duress, was that of shipwrecked sailors, adrift in an open boat in mid-ocean, who killed a boy, one of their number, ate his body and drank his blood to save themselves from death and who raised the defence of necessity when ultimately rescued and tried on a charge of murder. Despite the close connection in principle between necessity and duress, this case in fact has little in common with the present; it was an instance of "his life or mine", much like the oft-cited and hypothetical case of two men in the water and at risk of drowning, and with a plank only big enough to support one of them. The problem which so concerned Lord Coleridge, that of the measure of comparative value of lives, and which he resolved by adopting Lord Hale's dictum that a man ought rather to die himself than kill an innocent, is wholly absent if the innocent are to die in any event.

35. Although English writers of authority were for long unanimous in denying duress as any defence to murder, there appears to have been, until *Lynch*'s case in the 1970s, only one reported case in the past one hundred and fifty years directly in point, that of *R. v. Tyler and Price*[26]. That case is itself revealing since Denman C.J. is reported as stating that "It cannot be too often repeated that the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal". In thus apparently excluding duress as a defence in the case of all illegal acts, what Lord Denman said no more states the law as it has developed in England in this century than do the views of Stephen, some fifty years later, which I have already cited.

36. It was in *Lynch*'s case that, for the first time this century, there arose for decision before the House of Lords the availability of duress in a case of murder, albeit murder in the second degree, and whether it was right to distinguish in this respect between murder, on the one hand, and other serious crimes, on the other. *Lynch*'s case was one of one life or another, the very situation of Lord Hale's dictum. Even so, a majority of their Lordships in *Lynch*'s case could detect no ground upon which to deny the availability of duress as a defence. Lord Morris posed

[25] *Dudley and Stephens, supra n. 23.*
[26] *R. v. Tyler and Price,* (1838) 8 C&P, at p. 616.

the question, whether there was "any reason why the defence of duress, which in respect of a variety of offences has been recognized as a possible defence, may not also be a possible defence on a charge of being a principal in the second degree to murder"[27]. He could find none and concluded, that "both general reasoning and the requirements of justice"[28] led to the conclusion that duress was a defence in the case of murder in the second degree involved in *Lynch*'s case.

37. Lord Wilberforce came to the same conclusion. He sought in vain for any principled reason for excepting murder from the many other crimes in which in recent years duress had come to be regarded as a defence. The only at all acceptable reason which suggested itself concerned the particular heinousness of murder, yet heinousness is, as his Lordship observed, a word of degree and could scarcely justify the absolute exclusion of duress in all cases in which murder was in issue. If duress were to be wholly excluded as a defence to murder no matter of principle could justify such exclusion, its exclusion must, he concluded, be based not on principle but on either authority or policy. His Lordship dealt with each in turn. He found no direct English authority for the exclusion of duress in cases of murder, referred to decisions to the contrary in the Court of Appeal, where murder other than as a principal was in question, and to Commonwealth cases and cited in full a passage from the judgement of Rumpff J. in the South African case of *State v. Goliath*. There Rumpff J. examines the law of many countries and systems and in particular the English and civil law authorities which have shaped South African law, and says:

> 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. In the application of our criminal law in the cases where the acts of an Appellant are judged by objective standards, the principle applies that one can never demand more from an accused that 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

[27] *Lynch, supra n. 13*, at p. 671.
[28] *Ibid.*, at p. 677.

> 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 a exception to the general rule which applies in criminal law, is justified.[29]

Lord Wilberforce concluded that, at least in cases other than murder in the first degree, the balance of judicial authority was, if anything, in favour of the admission of the defence of duress. It always being the task of the judges, in the domain of the common law, to set the standards of right-thinking men of normal firmness and humanity at a level which people could accept and respect, his Lordship concluded that the defence of duress was admissible in the instant case, cases of principals in the first degree to murder being left to be dealt with as they arose. One such did speedily arise in *Abbott v. The Queen*[30], to be mentioned below.

38. Lord Edmund-Davies, the third member of the majority in *Lynch*'s case, refers to the modern trend of the common law to admit duress as a defence in a variety of crimes and cites authorities which illustrate that trend. His Lordship then examines in detail the precedent cases and finds himself "unable to accept that any ground in law, logic, morals or public policy has been established to justify withholding the plea of duress in the present case"[31].

39. The two members of the minority, Lord Simon of Glaisdale and Lord Kilbrandon, took a contrary view. Lord Simon relied upon what he regarded as an authority directly in point, that of *R. v. Dudley and Stephens*[32] albeit that it was a case of necessity rather than true duress; he thought that no distinction could be drawn between a principal and secondary parties charged with murder, referred to the distinguished writers on criminal law of the last century who rejected duress as a defence and concluded that any change in what he regarded as settled law was for the legislature and not for a court of law. Lord Kilbrandon also founded upon the undesirability of changing by a judgement rather than by act of the legislature what he regarded as long-settled law, spoke of policy and the facts of the case, which came on appeal from Northern Ireland where coercion of law-abiding citizens could turn them into unwilling murderers, and concluded that policy questions were "so deeply embedded in the legal doctrines

[29] *State v. Goliath*, (1972) (3) S.A.L.R. 465 at p. 480.
[30] *Abbott v. The Queen, supra n. 19.*
[31] *Lynch, supra n. 13*, at p. 715.
[32] *Dudley and Stephens, supra n. 23.*

we are being asked to review"[33] that the majority judgement was in truth a declaration of public policy inappropriate for a court to make and instead requiring legislation.

40. The majority judgement in *Lynch*'s case by no means disposed of the matter. Two years later, in the Privy Council case of *Abbott v. The Queen*[34], on appeal from Trinidad and Tobago, Lord Wilberforce and Lord Edmund-Davies, now in a minority, applied their reasoning in *Lynch*'s case to a principal in the first degree to murder, finding no logical ground for distinguishing such a case from that of an accessory. The majority, Lord Kilbrandon now being joined by Lord Hailsham and Lord Salmon, the latter delivering the judgement of the majority, voiced strong disapproval of *Lynch*'s case, distinguished it as dealing only with an accessory to murder, and went on to refer to *Blackstone* and later textbooks, to criminal codes throughout the Commonwealth, to what they regarded as the rejection of defences of superior orders and duress urged in war crimes trials after the Second World War and echoed the fears of Lord Simon in *Lynch*'s case that to allow such a defence would prove to be "a charter to terrorists, gang leaders and kidnappers"[35]. This fear, with respect, appears to ignore the stringent conditions customarily attached to the defence of duress, conditions which would, in the examples given by his Lordship of the possible misuse of duress, not be satisfied and thus destroy that defence. It also ignores the fact that the civil law world admits duress without suffering those dire consequences.

41. In a joint judgement the two members of the minority, Lord Wilberforce and Lord Edmund-Davies, in my view tellingly disposed of each of these points, which had already been canvassed in *Lynch*'s case. They also pointed out that until 1898 an accused could not in England be a witness on his own behalf and was hence in any event unable to raise duress as a defence by explaining to a jury how it was as a result of duress exercised upon him that he had acted as he did[36].

42. *Abbott*'s case was followed, ten years later, by *R. v. Howe*[37], which overturned *Lynch* and restored to English common law its denial of duress as a defence to murder, the five members of the Court, unanimous as they were, expressing, however, somewhat different reasons for doing so. Lord Hailsham relied both on distinguished English writers of the nineteenth century, on the minority judgements in *Lynch*, on *R. v. Dudley and Stephens*, and on Article 8 of the Charter of

[33] *Lynch, supra n. 13,* at p. 702.
[34] *Abbott v. The Queen, supra n. 19.*
[35] *Lynch, supra n. 13,* at p. 688.
[36] *Abbott v. The Queen, supra n. 19,* at p. 772.
[37] *Howe, supra n. 14,* at p. 417.

the International Military Tribunal at Nürnberg, which deals with superior orders rather than with duress, there being in his Lordship's view, in the circumstances of the Nazi regime, negligible difference between the two. He concluded that the majority decision in *Lynch*'s case could not be justified on the prior authorities and that the law should be restored to its prior state, describing the effect of *Lynch* as being to withdraw "the protection of the criminal law from the innocent victim" and to cast "the cloak of its protection on the coward and the poltroon"[38].

43. Lord Bridge accepted the view that to act under duress is not to be so deprived of volition as to lack the necessary criminal intent for murder, preferred the views of the minority to those of the majority in *Lynch*'s case and entirely agreed with the speeches of Lord Griffiths and Lord Mackay of Clashfern. Lord Brandon of Oakbrook also agreed with the speech of Lord Mackay while not regarding the outcome as satisfactory. He made the observation which I have already quoted about lack of logic and justice in the common law's approach to duress but was persuaded to agree with Lord Mackay because no valid distinction could in this regard be drawn between murder in the first degree and in the second degree; over the centuries the common law had, he said, in fact developed according to an illogical and unjust result and if there was to be any alteration to the law as it now stood that should be by legislation and not by judicial decision.

44. Lord Griffith reviewed both the writings of authoritative writers of the past, and past cases, dealt at length with the Law Commission's 1977 report, which recommended that duress should be a defence to all crimes including murder, and noted however that Parliament had not amended the law accordingly, referred to the "rising tide of violence and terrorism" against which the law must stand firm and, being "firmly convinced" that duress should not be made available to an actual killer, was unable to see any fair and certain basis for differentiating between various participants to a murder. He accordingly joined in overruling *Lynch*'s case. Lord Mackay of Clashfern referred to past writers on the subject and declined, consistently with what he regarded as a proper application of the doctrine of precedent, to extend duress to murder in the first degree, while accepting that no rational distinction could be drawn between principals of various degrees to the crime of murder. He concluded that were duress to be allowed as a defence to first degree murder the practical result would be that it would never be established. However, he cited the Scottish jurist Hume who, in his Commentaries on the Law of Scotland respecting Crimes, had said of a case in which duress was raised as a defence to armed robbery:

[38] *Ibid.*, at p. 432.

> But generally, and with relation to the ordinary condition of a well-regulated society, where everyman is under the shield of the law, and has the means of resorting to that protection, this is at least somewhat a difficult plea, and can hardly be serviceable in the case of a trial for any atrocious crime, unless it has the support of these qualifications: an immediate danger of death or great bodily harm; an inability to resist the violence; a backward and inferior part in the perpetration and a disclosure of the fact, as well as restitution of the spoil, on the first safe and convenient occasion.[39]

His Lordship otherwise applied similar arguments to those of others of the majority. The above passage from Hume is however of interest as providing an instance in which Scots law, not being in origin of the common law variety, takes an attitude somewhat similar to that taken by civil law countries.

45. In *R. v. Gotts* the House of Lords, differently constituted, again had to consider duress, in that case as a defence to attempted murder, and by a majority of three to two held it to be no defence. The speeches of their Lordships further demonstrate, if demonstration be needed, the difficulties which surround the common law treatment of duress. As Lord Keith, one of the minority, said:

> The complexities and anomalies involved in the whole matter of the defence of duress seem to me to be such that the issue is much better left to Parliament to deal with in the light of wide considerations of policy.[40]

With this view Lord Templeman, one of the majority, expressly concurred and others of their Lordships expressed similar views. Indeed, Lord Lowry, one of the minority, makes the very cogent observation that, in the common law treatment of duress in the case of murder,

> The defence is withheld on the ground that the crime is so odious that it must not be palliated; and yet, if circumstances are allowed to mitigate the punishment, the principle on which the defence of duress is withheld has been defeated.[41]

46. To admit duress generally as a matter of mitigation but wholly to exclude it as a defence in the case of murder does indeed appear illogical. It also seems no less curious to emphasise the innocence of the victim, as is customary when duress is discussed in the cases, the phrase "innocent victim" being very commonly used, while ignoring the fact that in lesser crimes, where

[39] Hume, *Commentaries on the Law of Scotland respecting Crimes*, (3rd ed. 1829), at p. 53.
[40] *Gotts, supra n. 15,* at p. 419.
[41] *Ibid.*, at p. 439.

duress is allowed as a defence, victims may be no less innocent. The innocence of the victim can, of itself, be no ground for treating murder differently from other crimes. Nor can any question of evil intent. As Lord Keith said:

> I find it difficult to accept that a person acting under duress has a truly evil intent. He does not actually desire the death of the victim. In the case of a man who is compelled by threats against his wife and children to drive a vehicle loaded with explosives into a checkpoint, the object being to kill those manning it, but that object having fortunately failed, the driver is likely to be as relieved at the outcome as anyone else.[42]

From the Appellant's account of events, the same could be said of him had the execution of the Muslim victims for some reason mis carried.

47. The decision in *Gotts* case concludes, so far as I am aware, the examination by English courts of the law regarding duress. In all those cases what the courts had to consider were cases to which Lord Hale's dictum could readily apply, cases of "one life or another" and not cases of "one life or both lives", as was the choice which the Appellant says confronted him. It is to cases of one life or another that the common law has applied the exclusion of duress as a defence to murder, while otherwise accepting duress, albeit subject to rigorous qualifications, as a defence in cases of other criminal acts.

48. In the United States, Section 2.09 of the Model Penal Code[43] allowing duress as a defence has, as I understand it, been adopted in 32 States, in 12 of these States it being available equally in charges of murder as in the case of other crimes; in 2 other States it operates to reduce murder to manslaughter. In the remaining 18 States that have adopted the Code murder is made an exception to the applicability of duress as a defence, as I gather that it is in those other States which have not to date adopted the Code.

49. It is in *Lynch*'s case and in the detailed examination there by the three members of the majority of the evolution of duress in the common law that, in my view, is to be found the most principled judicial reasoning regarding the common law's treatment of duress in the case of murder. Although subsequently overruled in *Howe*'s case, the reasoning in *Lynch*'s case remains as casting serious doubts upon the whole basis for the exclusion of duress in the case of murder

[42] *Ibid.*, at pp. 418 - 19.
[43] American Law Institute, Model Penal Code, (1985), s. 2.09.

involving "one life or another". Perhaps the most cogent subsequent reasoning for discounting the effect of *Howe*'s case is that of the authors of the authoritative work, Smith & Hogan's *Criminal Law*, where the English and Commonwealth cases are reviewed and in which, after analyzing and refuting each of the reasons advanced in Howe's case for overruling *Lynch*, it is submitted "that none of these reasons is convincing"[44]. Additionally the authors demonstrate what they describe as the "technical and absurd" distinctions which have been drawn between the case of an actual killer and that of an accessory - *supra*. A number of those distinguished English judges who, in the various cases discussed above, have held that duress is no defence where the charge is murder, have themselves pointed out the absence of any sound basis for distinguishing between the case of an actual killer and that of an accessory.

50. In like vein to Smith & Hogan is Reed's recent article in the Journal of Transnational Law and Policy where he examines the English jurisprudence regarding duress and describes the current position adopted by English law as "egregious"[45]. He advocates the recognition of duress as a defence to charges of murder, as it now is in the United States Model Penal Code.

51. In his 1989 Hamlyn lecture "Justification and Excuse in the Common Law", one of the two authors of Smith & Hogan, Sir John Smith, examines in detail the whole question of duress in the common law, criticizes the reasoning in *Howe's* case and advocates the availability of duress as a defence where an ordinary person of reasonable fortitude would have yielded to the threat that was made to him. He observes that "it is the blueprint for saintliness, or rather heroism, theory" which prevails in the English law relating to duress[46].

52. Highly relevantly to this present appeal, he points out that it has generally been supposed by those opposing duress as any defence to murder "that there is a direct choice between the life of the person under duress and the life of the victim" and adds: "This is by no means always the case . . . ". It is not, as I have said, the case in the present instance. It is significant that in all the reported cases this question of choice was present, the choice, to be made by the accused, between the victim's life and that of the accused, so that Lord Hale's dictum - that an accused ought rather "to die himself, than kill an innocent" at least has some meaning, whatever else may be said of it. This matter of choice, inherent in the element of proportionality and in the

[44] Sir John Smith and Brian Hogan, *Criminal Law*, (8th ed. 1996) at p. 241.
[45] Alan Reed, *Duress and Provocation as Excuses to Murder: Salutary Lessons from Recent Anglo-American Jurisprudence*, Journal of Transnational Law and Policy, vol. 6, p. 51 at 53.
[46] Sir John Smith, *Justification and Excuse in the Common Law*, Hamlyn Lectures (1989), at p. 94.

questions of morality which surround it, necessarily plays a prominent part in the reasoning on duress. It features prominently in *R. v. Dudley and Stephens* and again in the later cases to which I have referred. The altogether different situation which faced the Appellant in the present case, according to his account of events, was one in which he believed, in all probability correctly, that no choice of his would alter the fate of the Muslim victims, the choice for him was to die alongside them or to live, a situation not addressed in the reported cases yet clearly falling within the general classification of duress.

53. The great relevance of this for present purposes is made clear by Lord Mackay of Clashfern in *Howe's* case, where he says:

> 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.[47]

54. Such a moral choice was, according to the statements of the Appellant, not open to the Appellant to make. However he chose, the lives of the innocent would be lost and he had no power to avert that consequence. It is in this sense that it can be said that the Appellant had no moral choice. Of course he did have a choice, whether or not to lay down his life for the sake of the highest of ethical principles. But that is not the sort of choice the making of which criminal laws should enforce with penal sanctions; in the circumstances which the Appellant recounts, the desire for self-preservation is not merely instinctive but rational, and a law which would require it to be contradicted is not consistent, as Lord Morris would have it, with a 'rational system of law' that takes "fully into account the standards of honest and reasonable men"[48].

55. Sir John, in his Hamlyn lecture, provides two striking examples, not hypothetical but rather of situations which actually occurred, which illustrate his proposition that the English exclusion of duress in murder cases is unsound: one of a ferry disaster, the other a case involving mountaineers. In the former, passengers in a ferry which had sunk were in the water and in danger of drowning. A rope-ladder would lead them to safety but a man, petrified with cold or fear, stood motionless on that ladder, incapable of climbing it and yet blocking the way up it to

[47] *Howe, supra n. 14*, at p. 456.
[48] *Lynch, supra n. 13*, at p. 670.

others. Eventually, after some ten minutes, he was pushed off the ladder into the water by others and presumably drowned, allowing those others to climb up the ladder to safety. The coroner instructed the jury that this was a reasonable act of self-preservation and not necessarily murder at all. There was no suggestion that anyone involved should be prosecuted yet, as Sir John points out, on the authorities what occurred was neither justifiable nor excusable in law. He concludes that the law has lost touch with reality if the act of pushing the man off the ladder was to be treated as murder and distinguishes *R. v. Dudley and Stephens* by pointing out that here there was no true choice between one life and another, all would have drowned had the man remained immobile, blocking the path to safety.

56. The second example he gives is of two British mountaineers, Yates and Simpson, roped together. Simpson falls over a cliff edge and, hanging in space, is for an hour supported by the ever-weakening Yates who at last, finding himself also about to slide over the edge, cuts the rope. Again, there is no question of the making of a choice between one or another of two lives; it was a matter, rather, of the life of one or of both, the initial fall having, in effect, determined the choice. In fact the fallen mountaineer survived, landing on an unperceived ice bridge below, but had he died it would, according to the present state of the common law authorities, have been murder on the part of Yates.

57. The similarity of this latter example with the present case is particularly apparent, a choice between the loss of one life or two, not a choice between one life or another, and both examples illustrate what would be the consequences of applying to cases where there is no question of true choice between one life and another precedent cases where such a choice existed. In duress, to the extent that it has been dealt with in common law cases, such a choice has existed and with it an opportunity for the court to require of an accused heroism and death. Whatever may be thought of the justice of such cases, they say nothing concerning cases where no such choice exists.

58. Although Sir John's examples are more properly to be considered as cases of 'necessity' than 'duress', the effect of the threat upon the mind of the accused, whether emanating from a natural source or from another human being, and the choice with which the accused is faced are indistinguishable. Indeed, as both common law courts and the codes of various legal systems have accepted, the principles underlying necessity and duress are in substance the same. These examples are thus closely related both in fact and in law to the circumstances in which the

Appellant found himself; under an imminent threat of death and faced with unwilling participation in the taking of innocent human life and without the ability to save those lives by the sacrifice of his own life.

59. Symptomatic of the underlying logical difficulties of the English common law approach to duress in charges of murder is what Dinstein describes in his study of "The Defence of Obedience to Superior Orders in International Law"[49] as the changing views of the eminent jurist Lauterpacht in relation to superior orders accompanied by compulsion. In 1944 Lauterpacht had written that immediate threat of death as a result of refusal to obey an order would suffice to exclude a soldier from accountability for obeying that order[50]. But in 1952, after the major Nazi war criminals had been brought to trial, Lauterpacht changed his view and rejected the concept that an individual may properly save his own life at the expense of the lives of others[51]. Dinstein, in commenting upon this change of view, regarded it as unnecessary "to resolve the question whether international law recognizes the validity of any defence based on compulsion, and, if so, what are its limitations"[52]. That is, however, a necessity that this Appeals Chamber faces in determining this appeal. Dinstein goes on to say that to his mind "the proposition flowing from the doctrine of absolute liability . . . is unacceptable"[53]. He sums up his own views when he says:

> [W]e may conclude that the fact of obedience to superior orders may be taken into account in appropriate cases for the purpose of defence, but only within the scope of other defences, namely, those of mistakes of law and compulsion, insofar as the latter really constitute valid defences under international law.[54]

He regards superior orders as not in itself providing a defence but as contributing, in conjunction with other facts, to the substantiation of a defence recognised in the international sphere [55].

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[49] Yoram Dinstein, *The Defence of Obedience to Superior Orders in International Law*, (Sijthoff 1965), at pp. 78-79.
[50] Sir Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes,* 21 British Yearbook of International Law, (1944) at p. 58.
[51] *Oppenheim's International Law: A Treatise* (Sir Hersch Lauterpacht, ed., Longmans, London, 7th ed., 1952), vol. 2, at pp. 571-72.
[52] Dinstein, *op. cit.*, at p. 80.
[53] *Ibid.*, at p. 81.
[54] *Ibid.*, at p. 82.
[55] *Ibid.*, at p. 81.

60. Dinstein's study of the Nürnberg trial of leaders of the Third Reich is especially valuable for its consideration of the International Military Tribunal's reference there to "moral choice". When that Tribunal, in discussing Article 8 of its Charter excluding obedience to superior orders as any defence, said that, "The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible", it thereby added to Article 8's negation of superior orders as any defence what Dinstein describes as a contribution of its own, the moral choice test[56]. As Dinstein interprets this test, having recourse to both the French and English text of the Tribunal's judgement, "if there is no possibility of moral choice - or moral liberty (*liberté morale*) and the faculty of choice (*faculté de choisir*) according to the French version - the defendant ought to be relieved of criminal responsibility and not just be subjected to a lenient punishment"[57]. Then Dinstein examines the circumstances in which no moral choice exists and concludes:

> When a person really acts under compulsion, that is, when he is physically coerced by overwhelming force to behave in a certain way, he has no choice at all. In any other case, he is in fact confronted with a choice. Even if he acts at the point of the sword and out of fear of imminent death, there is still a choice open to him - commission of the act and life, or omission and death. Life or death is the result of the choice, but the choice is existent nonetheless. Yet in many cases it is impossible, from a moral viewpoint, to expect a person to choose death. From a moral viewpoint the person acts in such cases with no option: we resign ourselves in advance to his taking the course that will save his life. It is, consequently, possible to say that he has no moral choice. Not in every case of compulsion is a person divested of moral choice, for per definitionem it is the moral standpoint which here determines when a person has no choice but to submit to force. But, indubitably, in certain cases of compulsion at any rate, moral choice is eliminated, and there is no question that the test established by the International Military Tribunal relates to the subject of compulsion.[58]

It is noteworthy that even this passage, while conceding that in some cases of duress moral choice is eliminated, confines itself to the choice between the victim's life or the life of the actor who is subjected to duress. It does not go to the necessarily stronger case where the victim's fate is sealed and all that remains for the actor is whether or not to join the victim in death.

61. In an article in the Columbia Law Review, Dienstag, dealing with the United States experience of duress as a defence to murder and after recounting the so-called "black letter law"

[56] *Ibid.*, at pp. 147-48.
[57] *Ibid.*, at p. 149.
[58] *Ibid.*, at p. 152.

which denied duress as any defence to murder, states that "the more modern approach to murder committed under duress is at once more intellectually acceptable and more honest"[59] and cites the Model Penal Code, the adoption of which by a number of American States has already been referred to, as paradigmatic of the newer formulation of the duress defence. That Code makes no exception for homicide if the threatening force is such that "a person of reasonable firmness in his situation would have been unable to resist". She describes as cogent the moral argument for allowing the defence of duress and remarks that it is both unfair and hypocritical to punish an accused for conduct "that is the result of pressure to which his very judges would likely have succumbed"[60], and concludes that the "common law approach may be understood as a legacy of an earlier jurisprudence, but one cannot today accept its dogmatic imperatives"[61]. She would, however, on policy grounds, treat war crimes in a category of their own. Noting the substantial number of cases of war crimes trials in which United States Military Courts accepted duress as a defence following the International Military Tribunal's adoption of "the true test" of duress as being one of moral choice, she remarks that where in those trials the defence succeeded the industrialists concerned were not engaged in oppressive crimes[62]. She advocates an approach which denies duress as a defence and no doubt there is much to be said for her view but the facts of the present case, to the limited extent to which they have emerged to date from the evidence of the Appellant, demonstrate in my view the injustice involved in any absolute exclusion of duress as a defence to murder. Wholly to deny duress as a defence in the case of war crimes is calculated to deny justice in those cases, rare as they may prove to be, which satisfy the stringent conditions, including that of proportionality, which any successful defence of duress must meet.

62. Much turns, I believe, in any consideration of duress as an available defence to murder, on the question of proportionality, on a comparison between the evil of doing what the person exercising the duress demands and the harm which the person under duress will suffer if that demand is not complied with. Where it is possible to make such a comparison it also becomes possible to evaluate and weigh in moral terms the two outcomes. However, where resistance to the demand will not avert the evil but will only add to it, the person under duress also suffering that evil, proportionality does not enter into the equation. That, as I have earlier sought to show, is precisely the position with which, according to the statement of the Appellant, he was confronted.

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[59] Abbe L. Dienstag, *Fedorenko v. United States: War Crimes, the Defence of Duress, and American Nationality Law*, 82 Columbia Law Review, 1982, p. 120 at 142.
[60] *Ibid.*, at p. 144.
[61] *Ibid.*, at p. 145.
[62] *Ibid.*, at p. 147.

63. If in this Opinion I have at all accurately described what has been the common law's approach to duress as a defence to a charge of murder, and regardless of whatever criticism may be made of that approach, the question remains whether in all circumstances duress must in consequence be excluded as any defence to murder in international law because it cannot be said to be a general principle of law recognized by the world's major legal systems. In searching for a general principle of law the enquiry must go beyond the actual rules and must seek the reason for their creation and the manner of their application. When considering the application of duress to a particular crime courts in common law countries, for example, consider and apply principles of law relating to duress and necessity applicable to all other categories of crimes, although the conclusion arrived at will be derived from applicable authority and policy considerations or legislative intervention. Similarly, in those civil law systems which follow the general pattern of the French and German codes, provisions on 'duress', 'coercion', 'constraint' or 'necessity' are commonly to be found in that portion of the code containing general provisions and are equally applicable to all categories of crime contained in the specific provisions which follow, subject to such special exceptions as may exist in certain crimes under the specific part of the code. The general principle governing duress is therefore more likely to be found in these general rules than in specific exceptions which exist for particular crimes.

64. While it seems clear that the principles underlying the defence of duress and necessity "have been accepted as a fundamental rule of justice by most nations in their municipal law"[63] the extent of their application in international law is, as I have said, only in doubt by reason of the common law's exception in cases involving the taking of innocent life. No doubt, in identifying a general principle, an international tribunal must not, as one author has put it, be "doing violence to the fundamental concepts of any of those systems"[64]. However, the exception of murder apart, duress as a defence is now a "fundamental concept" of the common law and the grounds for exception in the case of murder have been aptly described by Lord Mackay in *Howe*'s case, in the passage which I have cited at paragraph 53, *supra*, as being the concern of common law judges with the supreme importance that the law affords to the protection of human life and their repugnance that the law "should recognize in any individual in any circumstances, however extreme, the right to choose that one innocent person should be killed rather than another". Neither this concern nor this repugnance can have any application to a case in which nothing that an accused can do can save the life which the law seeks to protect, so that no

[63] *Hostage* case, *supra n. 12.*
[64] H.C. Gutteridge, *Comparative Law* (Cambridge University Press, Cambridge, 2nd ed., 1949), at p. 65.

question of choice concerning an innocent life is left to an accused. In such a case the foundation upon which rests the exception at common law to its otherwise well-accepted recognition of duress as a defence disappears and what remains is the role of duress in freeing an accused from criminal responsibility when the stringent conditions for its application are satisfied. In such a case, too, there is nothing either in the principles of the common law or in the cases in which those principles have been applied which would exclude duress as a defence; the principle which supports its exclusion in the case of the taking of innocent lives is absent. No violence is done to the fundamental concepts of the common law by the recognition in international law of duress as a defence in such cases. Whether it may be raised as a defence in international law in other circumstances in crimes involving the taking of innocent lives is a matter for another day and another case.

65. In so concluding I am alive to the comment of Brownlie that, in drawing upon general principles of law, reference may be had by an international tribunal such as ours to principles of legal reasoning and the analogous treatment of similar crimes in domestic contexts where they are of assistance in promoting a "viable and mature international jurisprudence"[65]. I am at the same time alive to the concerns expressed by other members of this Appeals Chamber of the need to protect innocent life in conflicts such as that in the former Yugoslavia which involve so great a threat to innocent life. However, to my mind, that aim is not achieved by the denial of a just defence to one who is in no position to effect by his own will the protection of innocent life.

66. It is for the foregoing reasons that I conclude that, despite the exception which the common law makes to the availability of duress in cases of murder where the choice is truly between one life or another, the defence of duress can be adopted into international law as deriving from a general principle of law recognized by the world's major legal systems, at least where that exception does not apply.

[65] *See* Ian Brownlie, *Principles of Public International Law* (Clarendon Press, Oxford, 4th ed., 1990), at p. 16, quoting *Oppenheim's International Law: A Treatise* (Sir Hersch Lauterpacht, ed., Longmans, London, 8th ed., 1955), vol. 1, at p. 29.

67. The stringent conditions always surrounding that defence will have to be met, including the requirement that the harm done is not disproportionate to the harm threatened. The case of an accused, forced to take innocent lives which he cannot save and who can only add to the toll by the sacrifice of his own life, is entirely consistent with that requirement.

68. It follows that I agree with the conclusions of Judge Cassese, as expressed in Part IV of his Opinion, concerning the equivocal nature of the Appellant's guilty plea and with his enumeration of the conditions that must be satisfied before a defence of duress is established.

69. I would, as is implicit in what I have written, reject both the application that this Appeals Chamber should acquit the Appellant and the application that it should revise his sentence. Since I have, as earlier stated, concluded that the Appellant's plea was not an informed plea, the case should be remitted to a Trial Chamber so that the Appellant may have the opportunity to replead in full knowledge of the consequences of his plea.

Done in English and French, the English being authoritative.

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Ninian Stephen
Judge

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

[Seal of the Tribunal]