

## NOTES

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### NO EXCUSE: THE FAILURE OF THE ICC'S ARTICLE 31 "DURESS" DEFINITION

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#### INTRODUCTION

*"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.'"*<sup>1</sup>

The introductory quotation is taken from the case of Drazen Erdemovic, a soldier in the Bosnian Serb army who was sentenced to ten years in prison after pleading guilty to one count of crimes against humanity for his participation in the execution of innocent civilians during the armed conflict in the former Yugoslavia.<sup>2</sup> The International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber summarized the relevant facts as follows:

On the morning of 16 July 1995, Drazen Erdemovic and seven members of the 10th Sabotage Division of the Bosnian Serb army were ordered to leave their base . . . and go to the Pilica farm . . . . When they arrived there, they were informed by their superiors that [busloads of Muslim civilians] would be arriving throughout the day. . . . The [civilians] were escorted 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 Drazen Erdemovic, who composed the firing squad then killed them. . . . [Erdemovic] believes that he personally killed about seventy people.<sup>3</sup>

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\* Juris Doctor Candidate 2014, Notre Dame Law School. Thank you to the editors and staff of the *Notre Dame Law Review* for their assistance in preparing this Note for publication. Thank you to Professor Jimmy Gurulé for the invaluable insight and direction he provided. Finally, thank you to my wife, Crystal Lynn, and my son, Noel, for their love and support.

1 Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgement, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

2 *Id.* ¶ 1.

3 Prosecutor v. Erdemovic, Case No. IT-96-22-T, Sentencing Judgement, ¶ 78 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996) (footnotes omitted).

Erdemovic made it clear in his testimony that he had no knowledge of the purpose of the mission when he was ordered to report to the site, that his immediate refusal to participate in the killings was met with a threat of instant death, and that he had personally observed another member of his unit ordering the death of a soldier who had refused to take part in the massacre.<sup>4</sup> The question then becomes: Should Erdemovic be treated the same or differently under the law from the other soldiers who participated in the massacre without being under duress or coercion? More importantly, is the moral culpability of Erdemovic the same as the culpability of the willing participants? This Note will focus on analyzing these questions through the lens of “duress” jurisprudence with particular attention devoted to the International Criminal Court (ICC) and the definition of “duress” under Article 31 of the Rome Statute.<sup>5</sup>

The question of whether and to what extent duress should be recognized as a defense by the ICC is of immense importance because in situations like those faced by Erdemovic, it could mean the difference between facing decades behind bars and being excused from punishment under a theory of duress. Additionally, the questions speak more to fundamental justice and moral culpability under the ICC and the Rome Statute. The drafters of the Rome Statute had to balance two competing interests: (1) punishment consistent with the moral culpability of the accused actor under duress; and (2) the fear that duress could be used (or even abused)<sup>6</sup> to create a lack of accountability (or impunity) for those brought before the ICC. Unfortunately the latter interest has prevailed, and in adopting the Rome Statute, the international community has rejected a definition of duress based on the actor’s moral culpability in their desire to put forward a strong front and send a clear message that the killing of innocent civilians will not be tolerated no matter the situation. Accountability has trumped moral culpability.

Article 31 of the Rome Statute makes the unacceptable mistake of combining the elements of duress and necessity into one theory of excuse that includes a proportionality requirement.<sup>7</sup> The ICC should amend Article 31 so that duress is treated separately from necessity, and the proportionality

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4 *Id.* ¶¶ 80–81.

5 Rome Statute of the International Criminal Court art. 31(1)(d), July 17, 1998, 2187 U.N.T.S. 90.

6 This fear of the duress defense being used by criminals to escape punishment has been labeled the “Pandora’s Box Argument.” Payam Akhavan, *Should Duress Apply to All Crimes?: A Comparative Appraisal of Moral Involuntariness and the Twenty Crimes Exception Under Section 17 of the Criminal Code*, 13 CAN. CRIM. L. REV. 271, 277–78 (2009). This fear appears to first be evidenced in the English common law cases, but Akhavan asks the question: “If the mere availability of duress as a defence to murder would result in catastrophic consequences and uncontrollable ‘social evils,’ why is there no evidence of such a danger in civil law jurisdictions where . . . duress has long been recognized as a categorical ground for the exclusion of criminal liability?” *Id.* at 277.

7 Rome Statute of the International Criminal Court, *supra* note 5, art. 31(1)(d) (requiring “that the person does not intend to cause a greater harm than the one sought to be avoided”).

requirement that currently limits the applicability of duress should be removed. Duress is an excuse, not a justification. Necessity is a justification, not an excuse.<sup>8</sup> These two distinct theories of defense must be separated if the Rome Statute is to achieve the fundamental criminal law principle of only punishing actors consistent with their moral culpability. A rush to punish any and all involved in the world's most heinous international crimes may have its appeal, but when calmer heads prevail, it must be recognized that some actors do not possess the moral culpability that would make them appropriate targets for punishment.<sup>9</sup>

This Note proceeds in four Parts. Part I traces the historical development of “duress” through the common and civil law systems, World War II cases, the Model Penal Code (MPC) and, finally, through an in-depth analysis of the *Erdemovic* case before the ICTY Appeals Chamber discussed in the introduction. Part II then discusses “duress” under Article 31 of the Rome Statute and includes a survey of the Article’s drafting history, a statutory analysis of Article 31, and an application of the ICC definition of “duress” to the *Erdemovic* set of facts. This Part highlights the unjust result that inevitably occurs under the current definition. Part III proposes a revised definition of duress for the ICC to adopt that would rest on principles of moral culpability and better comport with historical understandings of what an excuse defense is under criminal law. Part III concludes with an application of the proposed revision to Article 31 to the *Erdemovic* facts and analyzes why the proposed revision leads to a more just result. Finally, the paper concludes briefly in Part IV with a summary of the current shortcomings of Article 31 and a restatement of why this issue is of critical importance given the ICC’s potentially vast power to handle and direct international criminal law. An organ with broad potential powers must be sincere in its efforts not only to punish and prevent the most heinous international crimes but also to ensure that fundamental justice is done for both the victims and the accused.

## I. HISTORICAL DEVELOPMENT OF “DURESS” AND THE MURDER EXCEPTION

Before proceeding to analyze “duress” under Article 31 of the Rome Statute in Part II, this Part will trace the historical development of duress

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8 This distinction was recognized by the drafters of the Model Penal Code. *See, e.g.*, MODEL PENAL CODE § 2.09 cmt. 2 (1985) (“The problem of [duress], then, reduces to the question of whether there are cases where the actor cannot justify his conduct under [choice of evils/necessity], as when his choice involves an equal or greater evil than that threatened, but where he nonetheless should be excused because he was subjected to coercion.”). It may sometimes be necessary to commit a crime because it involves the lesser of two evils and, in a sense, the actor is justified in his conduct because, by his actions, he avoided a greater harm. Duress, on the other hand, is a situation where the harm caused may indeed be greater than the harm avoided, but we nonetheless excuse the actor from punishment because at the time he acted his free will had been overcome by coercion, and he was therefore not morally culpable for his actions.

9 *See infra* Part II (discussing the four purposes of punishment and analyzing whether punishing an individual under duress actually serves any of those purposes).

jurisprudence through five major categories: (i) common law systems; (ii) civil law systems; (iii) World War II/IMT case law; (iv) the Model Penal Code; and (v) the *Erdemovic* decision of the ICTY Appeals Chamber. A brief but focused summary of these disparate areas will provide a proper framework to more deeply appreciate the theoretical underpinnings of the current ICC “duress” definition and also the principal reasons that it is flawed and in need of immediate revision. Additionally, a concise application of each of the five categories to the *Erdemovic* situation will illustrate the expected result had the trial taken place under that particular theory of “duress.”

#### A. Common Law Systems

The general consensus among the common law legal systems of the world is that duress cannot be used to excuse murder.<sup>10</sup> This traditional rule regarding duress and murder can be traced back to statements made in the nineteenth century by the Englishmen Lord Hale and William Blackstone.<sup>11</sup> Hale wrote in his *Pleas of the Crown*:

[I]f 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.<sup>12</sup>

Blackstone followed similar lines by stating unequivocally that a man under duress “ought rather to die himself, than escape by the murder of an innocent.”<sup>13</sup> Far from being dead letter law, this principle was reaffirmed in the 1987 English case of *Regina v. Howe*:

Lord Hailsham described the common law rule as “good morals” and categorically rejected the conclusion “that the law must ‘move with the times’ in order to keep pace with the immense political and social changes since what are alleged to have been the bad old days of Blackstone and Hale.” . . . [T]he question of excusing a coerced killer should not be determined by juries . . . . “It is one of principle.”<sup>14</sup>

This decision reaffirming the common law rule in *Howe* was significant, as noted by Judges McDonald and Vohrah in their *Erdemovic* opinion because (1) it overruled an earlier English decision that had allowed duress as a “defence to murder for a principal in the second degree” and represented a “firm rejection of the view in English law that duress, generally, affects the

10 Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

11 See Alan Reed, *Duress and Provocation as Excuses to Murder: Salutory Lessons from Recent Anglo-American Jurisprudence*, 6 J. TRANSNAT'L L. & POL'Y 51, 52 (1996).

12 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 50 (1800).

13 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 30 (1769).

14 Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1372 (1989) (footnotes omitted) (quoting *R v. Howe*, [1987] 1 All E.R. 771 (H.L.) 781).

voluntariness of the *actus reus* or the *mens rea*”;<sup>15</sup> and (2) that “duress as a defence affects only the existence or absence of *mens rea*.”<sup>16</sup> This second point is bolstered by what Judges McDonald and Vohrah take to be the correct reasoning articulated by Lord Kilbrandon’s minority opinion in the case overruled by *Howe*: “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.’”<sup>17</sup> Additionally, there is evidence in the *Howe* opinion that under the common law, duress is never to be afforded as a defense to murder<sup>18</sup> owing to the “special sanctity”<sup>19</sup> of human life and the “supreme importance” the law attaches to protecting human life.<sup>20</sup>

The general theme, then, of the common law systems as evidenced by English duress jurisprudence is a rejection of duress as a defense to murder out of a concern for protecting human life and a seeming rejection of the idea that one under duress is completely incapable of making a reasoned decision.<sup>21</sup> It is uncontroversial to state that if Erdemovic had been tried under a common law legal system he would have been unable to raise a duress defense because duress is never allowed as a defense to the murder of innocent civilians.

15 *Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 70.

16 *Id.* (quoting *Howe*, 1 All E.R., at 777).

17 *Id.*

18 However, duress is still available as a defense to all other crimes, including serious felonies.

19 *Howe*, 1 All E.R., at 785 (Lord Griffiths) (reasoning that duress is unavailable as a defense to murder because it “is based on 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”).

20 *Id.* at 798 (Lord Mackay of Clashfern) (“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.”); see also *R v. Gotts*, [1992] 2 A.C. 412 (H.L.) 425–26 (Lord Jauncey of Tullichettle) (Eng.) (“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 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.” (citation omitted)).

21 For a detailed summary of common law legal system codes rejecting duress as a defense to a charge of murder, see *Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 60.

### B. *Civil Law Systems*

Duress as a defense to murder has been treated more favorably in the civil law systems of the world. Under French law, “[no person is criminally responsible] who acted under the influence of a force or constraint which he could not resist.”<sup>22</sup> The rationale behind this defense is that when an individual is under such compulsion, the free will of that individual has been destroyed.<sup>23</sup> An actor robbed of his free will is not criminally responsible for the crimes he commits and is excused from punishment. Additionally, the purposes of punishment would not be served by punishing an individual who truly acted under duress or compulsion.<sup>24</sup> Belgium potentially allows the defense of duress to all crimes. Article 71 of the Belgian Penal Code of 1867 states, “[t]here is no offence where the accused or suspect was . . . compelled by a force which he could not resist.”<sup>25</sup> Similar provisions are present in the penal codes of The Netherlands, Spain, Germany, Italy, Chile, and Mexico.<sup>26</sup>

The general theme of the civil law countries regarding duress is whether or not the free will of the actor has been overcome. This emphasis on the mental state of the actor, rather than the crime he is coerced into committing, is proper because when an individual’s free will has been overcome, he is not focusing on what crime he is being asked to commit; he is not focused on anything except responding to the free-will destroying threat that has been leveled against him. Whether or not an individual’s free will has been overcome is not necessarily dependent on what crime he is being asked to commit. Coerced individuals are not free actors and as such they act without moral culpability.

Absent from the civil law penal codes is a murder exception to the defense of duress,<sup>27</sup> whereas the theme of the common law is that it is never permissible to take the life of an innocent.<sup>28</sup> Civil law jurisdictions do not focus on the victim of the coerced actor’s action; instead, they focus on the moral culpability of the accused and whether or not the free will of the coerced individual has been overcome. These divergent focuses help explain why the two dominant systems of criminal law have arrived at two starkly different treatments for actors who have been coerced into committing murder by fear or by force. Because civil law systems generally contain no categorical exclusion for intentional killings under the defense of duress, Erdemovic would have been permitted to raise the defense of duress and, if he prevailed, would have been excused from punishment for his actions.

22 CODE PÉNAL [C. PÉN.] art. 122-2 (Fr.).

23 G. STAFANI ET AL., DROIT PENAL GENERAL 331 (Daloz, Paris, 16th ed. 1997).

24 See *infra* Part II for a more detailed discussion on the four purposes of punishment (deterrence (both individual and general), rehabilitation, retribution, and incapacitation).

25 *Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 59.

26 For a detailed summary of civil law legal system codes accepting duress as a defense to a charge of murder, see *id.*

27 See *supra* notes 22, 26.

28 See *supra* note 21.

### C. World War II Military Tribunal Case Law

Moving forward from the jurisprudence of national common and civil law systems, we next turn to applicable international case law from the Second World War military tribunals. It is important to note, as made evident in the *Erdemovic* decision, that prior to the codification of duress under the Rome Statute there was no settled, specific international rule concerning whether duress afforded a complete defense to the killing of innocent civilians.<sup>29</sup> The rulings from the Second World War evidence a split of authority with some decisions allowing duress as a defense to murder and other opinions rejecting the notion that duress can afford a complete defense to the killing of innocent civilians.<sup>30</sup>

The conclusion that duress may not afford a complete defense for the killing of innocent civilians comes principally from the opinions of two British military tribunals and one Canadian military tribunal.<sup>31</sup> Alternatively, the viewpoint that duress is available even to excuse the killing of innocent civilians is best encapsulated in the *Einsatzgruppen* case tried before an American military tribunal:

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.<sup>32</sup>

Additionally, the *Erdemovic* Trial Chamber cited favorably the 1996 report of the International Law Commission summarizing post-World War II international military case law from nine nations concluding that duress constituted a complete defense.<sup>33</sup>

While there is case law that supports both sides of the controversy over whether or not duress can serve as a complete defense to the murder of innocents, the jurisprudence is marked with considerable problems just

29 *Erdemovic*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 12 (“[W]ith regard to war crimes or crimes against humanity whose underlying offence is murder or more generally the taking of human life, no special rule of customary international law has evolved on the matter.”); *id.*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 55 (“[I]t 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 defense to a charge of killing innocent human beings.”).

30 See *infra* notes 31–32 and accompanying text.

31 Trial of Max Wielen and 17 Others (Stalag Luft III Case), in 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 31, 49 (1949) (stating that the defense of duress may not be available in certain instances); Defence Pleas, in 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS, *supra*, at 153, 173 (citing the trials of Valentin Fuerstein and others and Robert Holzer and others as indicating that in some instances duress may only go to mitigation of the offense).

32 Trial of Otto Ohlendorf et al. (Einsatzgruppen case), in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 480 (1949).

33 Prosecutor v. Erdemovic, Case No. IT-96-22-T, Sentencing Judgement, ¶ 17 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996).

beneath the surface of the opinions. Many cases appear to be applying national common or civil law definitions of duress in the absence of settled international law;<sup>34</sup> some opinions discuss duress only in the context of *obiter dictum*;<sup>35</sup> and finally, those cases that do address duress may only speak of the defense generally without deciding the specific issue of duress in the context of crimes against humanity and the killing of innocents.<sup>36</sup> Certainly the duress issue in these contexts following World War II military tribunals was still an open question given the conflicting opinions and the general paucity of on-point case law available for in-depth analysis. If Erdemovic had found himself before a military tribunal following the Second World War, the availability of raising a duress defense to the murder of seventy innocent civilians would have depended entirely on which country was administering the proceeding. As discussed above, the British and Canadian systems would likely have rejected the availability of the defense,<sup>37</sup> whereas the Americans, who decided *Einsatzgruppen*, would have permitted the defense to be raised.<sup>38</sup>

#### D. Model Penal Code

Following the highly contentious and conflicting international case law that emerged from the military tribunals of the Second World War, we move from practice to theory, specifically to the Model Penal Code (MPC) created in the United States by leading legal scholars. The MPC was an attempt to offer a consistent and coherent penal code based upon ideals such as moral culpability. Section 2.09 covers duress, and the relevant portion states:

It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.<sup>39</sup>

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34 *Erdemovic*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶¶ 25–26 (finding that the *Fuerstein* case and the *Holzer* case were applying British and Canadian national law, respectively, and not basing their conclusions on prevailing international law).

35 *Id.* ¶ 25 (asserting that statements in the *Fuerstein* opinion rejecting duress as a defense to the murder of innocent civilians were *obiter dictum*).

36 *Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 42 (criticizing the United Nations War Crimes Commission as only dealing with duress in general and not specifically with reference to the killing of innocent persons and thereby rejecting its conclusions as applicable to the issue at hand).

37 *See supra* Section I.A.

38 *See supra* note 32. There is currently a split of authority within the United States. American jurisdictions that adopt the MPC (discussed *infra* Section I.D) would permit the defense to be raised (just as the tribunal did in *Einsatzgruppen*). However, some American jurisdictions follow the common law and would not permit the defense of duress to be used to excuse intentional murder.

39 MODEL PENAL CODE § 2.09(1) (1985); *see also id.* § 2.09 explanatory note (“Subsection (1) establishes the affirmative defense of duress, which is applicable if the actor engaged in criminal conduct because he was coerced to do so by the use or threat of



The MPC definition of duress is a significant improvement over previous attempts to define duress that either required a strict proportionality of harms or rejected it altogether in cases of murder. Duress under the MPC stresses the effect that the threat has on the individual, rather than categorically ruling out its applicability to an entire area of criminal law (intentional murder). There is neither an imminence requirement nor a requirement of a threat of death or serious bodily injury. The MPC focuses on the individual and not the act. The standard of a threat that “a person of reasonable firmness in his situation would have been unable to resist”<sup>40</sup> encapsulates the idea that the will has been overcome and therefore, without a free choice, there can be no moral culpability. Rather than relying on limiting the applicability of the defense through proportionality or a list of acceptable crimes that may be excused, the MPC definition codifies as its limiting factor the reasonable person standard when analyzing the threat. By using the objective standard, any and all threats will not be sufficient to trigger an excuse under duress; rather, the threat must be significant enough that a reasonably firm person could not resist. If the threat were such that a reasonably firm person cannot resist, it would be unjust to hold him criminally responsible and punish him when he was not making a free decision.<sup>41</sup>

The drafters of the MPC specifically recognized the fundamental unfairness of the murder exception to duress when they opined in the Commentaries:

[L]aw is ineffective in the deepest sense, indeed . . . hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic 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.<sup>42</sup>

Erdemovic would be permitted to raise the defense of duress under the MPC definition. Specifically, Erdemovic had alleged (1) he was coerced into committing the act (2) by the “unlawful” threat of death at the hands of his fellow soldiers and commanding officers, and (3) he was unable to resist the death threat.<sup>43</sup> The question for the finder of fact would turn on whether or

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unlawful force against himself or another, that a person of reasonable firmness in his situation would have been unable to resist. The standard is thus partially objective; the defense is not established simply by the fact that the defendant was coerced; he must have been coerced in circumstances under which a person of reasonable firmness in his situation would likewise have been unable to resist.”).

40 *Id.* § 2.09(1).

41 *See infra* note 42 and accompanying text.

42 MODEL PENAL CODE § 2.09 cmt. 2 (1985).

43 *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgement, ¶ 10 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996); *see supra* notes 1–4 and accompanying text.

not a person of reasonable firmness could resist a death threat when ordered to take part in the murder of innocents.

### E. Prosecutor v. Drazen Erdemovic

Prior to the codification of duress in the Rome Statute, the most significant statements regarding the application of duress and its status in international law were found in the multiple opinions in the Appeals Chamber decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Erdemovic*.<sup>44</sup> The relevant facts of the case were spelled out in the Introduction<sup>45</sup> and provided the basis for the situation that will be applied to the Rome Statute definition of duress as well as this author's suggested revision to the Rome Statute.<sup>46</sup> Because the defense of duress was not defined in the ICTY Charter, the judges in *Erdemovic* were forced to undertake a comprehensive review of duress under both international customary law as well its status in civil and common law nations.<sup>47</sup> The judges were searching for a consensus under international law that they could then label "customary" and apply to Erdemovic's situation.<sup>48</sup> The issue divided the panel<sup>49</sup> regarding the availability of duress, and the two opinions which best illustrate the split are the joint opinion of Judges McDonald and Vohrah (in the majority) and the opinion of Judge Cassese (writing in dissent).

Judges McDonald and Vohrah's opinion spelled out in great detail the reasons they rejected the availability of a duress defense when applied to the killing of innocents and crimes against humanity. First, after surveying the case law from the Second World War they came to the conclusion that no customary international law exists concerning the availability of duress as a defense to the killing of innocent civilians.<sup>50</sup> Finding no consistent customary rule in international law, the judges next examined the jurisprudence of

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44 *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); *id.*, Joint Separate Opinion of Judge McDonald and Judge Vohrah; *id.*, Separate and Dissenting Opinion of Judge Cassese.

45 *See supra* notes 3–4 and accompanying text.

46 *See infra* Part III.

47 *Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 46–55.

48 *Id.*

49 *Id.*, Judgement, IV. Disposition, ¶ 4 ("The Appeals Chamber . . . [b]y 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 . . ."). The separate opinions of Judges Li and Stephen are not featured in this Note and do not contribute to an analysis of the issue that is substantially different than the opinions of Judges McDonald, Vohrah, and Cassese, which are analyzed.

50 *Id.*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 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

the various civil and common law national law systems and again found a split of authority and no consistent rule across national law systems.<sup>51</sup> With no settled rule for the application of duress to the killing of innocent civilians, the judges decided to take a broader view: “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.”<sup>52</sup> Judges McDonald and Vohrah stated that the purpose of the ICTY was to discourage the most heinous crimes and afford maximum protection to innocent civilians; as such, it would be dangerous in their minds to allow a defense of duress that excused the killing of innocent people and thereby put the soldiers of the world on notice that they may go unpunished for their unlawful acts.<sup>53</sup>

Also weighing heavily on their minds was the fact that the common law nations<sup>54</sup> of the world categorically rejected duress as a defense to murder. The ICTY judges reasoned that if some nations of the world rejected the defense in favor of affording maximum protection and respect for innocent life, it would be unacceptable for the ICTY, which deals with the worst international crimes, to take a somewhat softer approach and allow duress as a defense to the murder of innocents.<sup>55</sup> The *Erdemovic* majority settled on the rule that duress cannot be a defense to the murder of innocent persons

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other national courts and military tribunals constitute consistent and uniform state practice underpinned by *opinio juris sive necessitatis*.”).

51 *Id.* ¶ 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.”).

52 *Id.* ¶ 75.

53 *Id.* (“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. . . . 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.”).

54 The rationale behind the civil law rule allowing the defense of duress even in the case of intentional murder was not heavily analyzed by the judges. Specifically, the judges stated (after acknowledging the different views of the civil and common law nations): “We would therefore approach this problem [of duress] 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.’” *Id.* ¶ 72.

55 *Id.* ¶ 75 (“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 slaughter [sic] of innocent human beings on a large scale.”).

based primarily on policy considerations and “without engaging in a complex and tortuous investigation into the relationship between law and morality.”<sup>56</sup>

Nonetheless, the *Erdemovic* decision was not unanimous, and Judge Cassese voiced a strong and well-reasoned dissent. The main point of contention was that once the majority declared that there was no specific rule of customary international law when it relates to duress and the killing of innocents, they created a rule of customary law “by upholding ‘policy considerations’ substantially based on English law.”<sup>57</sup> Rather than creating a law based on policy considerations, Judge Cassese instead would have applied the “general rule” on duress with its “stringent requirements” that can, in fact, be gleaned from precedent.<sup>58</sup> According to Judge Cassese, it was possible to analyze international case law and find four common conditions that have been required to successfully raise the duress defense:

- (i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb;
- (ii) there were 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.<sup>59</sup>

In his concluding considerations, Judge Cassese offered the following rationale for allowing the defense of duress in the case of crimes against humanity and the killing of innocents: “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.”<sup>60</sup> However, the proposed elements above still contain a proportionality requirement and thus confuse justification and excuse theories of defense. Even though Judge Cassese made an eloquent plea for the availability of the duress defense under certain conditions and stated further that we should not require martyrdom of our fellow man, *Erdemovic* would have been unsuccessful in prevailing under Judge Cassese’s definition since it appears obvious that murdering seventy innocent civilians was the greater evil and was a disproportionate response to the threat leveled against him.<sup>61</sup> The *Erdemovic* deci-

56 *Id.* ¶ 77.

57 *Erdemovic*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 11(ii).

58 *Id.* ¶ 12.

59 *Id.* ¶ 16.

60 *Id.* ¶ 47.

61 Judge Cassese’s definition could produce absurd results if it were stipulated that a defendant who was threatened with murder would prevail on the duress defense if he only took the life of one innocent civilian. In *Erdemovic*’s case, he murdered seventy innocent civilians in response to the threat made against his life. Would his actions have been

sion stands as the last influential statement on the availability of the duress defense as applied to the killing of innocent civilians available to the international community before the enactment of the Rome Statute.

## II. "DURESS" AND THE ROME STATUTE OF THE ICC

### A. *Drafting History*

At first, the draft statute for the ICC did not contain articles that defined or dealt with defenses.<sup>62</sup> The 1991 draft prepared by the International Law Commission stated: "The competent court shall determine the admissibility of defences under the general principles of law, in light of the character of each crime."<sup>63</sup> According to the draft commentary, the members of the Commission had "quite diverse [opinions], and . . . it was not possible to reach agreement on a detailed list of defences."<sup>64</sup> If the drafters had followed this course until the final version of the statute, the ICC would have gone the same route as the International Military Tribunal (IMT) at Nuremberg and the ICTY, which left the availability of defenses up to the trial judges with the elements based on customary international law.<sup>65</sup> By 1996 there was still considerable disagreement over the extent to which specific defenses should be codified in the ICC statute, as well as some delegations that felt there were no acceptable justifications for crimes against humanity due to the seriousness of the offenses handled by the court.<sup>66</sup> One year later, however, the Preparatory Committee's final draft was substantially similar to the text of Article 31 adopted in the Rome Statute.<sup>67</sup>

Duress in some form had been listed as an option for the list of codified defenses as early as the 1995 Ad Hoc Committee.<sup>68</sup> No delegation at the

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excused if he had taken the time to inquire after killing each separate civilian if he could be permitted to stop and then had his life threatened "anew" before each single killing? Would this then constitute seventy separate killings under duress that would be excused rather than seventy killings in response to one threat that presumably would not be excused? This example illustrates the difficulty inherent in analyzing duress from the standpoint of the action committed rather than focusing on the effect of the threat on the free will of the individual and whether or not he is morally culpable for his actions.

62 WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 482 (2010).

63 *Id.* (internal quotation marks omitted).

64 *Id.*

65 *Id.* at 481–82.

66 *Id.* at 483 ("Concern was expressed over adopting an overly generalized approach, particularly involving war crimes where specific defences already had been developed. The view was expressed that the list of defences should not be exhaustive given the difficulty of trying to cover every conceivable defense, while others believed that leaving to the Court the power to add other defences would be tantamount to giving legislative power to the Court.") (quoting Preparatory Committee 1996 Report, Vol. I, para. 204)).

67 *Id.* The scarcity of information relating to the drafting of the statute is frustrating and provides little information concerning how duress and other defenses came to be included despite the opposition of some delegations.

68 *Id.* at 490.

1996 Preparatory Committee meeting that submitted a list of defenses excluded duress as a potential option.<sup>69</sup> According to Professor Schabas, the Diplomatic Conference “spent little time on the matter” and duress was included in the Article 31 Working Paper.<sup>70</sup> Based on this early and evidently uncontroversial inclusion of duress as a possible defense, the drafters rejected the majority opinion in *Erdemovic* and decided that under certain conditions duress could be a defense to the killing of innocents and crimes against humanity. The text finally adopted in Article 31 is similar to the four-part test articulated in Judge Cassese’s *Erdemovic* dissent.<sup>71</sup>

Unfortunately, the drafting history of Article 31 is plagued by considerable paucity, and an analysis of the various stages and definitions that “duress” goes through from the period of 1996 to 1998 reveals that the adopted definition, like many other international law codifications, represents a compromise among competing ideals.<sup>72</sup> The compromise text is, however, novel in the sense that after the IMT and ICTY had declined to include a list of permissible defenses, the Rome Statute rebuked the trend and codified duress under Article 31 of the Rome Statute.<sup>73</sup> Because it is largely a “novel” creation, special attention must be given to the wording of the duress defense.<sup>74</sup>

### B. Statutory Analysis of Article 31 of the Rome Statute

Duress is specifically addressed in Article 31(1)(d) of the Rome Statute:

Article 31: Grounds for Excluding Criminal Responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

. . .

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person

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69 *Id.*

70 *Id.* at 490–91.

71 *See supra* note 59 and accompanying text.

72 *See infra* note 76 and accompanying text. *See generally* Per Saland, *International Criminal Law Principles*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 189, 206–10 (Roy S. Lee ed., 1999) (discussing the competing texts submitted by different delegations for various paragraphs of Article 31).

73 *See* Roger S. Clark, *In General, Should Excuses Be Broadly or Narrowly Construed?*, 42 *TEX. TECH L. REV.* 327, 332–33 (2009).

74 Albin Eser, *Article 31*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 863, 867 (Otto Triffterer ed., 2d ed. 2008) (“Due to the novel nature of how these exclusionary grounds are regulated in article 31, some caution with regard to the appropriate methodology of its interpretation appears advisable. . . . [W]ith regard to this section particular heed must be paid to the wording of these provisions, thus avoiding both an uncritical adoption of the ambiguous and controversial drafting at the Rome Conference and an unreflected implantation from national criminal justice systems.”).

acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.<sup>75</sup>

Albin Eser is especially critical of the duress provision when he writes: "Among the many compromises which had to be made in order to get this Statute accepted, paragraph 1 (d) is one of the least convincing provisions, as in an ill-guided and lastly failed attempt, it tried to combine two different concepts: (justifying) 'necessity' and (merely excusing) 'duress.'" <sup>76</sup> In fact it was not until the final stage of the Rome Conference that the two separate defenses were combined into one.<sup>77</sup> This is an inexcusable error that confuses the two very different underlying rationales for why the defenses exist in the first place.

Duress is an excuse that is premised on the idea that the actor is incapable of making a moral choice due to the overwhelming force of the threat, whereas necessity is a justification that is premised upon a lesser-of-two evils argument.<sup>78</sup> Duress is an excuse that does not condone the behavior, but instead recognizes that even though the individual is guilty of the charged crime, he is not a proper candidate for punishment. Necessity based on the lesser-of-two evils is a justification that is better viewed as an admission that it was proper for the actor to engage in the behavior. Article 31(1)(d) muddles these two different concepts of duress and necessity, and by requiring a strict proportionality requirement for both situations, misunderstands the underlying rationale behind duress.

The very language of Article 31(1)(d) bolsters this confused combination by stating: "provided that the person does not intend to cause a greater harm than the one sought to be avoided."<sup>79</sup> Arguably an individual who is truly under duress does not intend to cause any harm since his free will and ability to make a moral decision has been overcome. Leaving the "intent" criticism to the side, the inclusion of a proportionality requirement is only appropriate for a necessity defense. The proportionality requirement means that the threatened individual is choosing an action that will result in lesser harm than would otherwise be inflicted, and in essence this is a moral choice that would be justified; *but duress is not a justification*. Society may still condemn the action of the coerced individual, but he will nevertheless be excused from punishment for his action.

The same proportionality requirement may also lead to difficult questions being put to judges regarding the type of harm being inflicted. Situa-

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75 Rome Statute of the International Criminal Court, *supra* note 5, art. 31(1)(d).

76 Eser, *supra* note 74, at 883.

77 *Id.* at 883–84.

78 *Id.* at 884.

79 Rome Statute of the International Criminal Court, *supra* note 5, art. 31(1)(d).

tions may arise where an individual is told that he must participate in breaking an enemy's arm in an attempt to get him to reveal useful intelligence and, if the soldier refuses, he is told that his wife will be raped. How is a judge to determine if a broken arm is a greater harm than a rape?<sup>7</sup> This is only one example, and countless others could be imagined; the bottom line is that the proportionality requirement is simply asking the wrong question. The focus should not be on placing two different harms on a scale and attempting to see which harm is greater; the focus should be on whether or not the coerced individual's will has been overcome so that he was unable to make a voluntary moral decision. Duress is a defense that focuses on the mindset of the coerced individual and his ability to morally choose; necessity is based on the behavior and actions of the individual. Combining the two concepts confuses them and leads to absurd results, as well as the potential for punishment that is inconsistent with the actor's moral culpability.

There is another fundamental question that needs to be asked regarding the Rome Statute's definition of duress: Can it be applied to the killing of innocent civilians? At first, the answer may appear to be "yes." The specific language of Article 31(1)(d), again, states (in relevant part): "provided that the person does not intend to cause a greater harm than the one sought to be avoided."<sup>80</sup> A close reading reveals that the intended harm need not be *less* than the harm avoided, and so therefore a harm that is equal to the one sought to be avoided would fall under the protection of the definition of duress. It is not inconceivable, however, to envision a prosecutor arguing that the taking of an innocent life is actually a greater "harm" than the death of a soldier who willfully joined an army and presumably has a duty to sacrifice his life before he would allow the death of an innocent person.<sup>81</sup> These questions remain unanswered, but may be raised at future ICC trials.

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80 *Id.*

81 Article 31 does not contain specific language addressing the situation of an individual who voluntarily places himself in a situation where he is likely to be placed under duress, or where he is likely to be asked to commit crimes that fall under the ICC's jurisdiction. For example, if the army unit that Erdemovic joined was known for committing crimes against humanity, it should arguably limit Erdemovic from claiming that he should be excused because he had a gun put to his head when he refused to take part in what was commonplace behavior for that army unit. Duress presumably would not be available for an individual who knowingly placed himself in the situation, and punishment for crimes against humanity would still be consistent with his underlying moral culpability for joining a notorious army unit. The tougher situation involves an actor who either negligently or recklessly joins a unit that commits crimes against humanity as part of its regular conduct. The ICC specifically requires that all crimes be committed with intent and knowledge as defined in Article 30(1). The ICC does not appear to recognize crimes committed with a reckless or negligent *mens rea*, and therefore duress should still be available to an actor accused of crimes under the ICC who was only negligent or reckless in placing himself in the situation that led to the duress and the crimes. This could explain why Article 31 is silent when it comes to individuals who are negligent or reckless in placing themselves in criminal situations. Article 31(1)(d)(ii) does state "[c]onstituted by other circumstances beyond that person's control," *id.*, which could be interpreted as requiring that an individual who had control over placing himself in the criminal situation would not be permitted



Returning to the *Erdemovic* situation discussed in the Introduction,<sup>82</sup> it seems straightforward that if the ICC tried Drazen Erdemovic for his part in the massacre of innocent civilians, he would not be able to claim duress under the current definition. Erdemovic himself estimates that he was individually responsible for the shooting deaths of between ten and one hundred civilians.<sup>83</sup> It would be uncontroversial to say that murdering between ten and one hundred civilians is a greater harm than one's own individual death, so the proportionality element of duress under the Rome Statute would not be satisfied. There is a colorable argument that had Erdemovic refused to participate in the massacre, he would have been killed with the civilians, and therefore, in a sense, he was merely choosing to avoid the harm of his own death. The civilians would have been put to death regardless of his participation, but this argument is merely a distraction from the more fundamental problem of the inclusion of a proportionality requirement in the ICC duress definition.

The question that the court should be asking is whether or not Erdemovic was capable of making a moral decision regarding whether or not to participate in the massacre. Erdemovic himself stated, "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."<sup>84</sup> The language "could not refuse" suggests a man who has had his will overcome due to threats made against his life and the resulting burden it would have placed on his young family. Requiring a proportionality element to the duress claim ignores the fact that Erdemovic was unable to make a free decision, and because of that he is not morally culpable for the deaths of the innocent civilians. The international community is still free to condemn the actions,<sup>85</sup> but Erdemovic is not a fit candidate for punishment because he was not capable of making a moral choice.

There are four general purposes of punishment in criminal law: deterrence (both specific and general), rehabilitation, retribution, and incapacita-

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to later claim duress (similar to distinguishing between voluntary and involuntary intoxication under Article 31(1)(b)).

82 See *supra* notes 3–4 and accompanying text.

83 Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgement, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

84 *Id.* ¶ 4 (emphasis added).

85 See *supra* note 8 (describing duress as a situation where an actor is excused from punishment). The Rome Statute does not recognize crimes committed with a reckless or negligent *mens rea*. Even if Erdemovic was reckless or negligent in joining the 10th Sabotage Division there would not be a "lesser" crime with which to charge him. If reckless or negligent homicide were included within the Rome Statute then perhaps Erdemovic could be charged with those offenses—these would more accurately reflect the moral culpability of a soldier who negligently or recklessly placed himself in a position where he would be required to kill innocents. Erdemovic himself denies that he had any knowledge that he would be asked to commit murder against innocent civilians, so the above discussion is merely hypothetical.

tion.<sup>86</sup> An analysis of the circumstances surrounding Erdemovic's situation illustrates why not one of the four purposes is meaningfully served by punishing him. First, general deterrence will not be served by punishing a coerced individual. General deterrence is thought to help prevent future crimes by members of society at large by making an example and punishing an actor for his criminal behavior. The problem is that coerced individuals are not thinking about avoiding punishment from a legal body; rather they have had their free will overcome by a threat that no reasonable person could resist. In a similar vein, an individual who has the unfortunate fate of finding himself under coercion twice is not going to give weight to the fact that he was previously punished for a similar act. The actor under duress is not making choices of his own free will; instead, he is doing whatever is necessary to avoid the irresistible threat.

Next, rehabilitation<sup>87</sup> is unnecessary when an individual has acted under duress. Such an individual has had his free will overcome. He need not spend time in jail to learn how to make better decisions because, in a very real sense, while under duress the individual *made no decision at all*. Duress is available as an excuse because we recognize a fundamental and almost universal human frailty that makes us susceptible to threats. There is no rehabilitating an immutable trait of human nature.

Further, retribution is not served in a meaningful sense by punishing an individual who acted under duress. Retribution is meant to give victims and society at large some feeling that a criminal has received his just deserts and that the imbalance created by his crime has been restored.<sup>88</sup> But the key word in the phrase 'just deserts' is *just*. It is not in the interest of justice to punish an individual who is not morally culpable for his actions, no matter how strong our blood lust may be or how reprehensible the coerced individual's actions were. Additionally, while it may seem simple to punish the soldier who actually pulled the trigger, this punishment is misplaced. Our anger should fall upon those who placed the actor under duress, and punishment of that coercing individual would advance the purpose of retribution.

Finally, the coerced individual poses no danger to society and therefore need not be incapacitated. As discussed above, duress is available because we recognize that human beings are flawed and that in certain circumstances our free will may be overcome. An individual who has succumbed to duress is no better a candidate for incapacitation than any other person selected at

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86 See DEP'T OF JUST., UNITED STATES ATTORNEYS' MANUAL § 9-27.110(B) cmt. (1997), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrmt.htm#9-27.110](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrmt.htm#9-27.110).

87 *Rehabilitate Definition*, MERRIAM-WEBSTER DICTIONARY ONLINE, [www.merriam-webster.com/dictionary/rehabilitate](http://www.merriam-webster.com/dictionary/rehabilitate) (last visited Dec. 13, 2013) ("[T]o teach (a criminal in prison) to live a normal and productive life.").

88 *Retribution Definition*, MERRIAM-WEBSTER DICTIONARY ONLINE, [www.merriam-webster.com/dictionary/retribution](http://www.merriam-webster.com/dictionary/retribution) (last visited Dec. 13, 2013) ("[S]omething given or exacted in recompense; *especially*: punishment.").

random. Society is only safer as a whole because there is one less person available to coerce.

The preceding analysis demonstrates why the ICC definition fails when it treats duress as a justification (by encoding a strict proportionality requirement). No one is arguing that Erdemovic was justified in massacring civilians. The argument is that he should be excused from punishment because he lacked moral culpability. As previously discussed, any fears that the defense may be abused are probably overstated and ignore two powerful counterarguments: (1) civil law jurisdictions already permit the duress defense for cases of intentional murder and have witnessed neither anarchy nor widespread impunity; and (2) the defense is not proved just because it is raised—as a defense, the accused individual must demonstrate by either a preponderance of the evidence or clear and convincing evidence that he was in fact under duress.<sup>89</sup> It is fundamentally unjust to imprison a man who acted under coercion so severe that he was incapable of making a free and moral choice.

### III. PROPOSED REVISION OF ARTICLE 31 OF THE ROME STATUTE

In order to reflect the true purpose and meaning of duress as well as to ensure that actors are punished according to their moral culpability, modified Article 31(1)(d) should read:

Article 31: Grounds for Excluding Criminal Responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be [deemed] criminally responsible if, at the time of that person's conduct:

...

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat.<sup>90</sup>

There is no proportionality requirement in the modified Article 31(1)(d). By removing the proportionality requirement, the defense of duress would be restored to an excuse rather than a justification, and would better reflect principles of moral culpability and fundamental fairness. The Preamble to the Rome Statute states as one of its goals: "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."<sup>91</sup> The ICC is specifically attempting to prevent future crimes through deterrence by ending impunity for the offenders. This goal should not be placed above ensuring that those who are pun-

<sup>89</sup> See *supra* note 6 and accompanying text.

<sup>90</sup> Rome Statute of the International Criminal Court, *supra* note 5, art. 31(1)(d) (modified by deletion of the proportionality requirement).

<sup>91</sup> *Id.* pmb1.

ished are morally culpable actors. It is not an act of “impunity”<sup>92</sup> to declare that an actor under duress is not fit for punishment. It is a just and reasonable recognition that one under duress is not free to make a moral choice and as such is not morally blameworthy. Punishing an individual who has acted under duress will not serve a deterrent effect on future actors, or even on the actor himself if he later finds himself in a similar position. The individual under duress is not deterred by the possibility of future jail time if refusing the current demand means certain death or serious bodily injury.<sup>93</sup> The *Einsatzgruppen* decision made clear, and the MPC Commentary confirmed, that it is not the place of the law to demand heroism, and that no law should condemn a man for failing to reach such standards of heroism that a judge would not be prepared to meet himself.<sup>94</sup>

It is an unfortunate consequence of armed conflict that actors may find themselves placed under duress and forced to commit unspeakable evils, but that does not mean that it is just to punish those who act without free will.<sup>95</sup> The proposed modification to Article 31 still requires that the individual acts “necessarily and reasonably to avoid [the] threat” so that acts which do not meet this standard will still be worthy of punishment. No one would hesitate to declare it unreasonable to murder an innocent civilian in order to escape a slap on the wrist. This sort of threat would not only be unreasonable, but it would also fail the “death or serious bodily injury” requirement. Addition-

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92 In a very basic sense, impunity assumes the existence of moral culpability and, as discussed above, the individual under duress is not morally culpable, and therefore it is not an act of impunity for him to go unpunished.

93 The failure of the current ICC duress definition to adequately advance any of the four general principles of punishment was addressed in Part II. Deterrence is reiterated presently because it is thought to act as a check on an individual as he is making the decision whether to commit the criminal act. As discussed here and in the previous Section, there can be no deterring an individual who is not making a free and moral choice because they are under duress.

94 Trial of Otto Ohlendorf et al. (*Einsatzgruppen* case), in 4 TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS, *supra* note 32, at 480; MODEL PENAL CODE § 2.09 cmt. 2 (1985).

95 The ICC has been limited to “the most serious crimes of concern to the international community as a whole.” Rome Statute of the International Criminal Court, *supra* note 5, art. 5(1). As such, the Rome Statute goes on in Article 30(1) to specify that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.” *Id.* art. 30(1). This is important in the context of soldiers who place themselves either negligently or recklessly in a military unit that is specifically designated to commit these “most serious crimes” or that the individual knows commits these sorts of crimes. The ICC only punishes crimes committed with knowledge and intent, so duress should not be denied as a defense to any soldier whose level of moral culpability only rises to the level of recklessness or negligence. Only in the case where it is found that an individual trying to plead duress actually intentionally joined a military force that he knew committed war crimes would there be the requisite moral culpability present to justly deny the duress defense and allow punishment. It would send the obvious message that one may not intentionally join a “death squad” and then cry “duress” when he is expected to murder innocents or commit other violations of the Rome Statute.

ally, the presence of the duress defense is not an automatic free pass for any accused that attempts to claim it. The individual would still be required to offer proof and corroboration that he actually was under duress at the time of the alleged crimes. As an affirmative defense, the defendant *still bears the burden of proof*. In short, allowing a duress defense that does not require proportionality is not the automatic free pass that many appear to fear that it is.<sup>96</sup> There are required elements and standards of proof that must be met in the course of the individual demonstrating that he is not morally culpable for his acts. Accused actors deserve to be treated fairly, and fundamental principles of criminal liability should not be scuttled in a rush to condemn and punish all involved.

Finally, the proposed modifications to Article 31 would provide a more just result if applied to the *Erdemovic* set of facts. By removing the proportionality requirement, the judge could instead focus on the threat itself leveled against Erdemovic and decide whether or not it was reasonable and necessary for him to act as he did. Clearly the action was necessary as evidenced by Erdemovic's statement that he would be shot with the rest of the victims if he did not participate in the shooting.<sup>97</sup> The question then becomes whether or not it was reasonable for him to act as he did. This is an objective standard that asks whether it would be reasonable for an individual to respond as he did to a death threat.<sup>98</sup> While there may be room for argument about whether or not Erdemovic should be held to a higher standard than an ordinary person, clearly ordinary reasonable people will comply with almost any demand if it means their own life will be spared. The court may still condemn Erdemovic's conduct, but recognizing that succumbing to a

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96 See *D.P.P. v. Lynch*, [1975] A.C. 653, 687 (H.L.) (Lord Simon) (appeal taken from N. Ir.) ("I spoke of the social evils which might be attendant on the recognition of a general defense 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.'"); *Abbott v. The Queen*, [1977] A.C. 755, 766-67 (P.C.) (appeal taken from Trin. & Tobago) ("Common sense surely reveals the added dangers to which in this modern world the public would be exposed, if [duress were made a defense 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.").

97 See *supra* note 4 and accompanying text.

98 Arguably the MPC approach (which does not require the threat to be "death or serious bodily harm") encapsulates a purer system where punishment accurately reflects moral culpability. This author does not recommend the ICC adopt the MPC standard because presently it would be unrealistic to expect the MPC definition to gain sufficient approval. The ICC has already confused duress with justification by injecting a proportionality requirement into Article 31. See Rome Statute of the International Criminal Court, *supra* note 5, art. 31. It would be enough if the proportionality requirement were removed and duress was restored to an excuse rather than a justification. It would likely be too much to ask that the "death or serious bodily harm" requirement also be replaced with the MPC standard ("coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist"). MODEL PENAL CODE § 2.09 (1985).

death threat is reasonable under the circumstances—and punishing an individual who does yield to such a threat is not just nor in line with his moral culpability—a court would likely permit Erdemovic to avoid punishment for his actions.

Erdemovic would not be deterred by the thought of punishment; he stated himself that his only thought was survival so that he might care for his wife and infant child.<sup>99</sup> Others would likely respond the same way if placed in a similar situation, even if they were aware that Erdemovic had actually been punished for his crime with a ten-year sentence.<sup>100</sup> Ten years in prison is preferable to death for any reasonable person and thus responding in such a way to a death threat is a reasonable action. To push the hypothetical even further, were the ICC authorized to pursue the death penalty, it would still be reasonable for an individual to succumb to the threat and escape a certain immediate death, even if it meant the possibility that he *may* face the death penalty in the future if he is apprehended and the case against him is proven at trial. The MPC and the *Einsatzgruppen* decision recognize this overpowering will to live and at the same time recognize that it would be hypocritical for the law to demand that individuals sacrifice themselves rather than kill an innocent.<sup>101</sup> Such a request would be a demand for heroism, and that is not, and should not, be the duty imposed on individuals. Under the proposed revision to Article 31, Erdemovic's actions would still be condemned, but he would not be punished because he is not morally culpable when acting under duress.

#### CONCLUSION

Duress under the ICC Statute can be reduced to two competing interests: (1) aligning punishment with moral culpability; and (2) ending impunity for war criminals. Unfortunately, the current ICC definition<sup>102</sup> errs on the side of the latter concern by including a proportionality requirement that functionally denies the defense of duress to any actor who takes the life of an innocent person, regardless of the gravity of the threat leveled against him or her. The ICC has many potential reasons for favoring this approach, such as (1) the belief that allowing the defense in cases of murdering innocent civilians will be abused and lead to impunity for an unacceptable number of defendants brought before the ICC; (2) the idea that human life, especially innocent human life, is sacred, and nothing should ever justify or excuse an individual who makes the decision to save himself at the expense of an innocent; (3) that individuals who are under duress are still, in a sense, making a decision and weighing the costs and benefits of their actions, and therefore should not be viewed as the mindless slaves of their coercers; and (4) soldiers

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99 See Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgement, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

100 *Id.* ¶ 1.

101 See *supra* notes 42, 94 and accompanying text.

102 See *supra* note 75 and accompanying text.

intentionally join organizations where they may be called upon to commit these “most serious crimes.”<sup>103</sup>

None of the above reasons hold up to close scrutiny and for the following reasons should be discarded. First, the “Pandora’s Box”<sup>104</sup> argument of rampant impunity is unfounded because civil law jurisdictions already allow the defense of duress in cases of intentional murder, and the fears expressed by Lord Simon and the Privy Council have not taken shape.<sup>105</sup> Next, the sanctity of human life argument<sup>106</sup> impermissibly focuses on the external circumstances surrounding the coerced actor rather than focusing on the mental state of the actor himself. We may indeed believe that nothing should justify the murder of innocents. However, duress is *not* a justification, it is an excuse; and although we do not feel that, as a society, we should condone any act of murdering innocents, it must still be recognized that those under duress should be excused on the basis of lacking moral culpability and being unfit candidates for punishment. Next, the proportionality requirement is an extension of the idea that the individual under duress is still capable of making moral decisions and as such should never decide to cause greater harm than his action prevents. This idea ignores the fact that the coerced individual cannot make a moral decision due to the threat levied against him and likely would cause any amount of harm asked of him if it meant he could escape with his life. Finally, it was discussed previously<sup>107</sup> that if a soldier intentionally joined a military unit knowing that he would be committing crimes under the jurisdiction of the ICC, then the duress defense very likely would not be an option for him. However, that is not an argument for the total elimination of the defense when it comes to the killing of innocent civilians. Instead, it is an argument for a case-by-case examination and determination of the motives and actions of the individual who has the duty to prove his duress defense.

The revised Article 31 suggested in Part III removes the proportionality requirement and instead focuses on the moral culpability of the accused actor in a way similar to the approach traditionally used in both civil law jurisdictions and by the Model Penal Code.<sup>108</sup> It is only in recognizing that duress, at its heart, is an excuse and not a justification, that one can understand why the proportionality requirement is unjust. An individual who is truly under duress cannot make a free choice and thus cannot be morally

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103 Rome Statute of the International Criminal Court, *supra* note 5, pmb1. (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished.”).

104 See *supra* note 6 and accompanying text.

105 See *supra* note 96 and accompanying text.

106 See *supra* note 20 and accompanying text.

107 See *supra* notes 81, 95.

108 See *supra* note 98 (explaining that currently it may not be politically realistic to advocate the arguably purer MPC approach, and instead, the proposed revision should retain the “death or serious bodily injury” requirement in order to appear more moderate). The focus of this author’s proposed revision to Article 31 is removing the proportionality requirement.

culpable for his actions. Additionally, it was explained why a coerced individual is not a proper candidate for punishment based on any of the traditional penal purposes. Drazen Erdemovic had a gun put to his head and was forced to commit terrible crimes; but while his actions may indeed be condemned, Erdemovic himself should have been excused. The international community may still advance its goal of ending impunity by justly punishing those individuals who coerce the attacks, rather than the soldiers who are placed in an impossible situation. It is not the place of the ICC to put retribution and a perceived end to impunity above what is arguably the fundamental purpose of criminal law: punishing individuals in accordance with their moral culpability. The coerced individual (even when coerced into killing innocents) is not morally culpable and therefore should not be punished. For the foregoing reasons, immediate revision of Article 31 of the Rome Statute to remove the proportionality requirement is needed.