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Change of Course or Product of Desperation?: The Development of the Defense of Duress in International Criminal Law from Erdemovic to Rome

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CHANGE OF COURSE OR PRODUCT OF DESPERATION?

THE DEVELOPMENT OF THE DEFENSE OF DURESS IN INTERNATIONAL CRIMINAL LAW FROM ERDEMOVIĆ TO ROME

By

MICHAEL JOSEPH ORLANDO III

A Thesis submitted to the
Department of International Affairs
in partial fulfillment of the
requirements for the degree of
Master of Science

Degree Awarded:
Summer Semester, 2008

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To John, Louise, Michael and Philomena

ACKNOWLEDGMENTS

My most sincere thanks go to Professor H. Talbot D'Alemberte for his direction and aid in research. Thanks are also extended to Christian Ahlund. In addition, I would like to extend my gratitude to Ambassador Per Saland and Dr. Albin Eser for providing insight into the workings of the Rome Conference. I would also like to recognize Howard Shores and Christopher Mullins-Silverstein for their aid in editing. Additional thanks are due my wife and parents for their love, support and encouragement throughout this process.

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LIST OF ABBREVEATIONS

ACABQ:	UN's Advisory Committee on Administrative and Budgeting Questions
BSA:	Bosnian Serb Army
CCIL:	Committee for the Codification of International Law
HVO:	Bosnian Croat Army
ICC:	International Criminal Court
ICJ:	International Court of Justice
ICTY:	International Criminal Tribunal for the Former Yugoslavia
ILC:	International Law Commission
JNA:	Yugoslav National Army
OLA:	United Nations Office of Legal Affairs
OP:	Observation Post
PrepCom:	Prepatory Committee, appointed to succeed the *Ad Hoc* Committee
UN:	United Nations
UNMO:	United Nations Military Observer
UNPROFOR:	United Nations Protection Force
UNWCC:	United Nations War Crimes Commission

ABSTRACT

The case of Dražen Erdemović before the International Criminal Tribunal for the Former Yugoslavia is among the most important in modern international legal history. It represents the first time an accused has pled guilty to committing crimes against humanity before an international tribunal, but most importantly it was the first trial since those following World War II in which the issue of acting under duress was raised as a defense. The issue of admitting duress as a defense is of great importance to the nature of fairness in an international tribunal. As this issue was an unsettled matter of international law, this case produced important opinions, both for and against the use of the defense in a case involving the death of innocent people. Only months after the decision in *Erdemović*, the Rome Statute of the International Criminal Court was promulgated. This document took a decidedly different view of duress as compared to *Erdemović*. This paper examines the *Erdemović* case in detail and its impact on the Rome Statute.

INTRODUCTION

The right to defend oneself against allegations of wrongdoing is one of the hallmarks of a just legal system. This is the case not only in national jurisdictions, but also in international law. As such, in much of the world the accused is afforded a presumption of innocence and the right to defend himself or herself through counsel of their choice. Contained in the right to answer criminal accusations is the concept that the accused may chose to claim a defense against the charges they face. Among these defenses can be loss of mental capacity, self defense, and acting under compulsion. The last of these is also known as acting under duress. That is, acting under threat of immediate harm from a third party.

Dražen Erdemović faced these circumstances when he, along with several of his follow soldiers from the 10th Sabotage Unit of the Bosnian Serb Army (BSA), participated in the Srebrenica Massacre on July 16, 1995. A reluctant soldier, he did not want to participate in the killing, but was threatened by his commanding officer that if he failed to do what was asked of him, he too would be killed along with the victims. Erdemović was wracked with guilt over what he had done. In an effort to alert the world about what had happened that July day, he contacted several western news organizations and told them his story. This act set up a chain of events which put Erdemović in the dock at the International Criminal Tribunal for the Former Yugoslavia (ICTY) to answer for his crime. His case, and the issues raised within it, would become a central focus of modern developments in international criminal law. Of central importance was the question of whether Erdemović should be allowed to plead that he acted under duress when he participated in the massacre. It was finally determined that this defense was not available in cases which involved the death of innocent people.

The decision in *Erdemović* would be examined by many legal scholars. Opinions about the fairness of the outcome of this case were mixed. Only months later, the Rome Statute of the International Criminal Court was released. A portion of the Statute lists general principles of law under which the Court will operate. In these principles is a list of several defenses which may be raised to answer charges before the court. Included in

this list was the defense of duress. Of note is that no explicit prohibition against the use of the duress defense to answer the crime of murder existed in the Statute. This would lead one to question whether the *Erdemović* decision had influenced the final language of the Rome Statute in any way.

Through careful analysis of court documents, this work will outline the circumstances which led to Erdemović's participation in the Srebrenica Massacre. It will then discuss the trial proceedings and opinions rendered by the ICTY. Finally, with the help of two members present at the Rome Conference, this work will examine the development of the concept of a duress defense within the Rome Statute. Special attention will be paid to the negotiations surrounding the Statute and how, if at all, the *Erdemović* decision impacted them.

The first chapter will examine information from close friends and relatives, as well as court testimony, to determine how Dražen Erdemović, a young locksmith from Bosnia-Herzegovina, came to face the charge of committing crimes against humanity before the ICTY. Additionally, the chapter will examine the development of the ICTY from its philosophical roots to its inception.

The second chapter will discuss Erdemović's case before the ICTY. The primary sources of information in this section will be court transcripts and judicial opinions. Through analysis of the case, the reader will also learn about the history of cases concerning duress, especially those decided following World War II. This chapter will also highlight the differing conceptions of the nature of this defense within the common law and civil law nations.

The final chapter examines how the Rome Statute of the International Criminal Court came to be. It will examine its origins following World War II and the lack of substantive work on the Statute through most of the Cold War. Analysis will continue with a study of how the Rome Conference, which formulated the code, made final decisions on the language contained in Article 31 (1) (d), dealing with the duress defense. Finally, criticism of the final form of Article 31 (1) (d) will be examined.

Through analysis of the *Erdemović* case, it will become apparent that the issue of acting under duress was not a settled matter of international law following World War II. As such, the decision taken in *Erdemović* would be a definitive statement on the current

development of international law on that topic. Additionally, analysis of the nature and working of those attending the Rome Conference will reveal that the *Erdemović* case was used by both those in favor of admitting duress as a defense to the charge of murder and by those opposing it.

As such, the factor which truly determined the nature and language of the Rome Statute on duress was the desire of the leadership at Rome to achieve consensus on the issue, rather than formulating what they viewed as a proper conception of the issue. The decision taken by the court in *Erdemović* and the development of the Rome Statute are important factors in the modern development of international criminal law. At the core of these developments is the issue of fairness to the accused. Even those who stand accused of the most heinous crimes imaginable deserve fairness before the law.

I

ERDEMOVIĆ'S PATH TO INFAMY

On May 22, 1996, the head prosecutor at the International Criminal Tribunal for the Former Yugoslavia, Richard Goldstone, released an indictment against Dražen Erdemović. The charge alleged Erdemović, an ethnic Croat who had been serving in the Bosnian Serb Army, committed violations of the laws and customs of war or alternately crimes against humanity for his participation in the massacre following the fall of Srebrenica, Bosnia-Herzegovina, July 16, 1995.[1] Earlier in the year, Erdemović had given interviews to ABC News and the French daily, *Le Figaro*.[2] Without his admission concerning his role in the massacre at Srebrenica, the world would not have known Erdemović's guilt. Following these interviews, Serbian secret police arrested Erdemović.[3] He was turned over to the ICTY within a month of the court's request to question him.[4] On August 2, 1996, ABC News aired a *Nightline* special on Erdemović entitled "Portrait of a War Criminal."

This chapter will examine the early life of Dražen Erdemović, specifically how he managed to fight for each side in the Bosnian Conflict, and how he came to be involved in the worst mass killing in Europe since the Holocaust. Additionally, the circumstances surrounding the Srebrenica Massacre will be examined, and Erdemović's role in that event will be explained. However, the broad and detailed events surrounding the evacuation and subsequent crimes involved in the Srebrenica Massacre are outside the scope of this thesis.[5] This work will concern itself only with events in which Dražen Erdemović directly participated. In addition to these issues, the second portion of this chapter will focus primarily on the founding of the International Criminal Tribunal for the Former Yugoslavia. It will trace the beginning of the process at the London Conference held in August, 1992 through the end of its formation.

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[1] *Prosecutor v. Erdemović*, IT-96-22-PT, 22 May 1996.
[2] Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 257.
[3] Ibid.
[4] Ibid.
[5] For more detailed information on this subject, please see Appendix.

Erdemović's actions, in addition to those of the international community, converged to form the conditions under which a major issue of international law would be decided. The decision rendered in the case of *Prosecutor v. Erdemović* would prompt much legal and philosophical debate, and would perhaps influence the further development of international criminal law.

Early Life

Dražen Erdemović was born on November 25, 1971. He grew up outside the town of Tuzla, Bosnia-Herzegovina. Erdemović was ethnically Croat; however, his hometown was mixed with those of Serb, Croat and Bosniac Muslim descent. He had a circle of friends that was also ethnically diverse. A Muslim friend of his claimed that they did everything together, that there was no difference between them.[6] Erdemović's friends describe him as misguided, unstable and weak. According to a former girlfriend of Erdemović, he did not know what he wanted; he was trying to find himself.[7] This man who was trying to find himself, instead was caught up in the events of the breakup of the former Yugoslavia.

Military Service

In December 1990, Erdemović began his compulsory military service in the Yugoslav National Army (JNA).[8] He served as a military policeman at a checkpoint near Vukovar in what is now Croatia. Soon after Erdemović ended his compulsory service, the conflict in the Balkans expanded into Bosnia-Herzegovina. He received draft orders from the Bosnian Army and reported for duty.[9] While serving, Erdemović began to feel disillusioned with war, after losing four of his friends. In November of 1992, he left the army in order to avoid participating in combat operations.[10]

[6] *ABC News Nightline: Portrait of a War Criminal*. 30 min. Aug. 2, 1996, DVD.
[7] Ibid.
[8] *Prosecutor v. Erdemović*, IT-96-22-T, 20 Nov. 1996, 260.
[9] Ibid., 262.
[10] Ibid., 222.

Erdemović sought to serve in the Bosnian Croat Army (HVO) in his former role as military policeman.[11] He stood guard close to the front lines and in close proximity to a major smuggling route. For a price, people, principally Serbs, were transported along this route out of Bosnian lands to Bosnian Serb held territory. This territory claimed by ethnic Serbs in Bosnia came to be known as Republika Srpska. Erdemović took part in this smuggling operation; his actions were eventually discovered by the Bosnian authorities. He faced up to 20 years in prison as punishment.[12]

In order to escape punishment, Erdemović and his girlfriend Vesna, fled to Bosnian Serb held territory on November 3, 1993.[13] Their plan was to ultimately flee to Switzerland in order to escape the war.[14] This plan hinged on getting passports with the cooperation of those Bosnian Serbs he had helped to smuggle. However, when Dražen and Vesna arrived in Bosnian Serb territory, they found no help at all.[15] Erdemović was able to survive in Bosnian Serb held territory without joining the army until April 1994. By this time, he and Vesna had run out of money. They went to visit Vesna's uncle in Foca, Republika Srpska.[16] The couple was told that Vesna could stay in Foca, because she was ethnically Serb, but Dražen must leave, because there were only Serbs living in the city and his safety could not be guaranteed.

So, Erdemović fled to Bijeljina, Republika Srpska.[17] Upon his arrival there, he attempted to register himself in order to get an identification card. During this process, he had to produce military papers, in order to qualify for accommodation and other benefits. Having no such papers, Erdemović was not able to register. During a police raid of the town, when asked by the officers to produce a military pass, Erdemović could not oblige. A Serb friend, who happened to be with him at the time, vouched for his credibility and told the officers how Erdemović had helped smuggle Serbs into Republika Srpska.[18] Erdemović described the encounter, "They told me to go to the military department because I had no rights whatsoever because I was a Croat and I did not possess any

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[11] Ibid., 263.
[12] *ABC News Nightline*
[13] Ibid.
[14] *Prosecutor v. Erdemović*, 20 Nov. 1996, 264.
[15] *ABC News Nightline: Portrait of a War Criminal.*
[16] *Prosecutor v. Erdemović*, IT-96-22-T, 19 Nov. 1996, 180.
[17] Ibid.
[18] Ibid., 181.

document issued by the Republika Srpska."[19] Upon telling his story to an official at the military department, Erdemović was presented with two options. The first was to serve in the 10th Sabotage Detachment; this unit had soldiers of Serb, Croat and Muslim ethnicity and was primarily tasked with reconnaissance missions.[20] The second option was to serve in a paramilitary unit. Erdemović was convinced that certain members of this unit wanted to kill him.[21] So, Dražen decided to join the 10th Sabotage Detachment. He spoke with one of the Croats in the unit who assured him, "Dražen, the Commander is a very good man and he has never ever issued any order to liquidate anyone."[22]

Erdemović was given the rank of Sergeant. Initially, his service went smoothly. In October, command of the unit was changed. Milorad Pelemiš became the commanding officer of the 10th Sabotage Detachment. According to Erdemović, Pelemiš' appointment changed the dynamic of the unit. Nationalist members of the detachment gained more influence.[23] After refusing to carry out one of Pelemiš' orders to conduct a mission into Bosnia-Herzegovina that, in his opinion, would have resulted in many military and civilian deaths, Erdemović was stripped of his rank.[24] On July 10, 1995, Erdemović arrived for duty; Pelemiš told him he was to go on an assignment. Erdemović, along with his fellow soldiers, arrived in the evening, just above Srebrenica.[25]

United Nations Intervention

The United Nations Security council designated the town of Srebrenica, Bosnia-Herzegovina and its surrounding area a 'safe area' through Resolution 819, adopted on April 16, 1993. The resolution's language defined a 'safe area' as an area that ought to be free from any armed attack or hostile act. According to the resolution, this measure was taken in response to, "continued deliberate armed attacks and shelling of the innocent civilian population by Bosnian Serb paramilitary units."[26] In addition to creating the 'safe

[19] Ibid.
[20] Ibid.
[21] *Prosecutor v. Erdemović*, 20 Nov. 1996, 266.
[22] Ibid.
[23] *Prosecutor v. Erdemović*, 19 Nov. 1996, 182.
[24] *Prosecutor v. Erdemović*, 20 Nov. 1996, 270.
[25] Ibid., 289.
[26] United Nations Security Council, Resolution 819, 1993.

area,' around Srebrenica, Resolution 819 demanded the cessation of armed attacks against the municipality, demanded that the Federal Republic of Yugoslavia cease its military support of the Bosnian Serb paramilitary units, and requested the UN Secretary-General increase the presence of the United Nations Protection Force (UNPROFOR) in the area surrounding the town.[27]

Realizing that the Bosnian Serbs dominated the area around Srebrenica, the UNPROFOR commanders approached the Bosniac leadership with a proposal that they forge an agreement with the Bosnian Serb paramilitary in which a cease fire would be instituted between the two groups. UNPROFOR would then be allowed to place a company in Srebrenica, the wounded would be evacuated, and UNPROFOR would disarm the Bosniac forces within the city.[28] In effect, the Bosniac forces were to give up their arms in order for Srebrenica to receive UNPROFOR protection. The leadership of all sides agreed to this arrangement, and the Srebrenica Demilitarization Agreement was signed on April 18, 1993. A further demilitarization agreement was signed on May 8, 1993. This agreement went further than the first, officially declaring Srebrenica and its surrounding area a demilitarized zone.[29] These agreements, along with Resolution 819, should have ensured that the 'safe area' of Srebrenica would be protected against any further attacks.

The UNPROFOR presence around Srebrenica was comprised primarily of Dutch soldiers. The Unit's strength in July 1995 was 429 soldiers, half of whom were support staff. In addition, these soldiers had 30 YPR armored infantry vehicles, TOW anti-tank missiles, and six 81mm mortars; ammunition and fuel were in short supply.[30] The Dutch forces were divided into two companies: Charlie Company, which served as head quarters and managed logistics, was located in an abandoned factory in the town of Potočari, a few miles north of Srebrenica town; and Bravo Company occupied an old textile mill in Srebrenica proper.[31] Additionally, 13 observation posts were spread in a 50km perimeter around the enclave. These posts were each staffed with seven men and

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[27] Ibid.
[28] United Nations, Report of the Secretary-General Pursuant to General Assembly Resolution 53/35, *Srebrenica Report*, 1998, III. D. 60.
[29] Ibid., III. E. 65.
[30] Jan Honig and Norbert Both, *Srebrenica: Record of a War Crime* (New York: Penguin Books, 1997), 6.
[31] Ibid., 5.

were charged with logging movement, explosions and any other military activity they might observe.[32]

The UN forces surrounding Srebrenica were put in a very difficult position. They were tasked as being impartial observers and facilitators of disarmament. The language of Resolution 819 and the Srebrenica Demilitarization Agreements placed these forces between a superior Bosnian Serb military and an inferior, partially-disarmed Bosniac force. In addition, the Srebrenica Demilitarization Agreements implicitly committed UN forces to defend the integrity of the Srebrenica enclave, an action that can be problematic when trying to maintain impartiality. This difficulty was compounded by certain contradictory language used by the UN in their resolutions. In addition to Resolution 819, the Security Council issued Resolution 824 on May 6, 1993 and Resolution 836 on June 4, 1993. Resolution 824 simply reiterated the Security Council's commitment to maintaining 'safe areas' around Srebrenica and five other municipalities in Bosnia-Herzegovina. However, Resolution 836 charged UNPROFOR: "to deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina."[33] This portion of the resolution is contradictory to the principle of a demilitarized zone within the city established by Resolution 819 and the Srebrenica Demilitarization Agreements. Resolution 836 permitted disarmed Bosniac soldiers to remain within the enclave, which created a problem for the UN forces within the enclave. The enclave could not rightly claim to be 'demilitarized' when members of a military organization still remained within its borders.[34]

Additional ambiguity was provided when determining the availability of the use of force to UN forces. As cited earlier, UNPROFOR was given a mandate to deter attacks against safe areas, monitor the cease-fire, and promote Bosnian Serb troop withdrawal. In paragraph nine of the same resolution, UN forces were directed:

> In carrying out the mandate defined in paragraph 5 above, acting in self-defense, to take the necessary measures, including the use of force, in reply to

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[32] Ibid.
[33] United Nations Security Council, Resolution 836, 1993, 5.
[34] Honig and Both, *Srebrenica: Record of a War Crime*, 5.

> bombardments against the safe areas by any of the parties or to armed incursions into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys.[35]

This portion of the resolution clearly envisages a broader application of the use of force rather than simply deterring attacks.[36] However, little clarification on this subject was available to the troops on the ground in Srebrenica. In addition, the state of the UNPROFOR force by July 1995 was such that they could not mount serious resistance to Bosnian Serb forces without massive aerial support.

The reality of the situation on the ground for the Dutch UN forces was that the cease-fire was repeatedly broken by both the Bosnian Serbs and the Bosniac forces that remained in the enclave.[37] Naser Orić, the commander of the Bosniac army in Srebrenica, launched raids on Bosnian Serb civilians living in the surrounding area for the two years the UN had been providing protection to the city.[38] By July 1995, UNPROFOR forces were reduced to little more than observers to the conflict.

The Attack Begins

On July 6, 1995 at 3:15 a.m., six rockets were fired into Srebrenica proper. This signaled the beginning of the Bosnian Serb offensive on the enclave. For the remainder of the day, the shelling continued. Dutch observers estimated that around 200 shells were fired that day, some of them hitting Observation Post (OP) Foxtrot.[39] OP Foxtrot's TOW anti-tank missile system was damaged during the shelling, rendering it useless. Commander of the Dutch forces, Lt. Col. Ton Karremans requested close air support. However, the UN, because of fear of provoking the Bosnian Serbs during delicate negotiations, refused to authorize any air strikes.[40] The shelling ended at 7:00 p.m. Despite the day's events, Karremans felt secure, believing that the shelling was merely an

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[35] United Nations Security Council, Resolution 836, 1993, 9.
[36] Honig and Both, *Srebrenica: Record of a War Crime*, 5.
[37] Ibid., 6.
[38] David Rhode, *Endgame: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre Since World War II* (New York: Farrar, Straus and Giroux, 1997), 15.
[39] Ibid., 14.
[40] Honig and Both, *Srebrenica: Record of a War Crime*, 8.

attempt to provoke the Dutch and Bosniac forces into a wider conflict. The shelling resumed on July 8. The position surrounding OP Foxtrot was again targeted. Around 2:30 p.m., OP Foxtrot was approached by a group of Bosnian Serb soldiers. The group was cordial at first, but later demanded entry into the OP. The OP was raided for military and personal belongings.[41] The soldiers manning the OP were allowed to leave in their YPR and return to the Dutch Command Post.[42] During their return to Srebrenica, the soldiers encountered a road block being set up by Bosniac soldiers and civilians. The Dutch had been warned by the Bosniac forces that they would be killed if they abandoned any of the OPs, which occupied important strategic positions.[43] The soldiers were ordered to scan the area for Rocket Propelled Grenades. When none were found, they were ordered to proceed on their way through the road block as quickly as possible. A grenade was thrown at the YPR by one of the group. The top hatch of the vehicle did not close on time, and Pvt. Raviv van Renssen was struck in the head by shrapnel.[44] Despite the best efforts of his comrades to save him, Van Renssen died shortly after.

This incident highlights the untenable position in which UNPROFOR forces found themselves in Srebrenica. They were charged with maintaining a peace that did not exist between two factions that were both hostile to its soldiers. In addition, the leadership of the UN valued pursuit of a diplomatic solution at the expense of protecting its own soldiers. By dusk on July 8, it was clear that the UN troops on the ground in Srebrenica were at the mercy of both the Bosnian Serbs and the Bosniacs within the enclave.

In the following days, OP Uniform was taken and its occupants were taken prisoner by the Bosnian Serbs, rather than risk returning to Srebrenica. Karremans had always assumed that if any OP was taken, its occupants could always retreat back to the main Dutch positions in Potočari or Srebrenica. However, this failed to be a viable option, after the Bosniacs made good on their threat.[45] So, the decision to surrender was left to the commander of each remaining OP. On July 9, OP Sierra and Kilo were taken

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[41]Rhode, *Endgame*, 31.
[42] Ibid., 32.
[43] Ibid., 35
[44] Honig and Both, *Srebrenica: Record of a War Crime*, 10.
[45] Ibid., 11.

and OP Delta was abandoned. The Dutch perimeter around the enclave was being systematically destroyed.

Terminus

On the evening of July 9, the UNPROFOR Commander, French Lt. Gen. Bernard Janvier, ordered UN forces to make a stand against the Bosnian Serb advance. In response, UN personnel set up 'blocking points' along major arteries leading into Srebrenica town. The soldiers feared for their safety, given their conspicuous white vehicles. However, these roadblocks were systematically avoided by the advancing Bosnian Serb Army, and thus were rendered ineffective.[46] The Dutch sought to fall back and redeploy, but Bosniac forces refused to allow them to do so. Threats between the BSA and the UN were exchanged. Limited close air support was authorized and carried out on July 11, however it was quickly ceased when the BSA threatened to execute the Dutch soldiers it held prisoner.[47] Karremans opened cease fire negotiations that night. The resulting surge of refugees fled north, toward Potočari. By the evening of the 11th, 25,000 refugees sought protection in Potočari.[48] Of this number, 20,000 were located outside of the Dutch compound; the remaining refugees remained inside the base perimeter.

Understanding their compromised position, the Dutch government and the UN both decided that the UNPROFOR soldiers in Potočari ought to concern themselves primarily with monitoring the evacuation of refugees.[49] Bosnian Serb General Ratko Mladić outlined the evacuation plans to Karremans. The refugees were broken up into five groups. The first four would consist of casualties, women and children, sick, international staff, and the Dutch forces themselves. The final group was to be made up solely of Bosnian Muslim men.[50] Karremans objected to the separation of the men from everyone else, but was rebuffed by Mladić. The evacuation was to be done by bus; the first busses left Potočari at 3:00 p.m. on the 12th.

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[46] Ibid., 16.
[47] Ibid., 25.
[48] Ibid., 28.
[49] Ibid., 33.
[50] Ibid., 34.

Dutch forces attempted to escort the busses evacuating refugees, but eventually had their vehicles confiscated by the BSA. There were to be no outside witnesses of the refugees' fate. As the number of people outside the Dutch compound slowly dwindled, those inside contemplated their fate. They were told that they too would be evacuated, as the Dutch could offer no resistance.[51] By the end of the day on July 13, 1995, nearly all of the refugees in Potočari had been evacuated. The enclave of Srebrenica had been successfully cleansed.

The Branjevo Collective Farm

On the morning of July 11th, Erdemović and his unit advanced into Srebrenica's city center. Contrary to what they had been warned, they encountered no resistance. The unit found only one hundred people still in the town. On the 12th, the unit's commander, Milorad Pelemiš, ordered the men to Vlasnica, as they had nothing to do in Srebrenica. Erdemović spent the 13th of July at the funeral of a fellow soldier, who had been killed in a traffic accident. Upon their return from the funeral, on or about July 16, Erdemović, along with seven other soldiers, Brano Gojkovic, Aleksandar Cvetkovic, Marko Boskic, Zoran Goranja, Stanko Savanovic, Vlastimir Golijan, and Franc Kos, were ordered to report to a Lieutenant Colonel in Zvornik.[52] This officer, later identified as LT. Col. Salapura, ordered the men from the 10th Sabotage Unit to follow his vehicle. He led them to Branjevo Collective Farm, outside Pilica, several miles north of Srebrenica. They arrived around 10:00 a.m. When they arrived, the Lieutenant Colonel spoke briefly with Brano Gojkovic, the ranking member of Erdemović's group. When Gojkovic returned, he informed his men, "Now buses will be brought in with civilian population from Srebrenica, men."[53] According to Erdemović's testimony, he replied, "I do not want this. Are you normal?"[54] Gojkovic responded, "Mr. Erdemović, if you do not want to, stand

[51] Rhode, *Endgame*, 260.
[52] *Prosecutor v. Erdemović*, 19 Nov. 1996, 185.
[53] *Prosecutor v. Erdemović*, 20 Nov. 1996, 293.
[54] Ibid.

with them so that I, so that we can kill you too or give them weapons so that they can shoot you."[55] Erdemović describes the subsequent events:

> There were two military policemen escorting these buses. They would bring out groups of 10 people out of the bus and, of course, they were looking into the ground. I remember the first bus. I remember the first bus. Their heads were bent downwards and their hands were tied and they were blindfolded.[56]

He continues:

> They took them to the meadow. So we started shooting at these people. I do not know exactly. To be honest, I could not follow. It was simply I felt sick. I had a headache. I tried to avoid it as much as I could, try to avoid taking part in it. I wanted to save one man, but they would not let me…They told me, that he did not want to have any witness to the crime.[57]

In all, between fifteen and twenty busses were brought into the farm area. Each bus carried roughly 60 men. It is estimated that over 1,000 men met their death by the hand of Dražen Erdemović and his fellow executioners.[58] During the subsequent investigation of the farm, clothing, shoes, ammunition cartridges, and human debris were found.[59] In addition, a mass grave on the site contained 153 bodies, some with their hands bound.

At around 3:00 p.m. on the 16th, after the busses stopped, Lt. Col. Salapura told Erdemović's group that there were 500 Muslim prisoners in the culture hall in Pilica, and that they were in danger of escaping. Erdemović again voiced his opposition to what was clearly an order to execute these prisoners. However, this time, those in his unit supported him, and also refused to take part. Another unit was sent to do the work, instead.[60] While attending a meeting in a café nearby the culture hall, Erdemović could hear gunfire and explosions from inside the building. At the end of the day, the troops were bussed back to Bijeljina.

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[55] Ibid.
[56] Ibid., 294.
[57] *Prosecutor v. Erdemović*, 19 Nov. 1996, 186.
[58] Honig and Both, *Srebrenica: Record of a War Crime*, 64.
[59] *Prosecutor v. Erdemović*, 19 Nov. 1996, 134.
[60] Ibid., 186.

Contacting the West

In the days following the massacre, Dražen and those who took part in the executions with him took to drinking heavily. Feelings of self-loathing crept into Erdemović's mind. He spent little time at home with his family. Haunted by his actions, he found solace in alcohol. His wife, Vesna, described, "He was lost. He couldn't sleep. He'd get upset and impatient. I asked him what happened that was so bad since the news said there were no Muslims left in the town, which meant no battles."[61] On the evening of July 22, 1995, Erdemović was drinking with two friends. Stanko Savanovic, a fellow member of the execution squad, shot at the men. Erdemović was hit twice. Erdemović reasoned, "They had probably reached the conclusion that I couldn't be trusted; that I couldn't stand it and that perhaps I'd do exactly what I am doing today, testifying."[62] After four operations to repair the damage, and a month in the hospital, Dražen Erdemović returned to Bijelina and attempted to contact the United States embassy with information on what he and the others had done at the Branjevo farm. The US embassy provided him information to contact media outlets. As a result of his contact with the media, he would face charges in a matter of months.

The Stage Is Set

Upon his going public with his story, Erdemović was arrested by Serbian Secret Police. The ICTY requested his testimony in cases they were currently hearing. The Serbian government agreed, and transferred him into the custody of the ICTY on March 30, 1996. Slightly less than two months later, Erdemović found himself charged for his actions at the Branjevo Farm. The events that occurred as a result of these charges could not have been foreseen at that time. However, Erdemović's case would raise a question that goes to the heart of criminal responsibility. It would be decided by the appeals chamber of the ICTY.

[61] *ABC News Nightline: Portrait of a War Criminal.*
[62] Ibid.

The London Conference and its Aftermath

On July 31, 1992 Human Rights Watch published *War Crimes in Bosnia-Herzegovina* which chronicled the horrors of the war and their impact on the civilian population. It referred to indiscriminate use of force, excessive collateral damage, and ethnic cleansing.[63] The report listed a group of ten Serb and Bosnian Serb leaders who were allegedly guilty of war crimes. Additionally, the report notes, "the Croat and Muslim armies are guilty of holding Serb civilians as hostages, of having mistreated prisoners detained and more generally for having harassed Serbs in certain zones that they control," but "the most egregious and overwhelming number of violations of the rules of war have been committed by Serbian forces."[64] The end of this report calls for an international tribunal charged with investigating and bringing to justice those individuals responsible for war crimes.[65] This report, coupled with news reports by the British television network ITN and reports by Roy Gutman in New York Newsday helped to influence Western public outrage at the atrocities being committed in Yugoslavia.[66] In response to public outcry, Western Leaders and leaders from the belligerent parties met in London in late August, 1992.

This conference was conceived to pressure the warring parties into producing a peaceful resolution to the conflict. Many threats were made, including: creation of a special investigator to probe possible war crimes, economic sanctions, and military intervention.[67] Germany was the most vehement in their condemnation of the acts taking place. Klaus Kinkel, the German foreign minister, proposed the establishment of a tribunal in his speech before the conference.[68] However, the crimes committed by the Nazi regime in the Balkans precluded any possibility of German intervention in the conflict.[69] The French and English delegations to the conference were wary of provoking reprisals on their soldiers already stationed in the Balkans on UN peacekeeping missions.

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[63]Pierre Hazan, *Justice in a Time of War* (College Station, TX: Texas A&M University Press, 2004), 13.
[64] Ibid.
[65] Ibid., 14.
[66] Ibid., 12.
[67] Ibid., 17.
[68] International Criminal Tribunal for the Former Yugoslavia, *The Path to the Hague: Selected Documents on the Origins of the ICTY* (The Hague: United Nations, 2001), 13.
[69] Hazan, *Justice in a Time of War*, 18.

The United States was especially wary of getting caught up in a potential quagmire.[70] With the leading Western nations completely unwilling or unable to back up any threat with action, their words and warnings rang hollow. The two major ideas agreed upon at the London Conference were: the imposition of an arms embargo on all of the former Yugoslavia, and the appointment of a special *rapporteur* for the former Yugoslavia. Tadeusz Mazowiecki, former Polish Prime Minister, was chosen for this post. He was charged with documenting crimes committed during the war. Three years later, in his letter of resignation, he describes his position as "stenographer of horror."[71]

Following the London Conference, several diplomats reiterated the need for intervention in the Balkan region. Most notably, the American Secretary of State, Lawrence Eagleburger made unexpected comments during the International Conference on the Former Yugoslavia held in Geneva. On December 16, 1992, he stated, "It is now clear, in short, that Mr. Milošević and Mr. Karadžić have systematically flouted agreements to which they had solemnly and yet cynically, given their assent."[72] He continued:

> Finally, my government also believes it is time for the international community to begin identifying individuals who may have to answer for having committed crimes against humanity. We have, on the one hand, a moral and historical obligation not to stand back a second time in this century while a people faces obliteration. But we have also, I believe, a political obligation to the people of Serbia to signal clearly the risk they currently run of sharing the inevitable fate of those who practice ethnic cleansing in their name.[73]

Eagleburger went on to name names of those he felt ought to be tried for war crimes. His list included the names of some present at the conference. In an interview following the conference, Eagleburger said that he had been persuaded to make the speech by Human Rights activist and Holocaust survivor Elie Wiesel.[74] "He persuaded me that these people needed to be named and that this conduct could not go on. It was my last opportunity to

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[70] Ibid.
[71] Ibid., 23.
[72] ICTY, *The Path to the Hague*, 67.
[73] Ibid., 69.
[74] Ian Guest, *On Trial: The United Nations, War Crimes, and the Former Yugoslavia* (Washington: Refugee Policy Group, 1995), 105.

do it and I did it on my own."[75] The Secretary's statements did not result in any action by the United States in support of his stated goal. The Bush administration was on its way out of office, and would not commit the U.S. to anything new.

Eagleburger's statement is thought to have angered some among the Vance-Owen peace team. Cyrus Vance and Lord David Owen were representatives of the UN and EC, respectively, charged with finding a diplomatic solution to the Bosnian Conflict. According to Eagleburger, Owen found his comments unhelpful and counterproductive; Owen denies making such a statement.[76] This incident highlights the struggle between those favoring a diplomatic solution to the problem and those favoring a judicial solution which would hold individuals accountable for their actions. This struggle would become a theme in negotiations to form the Tribunal.

The Commission of Experts

On October 6, 1992, the UN Security Council adopted Resolution 780. This resolution created the Commission of Experts. The Commission was responsible for analyzing information that the UN had already obtained through Resolution 771 and with gathering further information regarding evidence of grave breaches of the Geneva conventions and other violations of international humanitarian law committed in the former Yugoslavia.[77] Resolution 771 required states and Non-Governmental Organizations to submit substantiated information to the Security Council regarding war crimes in the former Yugoslavia.[78] Additionally, Resolution 780 contained the language "any recommendations for further appropriate steps."[79] This left the door open for further future action, but did not specify what type of action it might be. At this point, the U.S.

[75] Ibid.
[76] Ibid., 101.
[77] Virginia Morris and Michael Scharf, Eds., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 2 (Irvington-on-Hudson, New York: Transnational Publishers, Inc., 1995), 145.
[78] Michael Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (Durham, North Carolina: Carolina Academic Press, 1997), 37.
[79] Ibid., 42.

favored the formation of a commission because commissions by nature are less powerful than tribunals. They are also more easily controlled and dissolved than a tribunal.[80]

Naming Debate

Before the Commission was even a concrete entity, it created controversy. The US and UK disagreed as to the nature and power of the commission. In fact, they could not even agree on a name. The US sought to base this new body on the United Nations War Crimes Commission (UNWCC), which was formed in 1943 to investigate war crimes. The UNWCC paved the way for the prosecutions at Nuremberg two years later.[81] The US favored the name "war crimes commission" in order to establish a direct link to the past. The British did not want the phrase "war crimes commission" in the title of the new body. They favored the formation of a committee with no mention of war crimes. The two sides compromised on "Commission of Experts."[82] The two nations also clashed when determining the power of the Commission. The US favored an entity which would be able to conduct field investigations, something which the UNWCC was able to do very little. It also wanted a thirty day deadline instituted for the transmission of war crimes evidence from states to the Commission.[83] The Commission was granted the authority to conduct field investigations, but those investigations were to be funded from the UN's general budget. The thirty day deadline was also incorporated into the formation of the Commission. This may seem like a victory for US policy makers. However, this was not the case. The UN's budget was under much constraint because the US had insisted on a zero-growth UN budget for years. This meant that the commission had the power, but not the means to conduct investigations. Also, the thirty day deadline was simply ignored by nations like the UK and France.[84]

Commission's Makeup

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[80] Hazan, *Justice in a Time of War*, 23.
[81] Guest, *On Trial*, 53.
[82] Ibid., 54.
[83] Ibid.
[84] Ibid.

The Commission members were: Fritz Kalshoven, a Dutch professor of International Law and expert on the Geneva Conventions; William Fenrick, a member of the legal office for the Canadian Navy; Keba M'Baye, a former member of the International Court of Justice (ICJ); Torkel Opsahl, former member of the European Commission on Human Rights from Norway; Cherif Bassiouni, American of Egyptian descent, professor of International Law at DePaul University in Chicago.[85] Kalshoven was selected to chair the commission. A major criticism of the commission was that it was primarily academic in composition; there existed a lack of investigators.

The UN Office of Legal Affairs (OLA) was put in charge of the Commission. OLA pushed the commission to concentrate their efforts on presenting demonstrative rather than evidentiary information in their reports.[86] This was an obvious signal to the Commission that their work was not viewed as a prelude to a trial, but rather as gathering information for posterity. The commissioners themselves had difficulty in orienting the focus of their investigation. Kalshoven favored investigation of individual incidents, while Bassiouni, who was made the Commission's *rapporteur* on the gathering of facts, favored focusing on broad themes. This focus on broad themes was meant to develop a pattern with which charges against upper-echelon officials could be made.[87] By gathering as much material as he could and analyzing it for common threads, Bassiouni hoped to build a case which would lead to Radovan Karadžić, Slobodan Milošević and Ratko Mladić.

Financial Difficulties

The Commission had great difficulty in securing funds to create an official database. The Commission had to take their requests for funds to the UN's Advisory Committee on Administrative and Budgeting Questions (ACABQ). ACABQ refused funding for the project and suggested that the Commission utilize computers which had been used during the UN's peacekeeping operation in Cambodia, which was ending.[88]

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[85] Scharf, *Balkan Justice*, 42.
[86] Guest, *On Trial*, 58.
[87] Ibid.
[88] Ibid., 59.

This was of no help to the Commission, as the computers were on the other side of the world. The OLA told Bassiouni that he could not set up his database in Geneva, that he could not have extra staff to help him compile the data because no funding was available, and that he could not set up the database in Chicago because it was not a UN center.[89] This left him with no options. An agreement was reached between Bassiouni and his fellow commissioners that he would set up the database in Chicago, because UN funding would take a long time to secure. Kalshoven gave Bassiouni responsibility for the database, but reiterated that Bassiouni was working under the auspices of the Commission.[90] A $250,000 grant from the Soros Humanitarian Foundation followed by a grant from the MacArthur Foundation allowed work on the database to begin. Bassiouni employed some of his students in compiling the database, all were sworn to secrecy and the location of the database was secure, with copies stored at an alternate location.[91] Many of those working in Geneva, where the Commission was based, grew to resent the storing of documents in Chicago. Legitimate concerns were raised about an independent American institution having control of material collected for the Security Council. These concerns were voiced by UN Deputy Legal Council Ralph Zacklin.[92] He and Bassiouni would have a contentious working relationship throughout the life of the Commission. Unfortunately, there was no other option for the commission, given the circumstances under which they worked.

The Office of Legal Affairs was an under-funded and understaffed branch of the UN before the Commission was placed under its supervision. The OLA had only eight lawyers, and the Secretary General asked that three of those help with the Commission's work.[93] The Commission worked up a $1 million budget for its first year of operation. The ACABQ authorized only $680,000. In order to make up the shortfall, a trust fund was established in the Commission's name by the General Assembly. However, the Commission was not notified of the trust fund until five months after it had been established.[94] The United States was the principal contributor to the trust fund, and

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[89] Ibid.
[90] Ibid., 60.
[91] Ibid.
[92] Ibid.
[93] Ibid., 62.
[94] Ibid., 63.

provided additional support in the form of material and transportation. The UK and France contributed nothing to the fund. The trust fund became the principal source of funding for the Commission of Experts.[95]

Cooperation with the Commission

Kalshoven resigned his post in August, 1993. He cited opposition from the UN bureaucracy, lack of support from the UN and lack of independence as major obstacles facing the Commission.[96] Bassiouni replaced him as chair of the Commission.

The United Nations Protection Force was on the ground in the Balkans beginning in February, 1992. One would think the presence of UNPROFOR would afford the Commission a great opportunity to gather evidence in the Balkans. However, UNPROFOR proved to be difficult to deal with. When asked by the Commission for police reports in 1993, they were turned down. UNPROFOR claimed the reports were confidential.[97] UN military observers (UNMOs) proved to be a much better source of intelligence for the Commission. They operated on each side and were able to provide daily reports on shelling, manpower levels, and command structures. Additionally, UNMOs provided this information to the Commission. This information was especially useful in establishing command responsibility.[98]

As mentioned earlier, Resolutions 771 and 780 required governments and NGOs to share any information they had on war crimes with the Commission. The British were most uncooperative with these requirements. A 1993 incident is most illustrative of the British attitude toward the Commission. Having given asylum to about 1,000 former camp inmates at the beginning of 1993, the British had the opportunity to interview them. This produced what the British described as a "good untapped source of first-hand, substantiated, information from former detainees."[99] When Bassiouni first inquired about this information, he was told that it did not exist and that he would be notified if anything

[95] Ibid.
[96] Ibid., 64.
[97] Ibid., 67.
[98] Ibid.
[99] Ibid., 79.

turned up. By July Bassiouni had received a single sample affidavit from the British government. In an interview with the BBC Television Program *Panorama* he stated that the Commission had received no information from the British government regarding war crimes.[100] Only after the interview, in late October, did any further information from Britain arrive. This gave the distinct impression that Britain was withholding information from the Commission

The US provided the Commission with the most information, but also made it very difficult to obtain. Since most of the US intelligence on Yugoslavia was gathered through classified methods, the US had to have it declassified before it would share it with the Commission. This created a terrible backlog of information. In response, the State Department created an inter-agency group to hasten declassification, but this was only mildly helpful.[101] Bassiouni was eventually granted clearance, but this only allowed him to view the documents; he was not able to share the information in them with his fellow commissioners.

The Last Days of the Commission

Secretary General Boutros-Ghali and Cherif Bassiouni had agreed in August 1993 that the Commission would work until July 31, 1994. In November, 1993 Bassiouni prepared a budget that would fund the Commission until July 31, 1994. Carl-August Fleischauer, under secretary for legal affairs, stated that the budget seemed reasonable. On December 16, 1993, Bassiouni received a letter from Fleischauer stating that the Commission would stop its work on April 30, 1994.[102]

The UN had not approved any money to fund the committee past this date. According to a member of the ABACQ, the budget Bassiouni had prepared was not submitted by the OLA for approval on time. The reasoning the OLA gave for this was that the proposed budget that it and the Controller's office had prepared for the Tribunal was rejected by the ABACQ so forcefully that the Controller's office did not even bother to submit the Commission's budget. However, given the amount of money still in the

[100] Ibid., 80.
[101] Ibid.
[102] Ibid.

Commission's trust fund and the monthly expenses of the Commission, it could have continued to work until July 31, even without regular UN funding.[103] This begs the question, why end the Commission early?

One UN official explained, "They just didn't want Bassiouni to start lobbying, or spring any surprises that might complicate the Tribunal."[104] In fact, the US had exerted pressure to end the Commission once the Tribunal was established. It did not want to pay for two bodies to do the same job. Bassiouni fell out of favor with US diplomats when he turned down a post as deputy prosecutor at the tribunal. They felt that he was acting to extend the life of the Commission for self-serving reasons.[105]Bassiouni had proposed some Commission members be sent to the tribunal to help investigate and prosecute the Romanija Corps, who had shelled Sarajevo since 1992. The US did not respond to his proposal.

The Commission submitted an eighty-four page report with several thousand pages of supporting documents to the UN. The commission's work led directly to the prosecution of over two dozen people.[106] It ceased to exist on April 30, 1994. As of that date, the Tribunal was without a prosecutor, without a means of investigation, and had issued no indictments. Bassiouni had a starkly pessimistic assessment of the Commission. He cited: an eight month wait to establish a trust fund, no funds initially available for investigation, inability to visit Bosnia in early 1993, inability to hire field officers, an uncooperative UNPROFOR, and being shut down prematurely.[107] Each of these difficulties, except entry into Bosnia, could have been remedied or completely avoided by a bureaucracy that supported and saw value in the Commission's work. However, the Commission was viewed as a threat by many different entities for varying reasons. The lack of appreciation for the importance of quality investigations did not allow the Commission to reach its full potential. The Tribunal would face similar problems in its nascent stages.

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[103] Ibid., 92.
[104] Ibid.
[105] Ibid.
[106] Scharf, *Balkan Justice*, 48.
[107] Guest, *On Trial*, 93.

The Tribunal

The idea of a tribunal for Yugoslav war criminals was not first proposed by a diplomat or human rights group, but rather in the Serbian newspaper, *Borba*. In the January 16, 1991 edition, Mirko Klarin wrote an article entitled, "Nuremberg Now!" This article advocated the use of a 'mini-Nuremberg' to stem the tide of ethnic divisions and to bring leaders to account for their actions in order to prevent further bloodshed. "Not *when* 'this is all over', but *instead* of whatever might soon befall us."[108] Klarin attempts to form a case for prosecution based on the precedents established at Nuremberg, such as crimes against peace and crimes against humanity. He additionally cites the Convention on Genocide and the International Covenant on civil and Political Rights as obliging states to prevent and punish the provocation of ethnic and racial hatred.[109] He closes his piece, "At present, some would still be able to claim diminished responsibility, but after tens or hundreds of thousands have been killed, this would be more difficult."[110] Klarin's warning proved prescient. On May 25, 1993, nearly two and a half years later, 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 was formed by Resolution 827 of the Security Council.[111]

Why Form a Tribunal?

The reasons behind the formation of the Tribunal are many and varied. Francoise Hampson, in a February 1993 paper asserted that if everyone in the former Yugoslavia were expected to live in peace again, it was necessary for society to assert minimum values by which all must live. He felt that these basic values were essential to maintain peace in society.[112] Theodore Meron, added the potential for deterrence of future atrocities as reason to hold a tribunal. He also felt that judicial proceedings would help

[108] ICTY, *The Path to the Hague*, 43.
[109] Ibid., 45.
[110] Ibid.
[111] Morris and Scharf, *An Insider's Guide*, 177.
[112] Francoise Hampson, *The Case for a War Crimes Tribunal* (London: David Davies Memorial Institute of International Studies, 1993), 3.

educate the populace not to accept violations of human rights in the future.[113] James O'Brien wrote that the Security Council's response to the Yugoslav Conflict was four tiered. First, the Council *condemned* the atrocities through Resolution 764. Then, they *publicized* them through Resolution 771. The third step was to *investigate* through the Commission of Experts. The Tribunal fulfilled the final portion of the response, *Punishment*.[114]

The tribunal itself has commented on the nature and reason for its formation in its initial report to the General Assembly.

> The purposes of the Tribunal have been laid down in Security Council resolution 808 (1993) and, in even more detailed form, in Security Council resolution 827 (1993). They are threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace.[115]

Each of these reasons is valid. Still, the essential truth is that the Tribunal was necessary because there was a total lack of international will to intervene militarily in the Bosnian Conflict. US ambassador to Yugoslavia under George H.W. Bush, Warren Zimmerman said, "The administration's initial impulse was to cover it up."[116] President Clinton was not able to improve much on his predecessor's policy. The US government's official stance was that it was against war crimes, but not willing to commit any military forces to stop them.[117] Dick Morris, adviser to the Clinton administration, said of his former boss, "Did he value American lives more than Bosnian lives? Damn right he did. He's the president of the United States."[118] This policy left little in the way of alternative courses of action. The legalist approach was the only tool with which the West was left, after its diplomatic failures and its unwillingness to intervene militarily. The promise of justice in the future was the West's cover for inaction in the present. As Gary Bass put it, "Law became a euphemism for inaction."[119]

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[113] Theodor Meron, "The Case for War Crimes Trials in Yugoslavia," *Foreign Affairs* 72 (Summer 1993): 122.
[114] James O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia," *American Journal of International Law* 84 (Oct. 1993): 642.
[115] United Nations, International Criminal Tribunal for the Former Yugoslavia, *Annual Report*, 1994, 11.
[116] Bass, *Stay the Hand of Vengeance*, 213.
[117] Ibid., 214.
[118] Ibid., 227.
[119] Ibid., 215.

Nuremberg Reaffirmed

In its interim report filed in February, 1993, the Commission of Experts recommended that a Tribunal be established in order to prosecute clear violations of international law it found during investigations.[120] This recommendation led to the adoption of Resolution 808 on February 22, 1993. This resolution stated that the Security Council had decided in principal to establish an international tribunal to prosecute crimes committed in the former Yugoslavia. The resolution also asked the Secretary General to submit a report on the nature of the tribunal within sixty days.[121] Upon the adoption of Resolution 808, US ambassador to the UN, Madeline Albright addressed the Security Council.

> There is an echo in this Chamber today. The Nuremberg Principles have been reaffirmed. We have preserved the long-neglected compact made by the community of civilized nations forty-eight years ago in San Francisco to create the United Nations and enforce the Nuremberg Principles. The lesson that we are all accountable to international law may have finally taken hold in our collective memory. This will be no victor's tribunal. The only victor that will prevail in this endeavor is the truth.[122]

Once the decision to establish a tribunal was made, choices had to be made regarding its nature. Under what authority would the tribunal be established? One choice was to draft a convention which all governments would be able to join. The other option was to create the tribunal under the Security Council's authority to enforce international peace and security.[123] This power is granted the council by Chapter VII of the UN Charter. Each of these options had drawbacks. The convention method would be very time-consuming as each government would have to ratify the convention and incorporate its principals into its domestic legal structure. It would likely be years before the convention would come into force and the tribunal could be formed.[124] If the Security Council chose to invoke its Chapter VII powers, it would mean the decision would be

[120] Guest, *On Trial*, 106.
[121] Scharf, *Balkan Justice*, 54.
[122] Ibid.
[123] Guest, *On Trial*, 113.
[124] Ibid.

automatically binding on UN member governments without their having a say in the process. This had the potential to alienate a large group of nations. Several non-aligned nations already feared what they saw as the expanding power of the Security Council and did not wish to surrender any more power to the body.[125]

The Secretary General entrusted a team headed by Ralph Zacklin to produce the official statute of the Tribunal.[126] The team produced a statute fairly quickly. On May 25, 1993, the Security Council passed Resolution 827, officially establishing the Tribunal under the authority of the Security Council's authority to enforce international peace and security. The statute of the new Tribunal provided for no subsidiary UN body to oversee the commission, a measure many states favored. The statute also held that heads of state were not immune from prosecution, a major blow to those supporting diplomatic initiatives with leaders of the various factions.[127] The doctrine of command responsibility was also incorporated into the statute, along with the rejection of the defense of obedience to orders.[128] The statute provided for the prosecution of individuals for: crimes against humanity, violation of the Convention on Genocide, violation of the Geneva Conventions, and violations of customary international law.[129] This invested the Tribunal with more power than was expected. The Tribunal's rules improved on those used at Nuremberg in an important way. Any information available to the prosecution would also be made available to the defense. This was an aspect of the Nuremberg proceedings that had been criticized in years since the trials.[130] Initially, this seemed to discourage witnesses from sharing information with the Tribunal for fear of reprisals. The rules were amended, allowing for testimony to be kept confidential if not used as part of a charge.[131]

Because the Tribunal was formed under the authority of the Security Council, the non-aligned governments felt that they had been shut out of the process, and thus were less-likely to cooperate with and support it. This attitude pervaded the UN. The UN

[125] Ibid., 114.
[126] Ibid., 125.
[127] Ibid.
[128] Scharf, *Balkan Justice*, 58.
[129] Guest, *On Trial*, 125.
[130] Ibid., 133.
[131] Ibid.

expected roughly eighty nominations for judge positions on the Court. It received forty-one. Only eight nations nominated judges. [132]

The original slate of forty-one nominees compiled by the General Assembly was sent to the Security Council. The list was reviewed and cut in half by the Security Council and sent back to the General Assembly for voting. As it happened, no Muslim was elected judge. However, four predominantly Muslim nations did have seats on the Court, including Nigeria, Egypt, Malaysia and Pakistan. Russia was not represented on the panel. There was concern that judges had been chosen before a prosecutor was elected, this was to give an immediate face and legitimacy to the Tribunal.[133] Antonio Cassese of Italy was elected President Judge of the Tribunal.

Budgetary Concerns

The United States was arguably the biggest supporter of the idea of a tribunal. However, their insistence on a zero-growth UN budget hampered the Tribunal in its early days. The Tribunal, like the Commission of Experts, was funded through the UN's regular budget. Similarly, the tribunal was placed under the Office of Legal Affairs. The OLA, together with the Controller, created a $31.2 million budget for the tribunal's first year of operations.[134] However, the Tribunal encountered the same difficulties the Commission had when dealing with the ACABQ. The ACABQ questioned the need for so many new posts and the salary level for judges.[135] The US's insistence on a zero-growth budget made what money the UN had that much more difficult to obtain. The ACABQ approved a $5.6 million expenditure for the first half of 1994.[136] The tribunal had no choice but to accept it. In March 1994, the OLA requested $32,642,700 as the Tribunal's budget for the next two years. This proposal was again rejected; $11 million was approved for use for the second half of 1994. The Tribunal, even though it was officially formed, had not neutralized the skepticism of many at the UN. Small budgets for small periods of time allowed the UN to only spend what it absolutely had to on this

[132] Ibid., 131.
[133] Ibid.
[134] Ibid., 135.
[135] Ibid.
[136] Ibid., 136.

new body. This may have made sense to those in New York, but it nearly killed the Tribunal.

This budgeting amounted to a probationary period for the Tribunal. The Tribunal was able to make contracts for only one year at a time, hardly a long enough period to attract the most qualified candidates.[137] With the initial budget, the Tribunal was able to construct cells and a court room, but nothing more. The Hague, Netherlands was chosen as the location for the Tribunal. The Dutch foreign minister had offered to host the Tribunal without consulting others in the government. This led to some disagreement. According to UN custom, the Dutch, as the host nation, were supposed to charge a nominal rent and provide for incidental administrative expenses. However, the Dutch government was concerned about the lukewarm attitude toward the Tribunal, and was also wary of its budgetary problems. What's more, the prospect of having Serbs in the ICTY dock created fear that the substantial Serb guest worker population in the Netherlands would provoke civil unrest.[138] Finally, the two sides agreed that the UN would pay for use of the Aegon Insurance building as the Tribunal's seat. The UN would also be responsible for outfitting cells for the accused in the nearby Dutch jail at Scheveningen. The Dutch agreed to provide security to the Judges and the court, and would also arrange transportation for witnesses.[139]

The lack of funds also negatively affected the prosecution's ability to investigate. Of the $11 million approved for the second half of 1994, only $107,000 of it was earmarked for the prosecution's travel costs and $244,000 for witness travel.[140] Deputy Prosecutor Graham Blewitt was never asked to provide estimates of the costs of investigations during this time.[141] Budgetary decisions were made without consulting appropriate individuals. The lack of money prevented investigators from the prosecutor's office from continuing the Commission's work after it was dissolved. In response to the prosecution's protests, the UN Secretariat advised them that their main job was to debrief the Commission. A voluntary fund was set up, as had been for the Commission, to aid the

[137] Ibid., 137.
[138] Ibid., 139.
[139] Ibid.
[140] Ibid.
[141] Ibid., 141.

Tribunal in its work. The US contributed $3 million for computers and another $25 million to pay salaries of Americans working in the prosecutor's office.[142]

Chief prosecutor, Richard Goldstone provides an insight into UN red tape. When budget constraints resulted in his travel privileges being suspended, he sought to tap into the voluntary fund in order to continue with his investigations. He was refused. Goldstone then asked that Pakistan's ambassador to the UN inquire about why the funds were unavailable, as they had donated $1 million to the voluntary fund. Goldstone received his requested funds within days of the Pakistani inquiry.[143]

The Tribunal's proposed 1995 budget was $28.4 million. It included 152 new posts at the tribunal. When submitted to the ACABQ in December of 1994, it was rejected in favor of another stop-gap budget of $7 million which was to carry the Tribunal until March.[144] The tribunal was still very much under-funded. The reason lay in the composition of the ACABQ. Its American member was enacting the policy of her government in insisting on cost cuts. France was still skeptical the Tribunal would succeed. India, Mexico, and Brazil felt shut out of the process of forming the tribunal, and thus harbored some animosity toward it.[145] The Tribunal was to face budgetary problems until July 1995, when it was decided that funds would be drawn from both the UN's Regular fund and from its Peacekeeping fund.[146]

Selecting a Prosecutor

Budgetary concerns were not the tribunal's only worry following formation. Security Council members felt that a prosecutor would be found relatively easily. The process would be anything but easy. The Islamic and non-aligned nations favored Bassiouni as their prosecutor because of his Middle-Eastern roots and because he was a Muslim.[147] The US did not actively support Bassiouni's candidacy because they did not want the Tribunal to appear to be greatly influenced by US policy. Ambassador

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[142] Ibid., 142.
[143] Richard Goldstone, *For Humanity* (New Haven: Yale University Press, 2000), 88.
[144] Guest, *On Trial*, 143.
[145] Ibid., 144.
[146] Ibid.
[147] Ibid., 146.

Albright's staff did circulate a letter in favor of Mr. Bassiouni, but little else was done. The US suggested Bassiouni take a deputy prosecutor position under the British candidate, Duncan Lowe. Bassiouni refused this offer. This situation resulted in neither Bassiouni nor Lowe gaining the requisite number of Security Council votes to gain the position. The Tribunal's Statue lent little help in this process. It said the prosecutor should be of, "the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases."[148] This meant that there was little way to rank candidates for the position. Muslim nations were furious that Bassiouni was not elected, especially since there were not any Muslim judges on the Tribunal.[149] Next, former Indian Attorney General Soli Sorabjee was nominated. Pakistan made it clear that they would not allow his election, so he was dropped from consideration. Finally, on October 22, 1993, Venezuelan Attorney General Ramon Escovar-Salom was elected and accepted the position.[150]

Mr. Escovar-Salom was heavily involved in the upcoming Venezuelan presidential election. He was also in the middle of impeachment proceedings. This prompted him to inform the Security Council that he would not be available until February.[151] On a December visit to the US, he assured State Department officials that he still wanted the job, even though his political party had been victorious in elections. The US voiced concern that Escovar-Salom's absence may be hurting the Tribunal's cause. On January 14, 1994, Mr. Escovar-Salom withdrew his acceptance of the position. Escovar-Salom's only duty as prosecutor was to appoint Australian Graham Blewitt as deputy prosecutor. Blewitt had been part of the Australian government's war crimes unit before joining the Tribunal.[152]

In the wake of the disaster, Duncan Lowe was re-nominated. The US worked hard to secure the requisite number of votes for Lowe in the Security Council. However, Lowe's second bid was met with a Russian threat that they would veto any nominee from a NATO nation.[153] Blewitt was then nominated, but ran into resistance from his own

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[148] Ibid.
[149] Ibid., 149.
[150] Ibid.
[151] Ibid., 150.
[152] Ibid., 152.
[153] Ibid.

nation. Australia felt that having both a judge and head prosecutor at the tribunal might put them at undue risk. American Charles Ruff and Canadian Christopher Amerasinghe both fell victim to the Russian veto. The deadlock was broken on July 8, 1994.

Tribunal president Antonio Cassese submitted Richard Goldstone of South Africa to Ralph Zacklin for consideration. Goldstone had chaired a commission which conducted inquiries into the actions of South Africa's police force during Apartheid's last years. He had earned great praise for his conduct of the commission. Nelson Mandela gave his blessing to the idea and Goldstone was unanimously elected.[154] The Tribunal had been without a chief prosecutor for nearly 14 months.

Independence

> The Tribunal was a tool of politics, but it was a judicial, not political tool. The distinction is crucial. It means that the Tribunal itself, once created, was independent. The independent status of the Tribunal meant that it developed a momentum of its own, so that, in time, it mattered less what precise motives for its establishment were.[155]

In April of 1995, the Tribunal received its first defendant.[156] No longer could its viability be questioned. The Tribunal also requested that the government of Bosnia-Herzegovina defer their investigations of the Bosnian Serb leadership to the Tribunal. These two events would prompt the headline in *De Telegraaf* 'The Paper Tiger is Roaring.'[157] In the coming months the Tribunal would rule on technicalities of international law. It would even answer a challenge to its very existence by reviewing the validity of its formation by the Security Council, something the Nuremberg Tribunal never did.[158]

The ICTY was to be tested very early on in its existence. The case of *Prosecutor v. Erdemović* was to prove a milestone on many levels. It is the first time in world history that an accused pleaded guilty to committing a crime against humanity. In addition, the

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[154] Ibid., 153.
[155] Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia* (New York: Oxford University Press, 2004), 38.
[156] Ibid., 58.
[157] Ibid.
[158] Geoffrey Robertson, *Crimes Against Humanity* (New York: The New Press, 2000), 292.

case would raise important issues concerning the admissibility of the defense of duress when dealing with the murder of innocents in international criminal prosecution. This issue would highlight the stark differences between common law systems of justice and civil law systems of justice, an important issue when thinking about creating viable international legal structures. The decision rendered in *Erdemović* would not only further shape the jurisprudence of the ICTY, but would also serve as a guide to those creating the Statute of Rome, the founding document of the International Criminal Court.

II

ERDEMOVIĆ AT THE HAGUE

The indictment released on May 22, 1996 charged Dražen Erdemović with a crime against humanity, which was punishable under Article 5a of the Tribunal's statute; or alternatively a violation of the laws and customs of war, punishable under Article 3 of the Tribunal and also recognized under Article 3(1)(a) of the Geneva Conventions.[159] This kind of indictment allowed lawyers flexibility in trying the case. One of the two charges against Erdemović would be dropped and the other pursued. Although this may seem insignificant, this would come to have an extraordinary impact on the final disposition of Erdemović's case. Though it did not seem so at the time, a major issue of international criminal law would be influenced by this case.

This chapter will serve to describe the major events of each portion of Erdemović's case in front of the ICTY. It will begin with a summary of Erdemović's plea in front of the first trial chamber, and include a detailed examination of the issues raised in the sentencing judgment that followed Erdemović's plea. The next portion of this chapter will concern itself with the Appellate Chamber's hearing of the case and their decision regarding the admissibility of Erdemović's plea. This portion of the case is of greatest concern to scholars interested in this case's implications for international criminal law. It is here that the issue of acting under duress was examined and argued. Special attention will be paid to the majority opinion, and to Justice Cassese's dissenting opinion. In addition, selected cases of duress cited by each side in this debate will be examined in order to provide the reader with a basis for forming their own conclusion regarding this issue. Finally, the second trial chamber's sentencing judgment will be discussed.

The duress defense, as discussed in the case of *Prosecutor v. Erdemović*, highlights a major difficulty in developing international criminal law. Legal scholars and practitioners from disparate legal traditions sometimes find themselves at odds with one another. An acceptable, and ultimately just, resolution to this conflict must be sought

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[159] *Prosecutor v. Erdemović*, 22 May 1996.

when these conflicts arise. Erdemović's case provides an excellent case study for this concept, as it was not only a landmark decision for the ICTY, but also influenced the final language of the Rome Statute of the International Criminal Court (ICC).

First Trial Chamber

31 May 1996

Dražen Erdemović appeared before a trial chamber of the International Criminal Tribunal for the former Yugoslavia on May 31, 1996. This chamber was made up of Judge Claude Jorda of France, presiding judge, Judge Elizabeth Odio Benito of Costa Rica, and Judge Fouad Riad of Egypt. According to Rule 62 of the rules of procedure and evidence, this hearing was meant to:

> (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.[160]

Mr. Jovan Babić, a solicitor from Yugoslavia, represented Mr. Erdemović in front of the tribunal. Judge Jorda first made sure that both Mr. Babić and Mr. Erdemović had received copies of the indictment in Serbo-Croatian, and that they had understood it. Mr. Babić assured the chamber that this was the case. Erdemović was then directly asked the same question, and answered that he had read and understood the indictment. The registrar of the Tribunal was then called forward and read the indictment aloud in court. Following the reading of the indictment, Judge Jorda inquired if Erdemović had spoken

[160] International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rev. 6, 6 October 1995, Rule 62.

about the charges with his counsel; to which Erdemović responded, "Yes."[161] Judge Jorda then asked if the accused was prepared to plead guilty or not guilty. The Judge explained:

> 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 of the other violations, crime against humanity or war crime, violation of the 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 [*sic*] 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?[162]

Erdemović responded, "Your honor, I have told my counsel that I plead guilty."[163] Following this plea, the chamber inquired as to which one of the two alternative charges against him he was pleading guilty. Erdemović responded that he pled guilty to committing crimes against humanity. The prosecution, represented by Eric Ostberg and Mark Harmon, then summarized the facts surrounding the case. Erdemović responded that he agreed with the facts given by the prosecution, and that he had something to add. "Your honor, I had to do this. If I had refused, I would have been killed together with the victims."[164] Judge Jorda responded by assuring the accused that he would have time to explain himself in a future hearing. In addition, the presiding judge asked if Erdemović was pleased with his representation; he responded that he was satisfied. The court then clarified the possible consequences, including imprisonment, that the accused faced as a ramification of pleading guilty by having the registrar read the relevant articles of the Tribunal's charter and rules. Judge Jorda then asked Erdemović if he was coerced in any way into pleading guilty. Erdemović said he had not been threatened or offered any reward for pleading guilty before the Tribunal. Following this,

[161] *Prosecutor v. Erdemović*, IT-96-22-PT, 31 May 1996, 24.
[162] Ibid.
[163] Ibid.
[164] Ibid., 32.

the court definitively recorded his guilty plea.[165] The Tribunal then asked the prosecution whether they had any objections to dropping the second charge of a violation of the laws and customs of war; they did not.

According to Rule 100 of the tribunal, the Prosecutor and Defense would have the opportunity to, "submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence."[166] In addition, the Trial Chamber decided that Erdemović should undergo a psychiatric evaluation, in order to assure the court that he was of sound mind. Mr. Babić then made two requests of the Court. The first was seeking the Court's help in tracking down a particular witness that he intended to call at the sentencing hearing. The second was to include psychological experts from the former Yugoslavia on the team evaluating Mr. Erdemović. The Prosecution made no objection to these requests and the Tribunal moved that they be carried out. With that, the hearing was adjourned.

The commission of experts formed in order to examine the accused determined that Erdemović was not fit to appear before the trial chamber; this determination was made on June 27, 1996. The commission cited Erdemović's severe post-traumatic stress disorder as the reason behind their decision. The commission re-evaluated Erdemović months later and determined him to be fit to stand before the Tribunal in a report submitted on November 17, 1996. Two days later, Erdemović appeared before the Trial Chamber for a sentencing hearing.[167]

19 November 1996

The first issue dealt with was entering into the public record of the proceedings the fact that Erdemović reiterated his guilty plea before the Chamber in a closed hearing on July 4.[168] The Tribunal then proceeded to hear from the Prosecution. Mr. Ostberg then gave a detailed account of the events which brought Mr. Erdemović to The Hague; this included information about the Srebrenica Massacre, Erdemović's personal life, as well

[165] Ibid., 35.
[166] Ibid., 36.
[167] Sentencing Judgment, *Prosecutor v. Erdemović*, IT-96-22-T, 29 November 1996.
[168] *Prosecutor v. Erdemović*, 19 November 1996, 119.

as the facts of his crime. The Prosecution was then allowed to call forward any witnesses in support of its case. Tribunal Investigator Jean Rene Ruez was their only witness.

Mr. Ruez had investigated the fall of the Srebrenica enclave and was familiar with Erdemović's cooperation with the office of the Prosecutor. Ruez then gave a detailed description of the events leading up to the fall of Srebrenica. In addition, he testified about the fate of different groups of refugees and how they were divided and managed by the Bosnian Serb military forces. The witness then testified to the actions of Mr. Erdemović with respect to the massacre, including details about logistics and difficulties in investigating the scene of the murders. He testified that 153 bodies had been unearthed in excavations, to that point.[169] Mr. Ruez also testified as to the events that occurred at the Pilica Cultural Center, subsequent to the events on the Branjevo Farm.

When asked by Mr. Babić if the investigators found physical evidence to corroborate Erdemović's story, Ruez stated that Erdemović's description of events seemed to match up with the physical evidence that investigators found both at the Branjevo farm and at the Cultural Center. Upon hearing this question, Judge Jorda again inquired if Mr. Babić wished to change his client's plea, as the nature of his previous question seemed to indicate that he might be questioning the Tribunal's investigation. Babić responded that he did not intend to do so; he had asked the question simply to lend credibility to his client's testimony.[170]

Judge Benito asked Mr. Ruez to describe how Mr. Erdemović has cooperated with the Office of the Prosecutor. Ruez responded, "Had we not had Dražen Erdemović's testimony, we would not have been able to discover through the investigation alone the place of the execution of those prisoners who had been locked up in the Pilica school."[171] The Pilica School had been a collection point for those prisoners executed at the Branjevo farm; some of those prisoners were also executed at the school itself. When questioned further, Mr. Ruez admitted that much of the information he was testifying to was based solely on interviews he had done with Erdemović, that they were not his statements. Following this exchange, Judge Riad attempted to clarify the importance of Mr. Erdemović's testimony to the Tribunal.

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[169] Ibid., 135.
[170] Ibid., 147.
[171] Ibid., 148.

> Thank you. Mr. Ostberg, just a clarification: if you remember, you mentioned – I quote you – that the Prosecutor had no knowledge of the events prior to the confession of Mr. Erdemović.
>
> Yes.
>
> Which events are you referring to exactly?
>
> I am referring to the events that took place on the farm, on the killings, and from that we got also the information of the school and information about these killings in town. As far as I recall from our investigation of what we have done in this case, the foundation for this information in the things we were told by Erdemović. That is the only source.[172]

Mr. Ruez was then questioned as to whether he felt that the accused had joined the 10th Sabotage unit voluntarily or if he had been forced to join. The witness corroborated Erdemović's words, stating that he had joined the unit voluntarily. In addition, Mr. Ruez stated that Erdemović knew the unit carried out sabotage operations in enemy territory. This shows that Erdemović knew the nature of the unit he was joining and the potential risks and consequences that came with his decision. The unit, however, was not an execution squad. Mr. Ruez also stated that there were no contradictions found between what Mr. Erdemović had said in testimony and what was independently verified by the Office of the Prosecutor.

In order to show this corroboration, Mr. Ruez recounted the stories of two survivors of the Srebrenica Massacre. These two survivors had initially been housed in a building in Bratunac, full of prisoners who had attempted to flee the enclave as it fell. They told of systematic beatings and executions. From Bratunac, they were taken to what was independently determined to be the Pilica School. The same treatment continued, with individuals being taken out, beaten and executed. On the morning of July 16th, the remaining prisoners were told they were to be part of a prisoner transfer. Each was bound at the hands and led onto waiting busses. The busses arrived at a farm, a few minutes drive away from Pilica. When they arrived, they were forced to keep their heads down, and were led out into a field already strewn with bodies. Their group was led before an

[172] Ibid., 150-151.

execution squad, who began firing at them. The two survivors lay motionless until night fell, and they were able to escape the field.[173] Though there is no way to be certain, it can be deduced that there is a high probability that the two survivors were survivors of the executions that Erdemović's 10th Sabotage unit performed at the Branjevo farm outside of Pilica. Erdemović's and the witness' testimony seem to match up well; they both state the executions took place on the same day in a field just outside of Pilica. They also testify that the victims arrived by bus, were bound and led, heads down, toward their executioners. Judge Riad questioned Mr. Ruez on whether what the survivors said and what Mr. Erdemović said were identical stories. Mr. Ruez replied, "There are no major differences and there is no reason, therefore, to believe that was had been said is untrue. So one can take it that both parties are sincere in what they said."[174]

The final issue addressed by Mr. Ruez in his testimony was whether he felt that Mr. Erdemović had in any way minimized his role in the events he described, as he was the only one who had given testimony of his actions. Mr. Ruez responded to this query:

> I would say that having to do with the points in his statement, there were many which we were able to corroborate and the verification that we carried out was what led to the confirmation of the events as they took place as they have been described. The details of how these things were done, as you said, we have no way of investigation this in order to be sure that these have been correctly related. In my opinion, and this is to the credit of Dražen Erdemović, is that he volunteered to come to state the facts before this Tribunal. Likewise, he took the risk of identifying the perpetrators to lead to their arrest and that possibly one day they would hear their version of the facts. My personal point of view is that this approach, that is the way he describes his role in the events, makes what he says credible.[175]

Following Mr. Ruez's testimony, the Tribunal heard from Dražen Erdemović. Erdemović was first questioned about how he had come to be in the 10th Sabotage Unit. He responded, "Your honours, I would first like to say that I did not wish to do that. It was – I was under orders. If I had not done that, my family would have been hurt and nothing would have changed."[176] At that point, Judge Jorda stopped him, and informed

[173] Ibid., 157-158.
[174] Ibid., 160.
[175] Ibid., 176-177.
[176] Ibid., 179.

him that he would have time to express those feelings later, that he should simply answer the question asked of him. Following the Judge's advice, Erdemović recounted the events leading up to his service in the 10th Sabotage Unit.[177] Following this, the witness was asked if he had any knowledge of a soldier being shot for disobeying orders. Erdemović responded that he is certain he would have been killed because Milorad Pelemis had ordered the killing of one man in just such a situation. He added that a Commander was entitled to order the liquidation of anyone who dared to disobey orders.[178] Judge Jorda took that opportunity to ask an important question. "You refused twice to execute the orders and you went out of it degraded at the maximum, but not hurt. Why did you not also refuse to participate in the execution at Pilica farm?"[179] Erdemović responded to this question by showing the court the wounds he had suffered as a result of the shooting in the days following the Massacre. It was his contention that this shooting was directly related to his refusal to carry out the executions at the Pilica Cultural Hall.

Mr. Ruez was recalled in order to verify certain facts of Erdemović's story and to again recount the help in investigation he had provided the Office of the Prosecutor. In all, Erdemović informed the Tribunal's Prosecutor about four individual events of which it had no prior knowledge. They were: the Branjevo Farm, the Pilica Cultural Hall, the execution of a Bosnian Muslim Prisoner on July 11th, and the execution of a prisoner the unit had used in reconnaissance missions. Mr. Harmon then asked Mr. Ruez if he felt that Erdemović was remorseful for the acts he committed. Ruez responded that it was difficult to define remorse; however, the accused had repeatedly expressed his regret at having been involved in those events. Judge Jorda then asked if the Office of the Prosecutor was able to independently verify Erdemović's claim that his plan was to flee to Switzerland through Republika Srpska, and if the men Erdemović claims to have saved could be located. Mr. Ruez said that these facts could not be verified by secondary sources, that all the information about them had come from Erdemović's testimony. This was of major concern for the Court, as these events could be considered mitigating circumstances surrounding the crime.[180] With respect to aggravating circumstances, the Office of the

[177] As these events have been discussed in Chapter I, they will not be recounted here.
[178] *Prosecutor v. Erdemović*, 19 November 1996, 192.
[179] Ibid., 197.
[180] Ibid., 215.

Prosecutor felt that the sheer magnitude of the crime committed amounted to an aggravating circumstance, and that no other circumstances would be raised.

The proceedings ended with Mr. Babić asking if his client ever asked for special treatment or assistance from the Prosecution in exchange for his testimony. Mr. Ruez replied that Erdemović had not made any requests. Mr. Babić then asked if Mr. Ruez made it seem likely to his client that he would get special treatment because he was giving so much information to the Tribunal. Mr. Ruez said that such inducements were not necessary, as the defendant had voluntarily given information from the time he arrived at the Tribunal. Following this, the hearing was adjourned.

20 November 1996

The day's hearing began with Erdemović recalled to the stand. The court sought to clarify his dates of service the several military organs in which he was a part. The subject of his motivation to join the BSA was also brought up. In this day's testimony, he claimed he had joined as a financial consideration, whereas in his testimony on the previous day, he claimed it was to secure his rights and freedom of movement. The Tribunal then questioned him as to his awareness of any ethnic cleansing activities happening within the territory of Republika Srpska before he joined its military. This was in order to establish whether he knowingly joined a force he knew to be carrying out illegal activities. Erdemović responded that ethnic cleansing was not discussed publicly. In addition, Erdemović intimated that ethnic cleansing and exterminations were not discussed among his fellow soldiers.

The Court then inquired as to the command structure on the 16th of July and exactly to whom did Erdemović say he did not want to participate in the executions. The witness recalled Brano Gojkovic was in command of his unit that day. He added that he did not protest to anyone in particular about his objections to killing. Rather, he stated it to the whole unit, and no one supported him. It was at this point that Gojkovic threatened to kill him along with the Bosnian Muslim prisoners if he did not comply.[181]

[181] *Prosecutor v. Erdemović*, IT-96-22-T, 20 November 1996, 231.

Following this explanation, the defense called their first witness, referred to as X so as to protect his identity. X had met Erdemović in November 1992, while they were both serving in the HVO. The two did not serve together long, as Erdemović was forced to leave because of his being accused of smuggling. The two met again in 1994 on Mount Mavica. X was transporting weapons to the line, and encountered Erdemović and another member of the BSA. When Erdemović's companion raised his gun to shoot X, Erdemović jumped up and convinced him not to do so. As the two former comrades briefly spoke after the incident, Erdemović told him, "I tried to run away to Switzerland. They would not let me."[182] This testimony spoke both to the fact that Erdemović did save someone's life when given the opportunity. In addition, X's testimony strengthens Erdemović's contention that he only crossed into Republika Srpska in order to flee to Switzerland. After X was finished testifying, the defense called their second witness, Y.

Y had met the defendant in early 1993. The two were friends. Y testified that he and Erdemović were part of a multi-ethnic group of friends. Y further testified that Erdemović was not a nationalist and that nationality meant little to him.[183] Y also testified that he knew the defendant when he was a member of the HVO. The witness stated that Erdemović tried to avoid joining the BSA as long as he could, but could not avoid it. Y stated that Erdemović had traveled to Republika Srpska only in order to flee abroad and to avoid fighting. When questioned by the Court, Y stated that not following orders in Republika Srpska could have dire consequences for the soldier and his family.[184] Y also testified that ethnic cleansing and extermination were not discussed at all by the media within Republika Srpska. Following Y's questioning, Dražen Erdemović was recalled to the stand in order to give a statement.

Erdemović recounted in great detail the events of his life leading up to his appearance before the Tribunal. He again expressed his regret at having taken part in the killings. Mr. Ostberg, representing the prosecution, then asked if there was any way he might have avoided taking part in the events at the Branjevo farm on the day in question. Erdemović's frank answer was, "No."[185] Erdemović then went on to explain that once

[182] Ibid., 242.
[183] Ibid., 247.
[184] Ibid., 254.
[185] Ibid., 304

hostilities began in the former Yugoslavia, he could not flee the country because he did not have a passport. Such documents were only issued to those who had finished their compulsory military service; Erdemović had not fulfilled his obligation in time. When Erdemović had finished answering the Tribunal's questions, he stepped down and closing statements were given.

Mr. Harmon gave the prosecution's closing; in it he outlined the specific nature of Erdemović's crime, and cited the nature and breadth of the act as aggravating circumstances. Conversely, he praised the defendant for coming forward to tell his story and for voluntarily surrendering himself to the Tribunal, for his admission of guilt and acceptance of responsibility, and for the remorse he has shown toward his actions. Mr. Harmon contended that each of these factors ought to be considered in mitigation. In addition, he cited Article 7.4 of the Tribunal's Statute which prohibited using obedience to superior orders as a defense, but permitted its use as a mitigating factor when determining punishment.[186] Mr. Harmon also cited Erdemović's substantial and unconditional cooperation with the Office of the Prosecutor in their investigations into the Srebrenica Massacre and the events surrounding it. The Tribunal rule 101 (B) (iii) asserts that when determining sentence, the Court should take into account the general practices for determining prison sentences in the former Yugoslavia.[187] With this in mind, the sentence for the most closely related crime in the law code of the former Yugoslavia recommends between 5 and 20 years in prison. Taking all of these factors into account, Mr. Harmon recommended a prison sentence not to exceed 10 years as sufficient punishment for Dražen Erdemović's crimes.

Mr. Babić began his closing statement by asserting that his client was a victim, both of the political and military situation in which he found himself, and of his own crime. He quickly moved on to examining the indictment lodged against his client. Mr. Babić noted that its first eight paragraphs referred to actions taken by the Bosnian Serb military and the United Nations; none of these paragraphs mentioned his client in any way. Mr. Babić contended that these paragraphs seemed to be an echo of the indictments filed at the Nuremberg Tribunal following World War II. The difference, he held, was

[186] Ibid., 315.
[187] Ibid., 319.

that at Nuremberg both individuals and entities were tried for criminal responsibility. The ICTY, however, only had the power to try individuals. Since Erdemović did not contribute to the political situation in which he found himself, he could not be held responsible for what those in a position of power above him did. As a result, Mr. Babić contended that these paragraphs ought to be rejected as part of the indictment against his client.[188]

This opening shows a significant disconnect between the Tribunal and Mr. Babić. While his assertions about the opening paragraphs of the indictment may have been valid, his argument that they should be ignored holds no water. As a result of his client pleading guilty, the whole indictment, including these paragraphs, must be accepted. To argue otherwise is to, in effect, claim that the indictment was not valid from the beginning. If this were to be true, the defense ought to have pled not guilty and disputed these paragraphs in a trial setting, not at a sentencing hearing.

Mr. Babić then went on to discuss the evidence against his client. He cited the fact that Erdemović incriminated himself by confessing to his actions on or about 16 July 1996. He then discussed the details of his client's crime and the impact it had on him psychologically. Babić cited X's testimony that his client had spared his life. He also highlighted Erdemović's willingness to help Bosnian Serbs flee to Republika Srpska.

Babić then highlighted possible defenses such as: self-defense, extreme necessity, duress, and mental capacity.[189] He noted that these concepts are not regulated by the Tribunal Statute. As a result, Mr. Babić consulted the practices of several jurisdictions. This study led him to assert that if the Court could not find any corroborating evidence as to his client's crimes, then the crimes could not be proved and his client should be absolved of guilt, despite his guilty plea.

Babić again seems not to fully understand the impact of a guilty plea. The facts of the case were such that his client's guilt was already established by his own testimony. In addition, in pleading guilty, his client gave up the right to contest these allegations and any support, or lack thereof, they might have.

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[188] Ibid., 323.
[189] Ibid., 329.

Babić continued his closing by asserting that his client acted under duress or, "extreme necessity."[190] He cited the penal codes of several European nations which recognize duress as a defense to criminal accusations. Among these were: Austria, Belgium, Greece, Hungary, Finland, the Netherlands, France, Germany, Switzerland, Sweden, and Yugoslavia. After recounting the circumstances surrounding the commission of his client's crime, Babić claimed that his client had acted under extreme necessity. He cited the fact that Erdemović would not only have lost his life, but it was quite likely that his family would also have suffered as the result of his refusal to carry out the order to execute those civilians. In Mr. Babić's opinion, it was immoral to expect his client to make the alternative choice.

Mr. Babić asserted that Erdemović had diminished mental responsibility following his exchange with Gojkovic. He cited his client's emotional immaturity, feeling of helplessness, and feelings of panic and fear at the time the crime was committed. Babić asserted that his client acted without freedom of will following his being threatened. In addition, there was no premeditation on his client's part concerning his crime. Based on these factors, Babić asked that his client be acquitted of the charge against him. Babić ended his statement by asking the Tribunal to acquit his client, however if they chose not to do that, to please take into account the myriad of mitigating factors presented throughout the hearing in determining a proper sentence.

Erdemović gave a short final statement following his counsel's closing. In it, he expressed his sorrow for all the victims of the war in Bosnia-Herzegovina, regardless of their nationality. In addition, he talked about his desire to tell his story to the Tribunal to make sure that the world knew what happened that day at the Branjevo farm. He ended by expressing his deep regret for what had happened.[191] Following Erdemović's final statement, the Trial Chamber adjourned to determine what punishment, if any, he deserved. Sentence was delivered on November 29, 1996.

[190] Ibid., 330.
[191] Ibid., 341.

First Trial Chamber Judgment

The judgment began by recounting the proceedings of the case. It initially talked about the background of the accused and the events which led to his appearance before the ICTY. Additionally mentioned were the psychological examinations ordered for the accused; given the results of these examinations, the Court felt it necessary to examine the validity of Erdemović's guilty plea. Although the initial examination of the accused found him to be suffering from Post Traumatic Stress Disorder, subsequent examinations found him to be of sound mind. In addition, the Trial Chamber cited Erdemović's repeated admissions of his guilt, both before his psychological examinations and after he was cleared to stand before the tribunal. These factors led the judges to accept that the accused was fully cognizant of the significance of his guilty plea.[192] The judgment also cited the accused's right to formulate his own defense strategy, a principle derived from common law legal systems. The Court asserted that pleading guilty and claiming to have acted under superior orders and duress, as the accused had done, did amount to such a strategy.

The Court rejected the accused's assertion that he acted under superior orders as a defense. This defense was explicitly forbidden by Article 7 (4) of the Tribunal's Statute. However, obedience to superior orders was allowed to be asserted in mitigation of sentence. The Statute of the ICTY did not contain any language with respect to criminal actions committed under duress. The Court examined several post World War II cases. It found that nine nations allowed for such a defense. It found that three factors must always have been present for it to have been accepted as a complete defense. These factors were that the act was performed in order to avoid immediate, serious and irreparable danger, no means of escape existed at the time, and the remedy was not disproportionate to the evil.[193] With this in mind, the Court rejected Erdemović's claim of Duress. The reasoning behind this rejection stemmed from the fact that the accused had pled guilty to a crime against humanity. When examining the circumstances surrounding the events at the Branjevo farm, the first two factors for claiming a defense of duress were extent.

[192] Sentencing Judgment, *Prosecutor v. Erdemović*, 29 November 1996.
[193] Ibid.

However, the third factor did not exist. The Tribunal found that the remedy was disproportionate to the evil. It was judged that the life of the accused was not equal to the lives of his victims. This was the case because it is the nature of a crime against humanity that it is not simply a crime against an individual or group, it is a crime against the whole of the human race. For this reason, Erdemović's claim to have acted under duress could not be used as a complete defense to his crime.[194] However, it is important to note that this decision implies that the Chamber felt that the defense was available to Erdemović, if it could be proven.

The Court consulted the laws of the former Yugoslavia when attempting to reach a decision on an appropriate sentence. According to the Criminal Code of the former Yugoslavia, genocide and war crimes were punishable by imprisonment for a term between five and fifteen years, or by death. A death sentence was able to be commuted in favor of a term of imprisonment of twenty years. Having considered these facts, and with the knowledge that the Tribunal's Statute forbade the imposition of a death sentence, the Court considered the laws of the former Yugoslavia to be a guideline for their work; they did not consider it binding.

The Court found that several mitigating circumstances existed surrounding the commission of this crime. Primary among these was Erdemović's mental condition at the time he committed these crimes. As a provision of their examination, the court required that there be independent confirmation of the accused's statements in order to prove an assertion. The Tribunal examined Mr. Babić's claim that Erdemović was not conscious of his acts at the time the crime was committed. The Chamber found that no evidence had been presented to support this contention, and rejected it outright. In addition, the Court found that the accused could not receive mitigation from his claim of extreme necessity, or duress. It was felt that the circumstances surrounding the commission of the crime would have allowed for such a claim to be valid, however, the defense had produced no evidence to corroborate Erdemović's testimony. The Court did find that Erdemović held a low military rank, and did not occupy a position of authority.

The sentence went on to cite Erdemović's remorse at what he had done as a mitigating factor. His own statements and the reports submitted by the commission of

[194] Ibid.

psychological experts were mentioned as evidence of this claim. The accused's cooperation with the Office of the Prosecutor was also cited as a factor in mitigation of sentence. The opinion cited the crimes about which the Tribunal has no knowledge before Erdemović came before the tribunal, as well as Erdemović's testimony in the Rule 61 hearings for Radovan Karazic and Ratko Mladić as evidence of his cooperation. The Court found that factors in Erdemović's background including: smuggling Bosnian Serbs across the border to Republika Srpska, saving witness X's life, and his age all served as mitigating factors in determining his sentence. Taking all of these issues into account, the Trial Chamber determined that a penalty of imprisonment for a period of 10 years was appropriate punishment for the accused.

Appellate Chamber

26 May 1997

Erdemović came before the Appeals Chamber of the ICTY in late May, 1997. The Appeals Chamber was comprised of: President Judge Antonio Cassese of Italy, Judge Gabrielle Kirk McDonald of the United States, Judge Haopei Li of China, Judge Ninian Stephen of Canada, and Judge Lal Chand Vohrah on Malaysia. Erdemović had appealed the decision of the First Trial Chamber; he sought either a revised sentence or an acquittal. In deciding the case, the Appeals Chamber sought to answer three major questions. The first two questions were: Was the accused's plea voluntary? Was the accused's plea informed? The third question to be answered involved some legal nuance. The issue to be decided was whether Erdemović's plea was equivocal; that is, did his plea and the way he was represented following his plea have inherent contradictions? The key to answering this question was the deeper question of whether duress offered a complete defense to a person accused of a crime against humanity when the underlying offense was murder of innocents. If the Court found that duress was available as a complete defense, then that meant Erdemović's initial plea had been equivocal. However, if it was found that duress was not available as a complete defense to the charges facing the accused, his plea would be found not to have been equivocal.

The Issue of Duress

The proceedings quickly seized upon the most contentious of the issues mentioned above. What is the nature of the duress defense in international law? Mr. Grant Niemann, representing the Office of the Prosecutor, detailed his position:

> We consider it a complex issue, complex for two reasons: one, because there is a division in the various jurisdictions of the world, a division particularly between civil law and common law, and we say that that leads to an inconclusive position, and with the international law we argue that it is clear, but it is not clear on a prima facie glance at it, because there had been an influence of, we would say, the civil law position on the international law, but at the end of the say we would argue that the authority clearly points to the conclusion that duress is not available.[195]

In support of his contention, Mr. Niemann cited three cases from the United Kingdom. The first of these cases was *Lynch v. the Director of Public Prosecutions for Northern Ireland*. In this case, a man appealed his conviction for being a principal in the second degree to the murder of a police constable. It was his claim that he had been forced to act as an accomplice and drive those who had committed the murder to and from the murder. One of the three murderers, a man named M, was well known to be vicious and murderous when disobeyed. The accused felt that if he disobeyed M's orders, he would have been shot. Lynch was initially found guilty, because UK law did not permit the use of duress as a defense to murder. The House of Lords found that duress ought to be available to an accused in a murder trial. In his opinion, Lord Edmund-Davies stated that previous opinions about this duress were incorrect. He cited Professor J. C. Smith's opinion that, "To allow a defense to crime is not to express approval of the action of the accused person but only to declare that it does not merit condemnation and punishment."[196] The defense of duress was upheld and Mr. Lynch was given a new trial.

The Second case Niemann cited was *Abbott v. Queen*; this case came one year following the *Lynch* case. Abbott was charged and convicted of murder in the first

[195] *Prosecutor v. Erdemović*, IT-96-22-A, 26 May 1997, 4.
[196] *Lynch v. Director of Public Prosecutions for Northern Ireland*, 1975, 1 All England Reports, 957.

degree. He appealed his conviction based on the fact that the jury had not been instructed to consider if he had acted under duress. The facts of the case bore out that Abbott had been coerced into participating in the murder by another man. This man directly threatened both Abbott's and his mother's life if he did not obey his instructions.[197] The House of Lords dismissed Abbott's appeal on the grounds that Duress should not be available to a defendant facing a charge of first degree murder. The final case mentioned, *R v. Howe*, decided in 1987, totally overruled the *Lynch* case.

Mr. Niemann submitted that the proper response to a situation in which duress was a factor in the commission of a murder was not to acquit the accused, but to mitigate their punishment. He based this on the fact that courts, if they were moved by an accused's story, would be able to significantly shorten a period of imprisonment, or chose no punishment at all. However, Mr. Niemann asserted that the death of innocent people ought not be cheapened by allowing an accused to plead duress to the charge of murder. Following Mr. Niemann, Mr. Payam Akhavan spoke on behalf of the Prosecution. Mr. Akhavan asserted that duress was an excuse under the law, and not a justification.[198] He justified this by claiming that duress is not characterized by a situation where a person is compelled by force to commit a criminal action. Rather, it is concerned with a situation where a choice to commit an act does exist. Mr. Akhavan cites the English legal scholars Smith and Hogan in asserting that when duress is invoked as a defense the accused admits that he or she was able to control their action and chose to perform the act with which they are charged.[199] This admits a choice between two alternatives. Payam admits that the alternative to committing the criminal act may have been so unattractive that no reasonable person would have chosen it; however, a choice still existed.[200] He asserted that duress does not presuppose the absence of *mens rea*, as other categorical defenses do. Mr. Akhavan cited the Canadian case *Perka v. The Queen* which asserted that duress is an excuse whose scope is determined based on the reasonable expectations of society. He goes on to admit that duress was available to the defendants in the *Einsatzgruppen* trial, heard before the US Military Tribunal following World War II. Mr. Akhavan noted that

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[197] *Abbott v. The Queen*, 1976, 3 All England Reports, 141.
[198] *Prosecutor v. Erdemović*, 26 May 1997, 13.
[199] Ibid.
[200] Ibid., 14.

this decision cited no previous precedent and, in fact, was contrary to Anglo-American common Law. Mr. Akhavan concluded his remarks by stating that the task of resolving the apparent conflict between civil and common law systems on the issue of duress ought not be done through an exhaustive survey of the world's legal systems in order to determine a general principal of law. Rather, he asserted that the cases decided following World War II ought to be consulted as the primary means of determining the solution to this question.

In his response, Mr. Babić pointed out that the prosecution had not defined on which society's expectations duress should be judged. If it should be judged on the basis of the societal expectations of the former Yugoslavia, Babić argued, then his client should be acquitted. Mr. Babić also noted that the prosecution had cited many domestic laws during their statements. He further concluded that since there was no settled international law regarding the defense of duress, then the only logical way to determine how it should be dealt with would be to survey relevant national jurisdictions.[201]

The prosecution responded to Mr. Babić by allowing that some compelling reasons existed on both sides of the duress debate. Mr. Niemann cited Lord Salmon's commentary on the duress issue. Lord Salmon first mentioned the *Lynch* case, discussed earlier. He constructed his argument based on the appellant's contention that not allowing for the use of the duress defense presupposes a degree of heroism that can not be expected of a normal person.[202] Lord Salmon attacked this argument, asserting that historically, in cases of mass murder, torture, or experimentation, if the accused had refused to carry out their orders to perform these tasks, they would have been shot. He argued that acquitting the accused based on these circumstances has been universally rejected.[203] Lord Salmon went on to say that allowing this defense in a civilized society would be incredible. Mr. Niemann added that if duress were allowed to be a complete defense in these types of cases that it could prove, "to be a charter for terrorists, gang leaders and kidnappers."[204] In addition, Mr. Niemann cited these possible policy

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[201] Ibid., 20.
[202] Ibid., 49.
[203] Ibid., 50.
[204] Ibid., 51.

considerations and their possible international impact associated with allowing this as a defense.

The prosecution attempted to strengthen their argument by citing several cases, decided after World War II, in which duress was rejected as a defense. They first cite *Jepsen*, which was heard before a British Military Tribunal.[205] This case did permit the accused to claim duress as a defense. However, the prosecution argued that the *Stalag Luft III* and *Furstein* cases, decided the two years subsequent to *Jepsen* did not allow duress to be used as a defense. Mr. Niemann argued that these two cases cited authority upon which they made their decision, whereas *Jepsen* did not. The prosecution further noted that the decision in the *Einsatzgruppen* trial did not cite any authority in support of its decision to allow for the duress defense.

Mr. Akhavan clarified the difference between when an action is justified or excused under the law. In his explanation, he cited Smith and Hogan in saying that when an act is justified, the law gives the act its implicit approval. This can be seen in the area of a self-defense defense. If the defense can be proved, then the law approves of the act committed. Whereas if an act is excused, the act committed is viewed with disapproval, however the circumstances surrounding the excused act may lead to exculpation or mitigation.[206]

Following the Prosecution's statements, Judge Cassese took the prosecution to task concerning the formation of their argument. He noted that the several cases they relied upon happened to be British cases. Cassese questioned why other cases, when they relied on the so called, 'national approach,' were dismissed as unfit to guide the Tribunal and these few British cases were heavily relied upon to justify the Prosecution's position.

Judge Cassese then attempted to determine if there was indeed a difference between the way a common law nation and a civil law nation might approach the Erdemović case. He did this by proposing several different scenarios of duress. The first involved a person, A, being ordered by B to kill a victim, C. In this scenario B threatens A's life if he does not comply. The second instance proposed A being ordered by B to kill

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[205] This case is referred to by the prosecution as *Wepson*. However, no information could be found referring to a *Wepson* case. It is believed that the proper name of this case is *Jepsen*, as referred to in the Judge's opinions.
[206] Ibid., 57.

C; however, in this case, B has threatened to kill A's child if he does not comply. The third situation Cassese proposed involved A being ordered to kill C by B. The key difference here was B's threat to kill both A and C if A did not comply with his order.[207] This situation most clearly fits the facts of the Erdemović case. The question Cassese poses is: can a person be held responsible for killing another person or group of people when the clear likelihood is that if he does not comply he will die along with the victims? He put these scenarios to the prosecution and asked for an explanation of how they might handle them.

Mr. Akhavan responded that even if one accepts the numbers and allows for the fact that saving a life would be preferable in that specific instance, the broader policy implications would be untenable. He questioned this policy's vulnerability to possible abuse and asserted that it might open a Pandora's Box. Akhavan cited differences in the ways the varying legal systems dealt with the duress defense. Earlier in the hearing the laws concerning duress of the UK and Canada were compared; both nations are of similar common law legal tradition. The UK allowed for duress to be claimed as a defense in all cases, save those of murder. The Canadian Judiciary, however, precluded the use of duress not only in cases of murder, but also in cases involving sexual assault, kidnapping and those causing grave bodily harm.[208] Mr. Akhavan submitted that the best way to address the issue of duress would be to allow for mitigation of sentence if duress could be proven. In this way, the courts would be able to reduce or even remit the sentence of an accused.

Cases of Duress Cited in Proceedings

The basis for the prosecution's contention that the cases they submitted have primacy in determining the question of duress in the Erdemović case can be found in Allied Control Council Law No. 10. This law has its roots in the Moscow Declaration of 1943 and the London Agreement of 1945. The Allied Control Council was the de facto governing body of defeated Germany in the years immediately following World War II.

[207] Ibid., 62.
[208] Ibid., 64.

It consisted of representatives from the Soviet Union, France, the United Kingdom and the United States. Each of these nations controlled a portion of Germany and several laws were passed in order to facilitate uniform treatment of issues common to each of the zones of occupation. Control Council Law No. 10 dealt with several aspects of organizing investigations and prosecutions for those responsible for crimes against peace, war crimes, and crimes against humanity.[209] It defined the crimes, outlined possible punishments, and dealt with possible conflicts between the several zones in the adjudication of cases. In addition, it declared that the superior orders defense could not be used to excuse responsibility for a crime. The most important aspect of this document was that it gave each occupying authority the power to arrest, gather evidence and witnesses, and bring suspects to trial.[210] The nature of each zone's tribunal, their rules and procedures used were to be determined by each Zone Commander.[211] Three cases which were carried out under the auspices of this law form the bulk of the prosecution's evidence for not allowing duress as a defense to murder.

These cases were: the *Stalag Luft III case*, the *Furstein* case, both heard before British Military Tribunals, and the *Holzer* case, heard before a Canadian Tribunal. The *Stalag Luft III* case involved the execution of British prisoners of war who had escaped from a Nazi prison camp. Eighty men escaped the camp, four of whom were immediately captured. Of the remaining seventy six, only three escaped to safety. Fifty of that number were captured and executed, pursuant to an order given by Adolf Hitler. The case involved several of the men who carried out these orders. One of these men, Otto Preiss, worked for the Gestapo at Karlsruhe. He was ordered by his commanding officer, Josef Gmeiner, to accompany Walter Herberg and Heinrich Boschert in retrieving Flying Officer D.H. Cochran from the police. Cochran was one of the number who had escaped from Stalag Luft III. The group was then ordered to kill Mr. Cochran; Mr. Preiss was to be the executioner. Preiss carried out his orders. At his trial, Preiss protested that he did not know Cochran was a prisoner of war and that he had acted under duress. The

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[209] Allied Control Council Law No. 10, II, 1 (a,b,c).
[210] Ibid., para. 1.
[211] Ibid., para. 2.

Tribunal did not find that this was a valid defense. Mr. Preiss was found guilty of a war crime and executed.[212]

The accused in *Fuerstein* argued that if he had not participated in an execution of prisoners of war, others would have. In addition, he pled that he acted under duress. The court found that he could not make such a plea. The Court held:

> It has been said here that once the order for execution of these soldiers has been given, it was impossible for any of the accused to ignore it, and that the only way in which they could act was the way in which, in fact, they did act. Now that defence of 'duress or 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.[213]

The Holzer case involved three members of the German Army, two of whom had actively participated in the murder of a Canadian airman. Both of the men who committed the crime claimed superior orders and duress as defenses. One of the men testified, "The Lieutenant pulled his pistol, held it against me and said: 'Do you want to or don't you want to?'"[214] The judge in the case excluded the use of duress as a defense in this case, and sentenced both of the men who participated in the murder to death.

Since the decisions rendered in these cases were derived either from the British legal system or the Canadian legal system, also of common law nature, the 1884 case of *The Queen v. Dudley and Stephens* was a source supporting these decisions. This case arose from a situation in which three men and one boy were adrift at sea, more than 1000 miles from land. Having been adrift for eighteen days, Dudley proposed to Stephens and Brooks, the other man on the boat, that they draw lots to see who might die in order to feed the others. Stephens agreed, but Brooks did not. On the twentieth day, Dudley killed the boy, with the approval of Stephens. No lots had been drawn; Dudley and Stephens had decided that it would be better for the boy to die in order for them to save themselves.[215] The two men asserted that they had acted under extreme necessity; they

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[212] United Nations War Crimes Commission, *Law Reports of Trial of War Criminals*, Vol. XI, (London: H.M. Stationary Office, 1949), 41-42.
[213] Ibid., Annex II, 173.
[214] *Prosecutor v. Erdemović*, 26 May 1997, 113.
[215] *R v. Dudley and Stephens*, 1884, 14 QBD 273 DC.

would have died had they not acted in the manner in which they did. Lord Coleridge issued his opinion that:

> We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man had no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was willful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder.[216]

The two men were sentenced to death for their crime. Their sentence was commuted to six months imprisonment by the Crown. This case shows common law's attitude toward duress very well. It is unyielding in its condemnation of the crime, yet allows for a lighter sentence to be served as a means of mitigation of punishment. Though this case does not directly involve a third party threatening the lives of Mr. Dudley or Mr. Stephens, the case does present a situation of extreme necessity, which is very closely related to duress. It is not difficult to see how the guidance of the *Dudley and Stephens* case could have informed the opinions of those sitting in judgment of the *Stalag Luft III*, *Furstein*, and *Holzer* cases.

In opposition to those decisions are the opinions expressed in the *Jepsen* trial and the *Einsatzgruppen* trial. Jepsen had been ordered to participate in the extermination of 52 concentration camp prisoners. In his deposition, Jepsen did not mention the issue of duress at all. However, under direct examination at his trial, he asserted that his commanding officer had threatened to kill him, along with the prisoners if he did not participate. The Judge-Advocate found that duress could be used as a defense in this case, provided certain conditions were met. In the Judge-Advocate's opinion, those conditions were not met. Jepsen was found guilty, but his sentence was reduced from death to life imprisonment, largely based on the possibility that he acted under compulsion.[217]

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[216] Ibid.
[217] *Prosecutor v. Erdemović*, Separate and Dissenting Opinion of President Cassese, 7 October 1997, para. 23.

The *Einsatzgruppen* case involved several men who had been members of SS commando units which operated in conquered Nazi territory. In the course of the proceedings, the issue of the defense of obedience to superior orders was raised. In considering this issue, the American Tribunal found that in order to claim such a defense, duress must also be proven.

> But it is stated that in military law even if the subordinate realizes 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.[218]

Although this opinion in no way affected the final outcome of the trial, it obviously allowed for the use of the duress defense, if it could be proven that duress existed. Given the balance of evidence on both sides of this debate, the outcome of this issue was very much in doubt as the Appellate Chamber adjourned to make their judgments.

Ambiguity of Defense

In addition to the prosecution's assertion that duress not be permitted to be used as a complete defense in this case, they also pointed out that the issue of duress had not been raised by defense counsel at Erdemović's initial appearance before the Trial Chamber. Mr. Niemann pointed out that the first time Mr. Babić spoke about duress was

[218] Ken Lewis, 1998. *Military Tribunal Sitting in the Palace of Justice Nuremberg, Germany: Duress Needed for Plea of Superior Orders*. British Columbia: The Einsatzgruppen Archives. On-Line. Available at: http://www.einsatzgruppenarchives.com/trials/duress.html, accessed 18 March 2008.

six months later at the sentencing hearing.[219] Mr. Babić attempted to explain the issue of why his client pled guilty to a crime and then offered a possible defense.[220] He stated:

> Our positions regarding the plea of guilt are not in opposition against one another, because when sentence is passed according to the Yugoslav Criminal Code and the law on criminal proceedings, which is modeled on the French criminal law, the sentence is passed in such a way that the accused is proclaimed guilty for the commission of such and such an act and after that he may be discharged from punishment for such and such reasons. Therefore, the plea of guilt remains. It is verified, but the punishment is not carried out.[221]

This statement clearly gives the impression that the defense did not fully understand the nature of a guilty plea in the context of the Tribunal. In addition, the situation which Mr. Babić described is very similar to what the prosecution had argued for during the discussion on duress. It seems that under Yugoslav Code Erdemović would have been discharged from punishment, rather than been found not guilty of his crime. However, one must also take into account that the guilty plea is a common law conception, and Mr. Babić, being from a civil law nation, may not have fully understood its implications.

President Cassese attempted to get to the heart of one of the major questions facing the chamber: Was Erdemović's plea informed? He did this by questioning Mr. Babić as to why his client had pled guilty to a crime against humanity as opposed to a war crime. Cassese posed this question because, according to him, committing a crime against humanity usually entails a harsher penalty than does the commission of a war crime. President Cassese asked Babić if he had discussed the nature of the two crimes with his client prior to Erdemović entering his plea. Mr. Babić responded that the two had discussed the matter and that in their opinion a crime against humanity better fit the circumstances of his client's crime. He felt that all of the elements for a war crime were not present. Babić noted that there were no war operations in the vicinity of the Branjevo farm on the day in question, so it was his opinion that a war crime would not fit the facts

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[219] *Prosecutor v. Erdemović*, 26 May 1997, 9.
[220] It is important to note that Mr. Niemann refers to defense counsel, and not directly to the defendant in making this statement, because Erdemović did raise the issue of being forced to act as he had in his first appearance before the Trial Chamber.
[221] Ibid., 107.

of the case, but a crime against humanity would.[222] Babić defended the choice further, "A war crime and a crime against humanity are treated in the Statute as the same criminal offences."[223] He continued, "At that point it seemed to us the same, because the gravity of the offences were equal, but the grounds were different, and that is what determined our choice."[224] This answer satisfied the Chamber. The various issues involved in the judgment of this case produced several differing opinions on the part of the justices. As a result of this, many opinions were written. The majority opinion and President Cassese's dissenting opinion will be examined in the greatest detail, as they highlight the conflict between the two differing stances on the defense of duress.

Appellate Chamber Ruling

The Appellate Chamber returned its opinion on October 7, 1997. The Chamber unanimously rejected Erdemović's request that he be acquitted of the charges facing him. In addition the judges rejected the Appellant's application for a revised sentence by a vote of four (Judges Cassese, McDonald, Stephen, Vohrah) to one (Judge Li). By the same four to one vote, it was found that the guilty plea Erdemović entered at his initial trial was not informed. By a three (Judges McDonald, Li, Vohrah) to two (Judges Cassese, Stephen) vote, it was decided that duress did not afford a complete defense to someone charged with a crime against humanity or war crime when the underlying offense was the murder of an innocent. It was because of this ruling that the Chamber found Erdemović's plea not to be equivocal. Finally, by a four (Judges Cassese, McDonald, Stephen, Vohrah) to one (Judge Li) vote, the Appeals Chamber held that Erdemović's case be remitted to a Trial Chamber in order to give him the opportunity to replead.[225]

[222] Ibid., 36.
[223] Ibid., 109.
[224] Ibid.
[225] Judgment, *Prosecutor v. Erdemović*, IT-96-22-A, 7 October 1997, 17.

Joint and Separate Opinion of Judges McDonald & Vohrah

The joint opinion submitted by Judge McDonald and Judge Vohrah begins with the issue of a guilty plea. Article 20 paragraph 3 of the Tribunal's statute is examined, and it is determined that the opportunity to plead guilty or not guilty is available to the accused. The two also point out that this process is unique to the common law adversarial system and that any deeper examination of this article will rely on the common law authorities for guidance. In examining the case, the minimum preconditions for a valid guilty plea are outlined. The plea must be voluntary, informed and unequivocal. The opinion based this finding on established authorities within the common law tradition. The next task was to determine if each of these requirements were met in the *Erdemović* case.

The voluntary nature of Erdemović's guilty plea was examined first. It was noted that the panel of psychiatric experts found the accused unfit to stand trial in June, 1996. The cause behind this finding was post-traumatic stress disorder. However, it was noted by the Trial Chamber that the report the psychiatric experts submitted on October 17, 1996 found Erdemović to be of sound mind with no memory impairment. In addition, the Trial Chamber cited the several occasions on which the accused had reaffirmed his guilt before the Tribunal as a sign that he voluntarily made his plea before that body. Judges McDonald and Vohrah both agreed with the Trial Chamber's finding, reiterating the several occasions upon with Erdemović restated his guilty plea. They found the Appellant made his plea voluntarily while mentally competent to do so and under no threat or inducement from an outside source.[226] The next question to be answered was whether the Appellant's plea was informed.

Judges McDonald and Vohrah asserted that two conditions must be met to make that determination in Erdemović's case. The first is that the accused must understand the nature of the charges against him/her and also the consequences of pleading guilty to those charges.[227] The second condition to be met was to determine whether the accused could understand the nature and distinction between the alternative charges he was

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[226], *Prosecutor v. Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 13.
[227] Ibid., para. 14 .

facing, and the consequences of each.[228] The judges found that the Appellant had not been adequately informed of the consequences of pleading guilty. They noted that the Presiding Judge did not explain that by pleading guilty he would be forfeiting his right to a trial, to be considered innocent until proven guilty, and to assert his innocence or lack of criminal responsibility.[229] In addition, they noted that Mr. Babić had consistently argued the case in a manner that contradicted the admission of guilt by his client. They cited Babić's assertion that because the story Erdemović had told was not corroborated, that his criminal responsibility could not be adequately found. This action clearly shows that Mr. Babić did not understand that the guilty plea had already settled this issue, and that it could no longer be argued. As the result of this evidence, Judges McDonald and Vohrah found that the Appellant did not adequately understand the nature and consequences of pleading guilty.[230] The Judges went further, and found that the Appellant and his counsel did not adequately understand the nature of the two alternative charges facing them. From an examination of the trial transcripts, the judges found no indication that the Appellant and his counsel understood the nature of and legal requirements for each of the charges. They highlighted this fact by referring to Mr. Babić's assertion that Erdemović could not be guilty of a war crime, because not all of the elements of the crime existed. Judges McDonald and Vohrah found that these statements by Mr. Babić indicate his lack of understanding of what exactly constituted a war crime. The opinion found that the Appellant did not have the elements of the crimes with which he was charges adequately explained to him, either by his counsel or the Trial Chamber.[231] In addition, the opinion found that the Appellant did not understand that a crime against humanity was a more serious offense than a war crime. The two cited the fact that a crime against humanity is, by nature, not simply a crime against individual victims, but against humanity as a whole. In addition to this fact, the opinion stated that a crime against humanity differed from a war crime in that it must have been committed as part of a systematic perpetration of crimes and the accused must have had knowledge of

[228] Ibid., para. 14.
[229] Ibid., para. 15.
[230] Ibid., para. 16.
[231] Ibid., para. 18.

this policy.[232] The *Einsatzgruppen* case and the ICTY's own judgment in *Prosecutor v. Tadić* were cited in support of their assertion. In addition, at no time was it explained to the Appellant that a crime against humanity was a more serious crime than a war crime would have been. On these merits, the judges found that the Appellant's plea was not informed.

The final issue to be resolved in the opinion was whether Erdemović's guilty plea was equivocal. Included in this issue is whether a plea of duress might afford a complete defense to the Appellant. If duress were found to be available, then his plea would be considered equivocal. If duress did not amount to a complete defense, then the plea would not be equivocal. The two judge's opinion began by asserting that an unequivocal plea was essential to the fairness of a proceeding. The only common law nation that does not have the requirement of an unequivocal plea is the United States.[233] After establishing the necessary nature of an unequivocal plea, Judges McDonald and Vohrah sought to tackle the issue of duress.

Before dealing with this issue, the judges sought to clarify exactly the question they sought to answer. The question was, "In law, may duress afford a complete defense to a soldier charged with crimes against humanity or war crimes where the soldier has killed innocent persons?"[234] In beginning to answer this question, the distinction between a plea of duress and a plea of obedience to superior orders had to be outlined.

Superior orders and duress are separate concepts that often occur in concert. According to the Statute of the Tribunal, superior orders did not afford a defense to any crime, but it was to be considered in mitigation. Superior orders may also be a circumstance under which duress occurs, and thus, can be a factual element under which duress is considered. The two, however, do not necessarily have to be linked. The judges' opinion cites the Trial Chamber's assertion that a superior order must be proven in order to have the possibility of claiming duress. It disagrees with this assertion and states that absence of a superior order does not necessarily mean that duress cannot be used as a

[232] Ibid., para. 21.
[233] Ibid., para. 29.
[234] Ibid., para. 32.

defense.[235] In separating these two concepts, the Judges allow for an unfettered examination of duress.

In beginning their examination of how the duress defense ought to be handled in this case, Judges McDonald and Vohrah first examined the sources of international law. According to Article 38 of the statute of the International Court of Justice, international law can be derived from four sources. These sources are: international conventions, international custom, general principles of law recognized by civilized nations, and, as a subsidiary means, the teachings of the most qualified legal scholars.[236] As duress, to this point, had not been dealt with through an international convention, the Office of the Prosecutor submitted that international custom ought to be the basis upon which this issue was decided. The Prosecution submitted that the post World War II military tribunals' decisions amounted to customary international law. As such, they ought to be the determining factor in deciding this case.[237]

However, the Opinion cited a 1996 report by the International Law Commission found that the post-war tribunals of nine nations considered duress to be a complete defense.[238] In addition, Volume XV of the Law Reports of Trials of War Criminals by the UN War Crimes Commission states this general rule regarding duress:

> 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.[239]

The Judges pointed out that this passage never mentioned the use of the duress defense to a charge which involved the killing of innocent people. In addition, they cited the *Stalag Luft III*, *Feurstein*, and *Holzer* cases in support of the contention that the post World War II tribunals did not permit the use of this defense when the charge involved the murder of innocents. The *Einsatzgruppen* case was also cited in the opinion; however, its mention was in order to discredit its holding that duress could be used as a defense.

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[235] Ibid., para. 35.
[236] Ibid., para. 40.
[237] Ibid., para. 41.
[238] Ibid., para. 42.
[239] U.N. War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. XV, 174.

Judge McDonald and Judge Vohrah accused the case of not citing any authority as a basis for the holding and also stated that this decision goes against US military and domestic law. In addition the *Einsatzgruppen* case, the Judges cited several post-war cases heard before domestic jurisdictions which did permit the use of duress as a complete defense. Some of these cases were: the *Landovery Castle* case[240] before the German Supreme Court in Leipzig; the *Eichmann* case[241] before the Supreme Court of Israel; *Papon* case[242] before the French Court of Cassation; the *Warsaw Ghetto* case[243] before the Court of Assize attached to the District Court of Dortmund. Several more cases were mentioned, however their significance is in that they clearly established the concept that there existed a weight of evidence for both sides of the issue and that the post-war cases cited by the Prosecution did not represent an overwhelming preponderance of evidence, as had been suggested.[244] In summation of their argument, the two Judges cited the lack of uniform state practice regarding the issue of duress as well as the questionable international character of some of the cases cited as reason to reject the proposition that they represented customary international law.

With customary international law unable to offer any guidance on the issue, the Judges turned to general principles of law recognized by civilized nations. They got support for this decision directly from the Secretary-General's Report given on May 3, 1993. It directed, "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 capacity, drawing upon general principles of law recognized by all nations."[245] In making their survey, the Judges cited three principles they would follow. First, they noted that it was an accepted practice that not every legal system in the world would be examined in order to determine a general principle of law, as this was

[240] *Landovery 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.
[241] *Eichmann v. Attorney-General of the Government of Israel*, 36 ILR 277 (1962) at p. 318.
[242] *Papon* case, unpublished transcript of Judgement of 18 Sep. 1996, *Cour d'appel do Bordeaux, Chambre d'accusation. Arrêt du 18 septembre 1996*, no. 806. (Translation by Judge Cassese).
[243] *Warsaw Ghetto* case, decision of Court of Assize of Dortmund, 31 Mar. 1954, Vol. XII, 1974, pp.340-341.
[244] For a complete list of cases cited in this portion of the Opinion, please see: Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Prosecutor v. Erdemović*, 7 October 1997, para. 47.
[245] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), U.N. Doc. S/25704.

practically impossible. Second, the Judges cited eminent jurists in their assertion that the purpose of this provision was to ensure that international tribunals were never handcuffed by lack of legal rules upon which to make their decisions.[246] Third, the Judges noted the difference between a "general principle" and manifestations of that principle in specific rules. They asserted that a rule was a binding, practical standard; whereas a principle was a general truth which served as a guide to action.[247] With that in mind, the two Judges claimed their survey was confined to jurisprudence to which they had access and that this review was meant to determine a general trend.

Civil Law Nations

Civil law nations represented the majority of evidence of countries which permitted duress to be used as a defense to murder. It is noted that some nations made the distinction between necessity and duress, with necessity being caused by natural forces and duress being the result of threats from other humans. The penal codes of France, Belgium, The Netherlands, Spain, Germany, Italy, Norway, Sweden, Finland, Venezuela, Nicaragua, Chile, Panama, Mexico, and the former Yugoslavia were examined in detail. In order to provide a sampling of these legal codes, the laws of Germany, Italy, Nicaragua, Mexico and the former Yugoslavia will be discussed here.

Section 35 (1) of the German Penal Code of 1975 (amended 1987) states:

> 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.[248]

The important issues to note in this code is the total exculpation of the accused if this defense can be proven and the prohibition against claiming duress if one can have been fairly expected to encounter risk in the form of duress. This law seems to view the

[246] Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 57.
[247] Ibid.
[248] George Fletcher, translator. *Rethinking Criminal Law* (Boston/Toronto: Little, Brown and Company, 1978), 833.

person who commits the wrongful act as without choice. This stands in contrast to the opinions of British legal scholars mentioned earlier in this chapter.

A portion of Article 54 of the Italian Penal Code of 1930 (amended 1987) states:

> (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 or otherwise inevitable, and the acts committed under which are proportionate to the threatened harm.

Article 46 of the same code holds:

> 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.[249]

Article 46 of this Code negates criminal responsibility for the act committed by the coerced person and places it on the shoulders of the persons or people responsible for creating duress. Article 54 (1) adds the issue of proportionality to be considered. This is similar to the proportionality requirement of the general rule regarding duress advanced by the UN War Crimes Commission.

Nicaragua's Penal Code of 1974 (amended 1994) removes the criminal liability of someone, "who acts under an irresistible physical force of is compelled by the threat of an imminent and grave danger."[250] In addition, this code requires that one must act while under a threat of evil which is real and imminent and that evil is greater then the harm caused by the act in order to receive exculpation. Again, the concept of proportionality is present and necessary in order to claim duress under Nicaraguan law.

The Mexican Penal Code of 1931 (amended 1994) holds that no crime is present 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….[251]

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[249] Giovanni Conso, ed., *Codice Penale*, 5th ed. (Milano: Giuffré, 1987), 33.
[250] *Ley de Código Penal de la República de Nicaragua* (BITECSA, 1995).
[251] *Código Penal para El Distrito Federal*, 56th ed. (Editorial Porrua, S.A., Mexico, 1996).

In this case, the issue of reasonable expectation is revived. The act will be judged according to what the judge views can be reasonably expected of a normal person in Mexican society. In addition, this portion of code seems to imply the lack of moral choice on the part of the person committing the act in question, as the result of coercion. This is similar to the concept found in Germany's Code.

The Penal Code of the former Yugoslavia has its roots in the Penal Code of the Socialist Federal Republic of Yugoslavia. This code was applied to the republics and autonomous provinces of the former Yugoslavia during the breakup, and was supplemented by an amendment in 1990. Article 10 of this amendment states:

> (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 of 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 had 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 punishment.
>
> (4) There is no extreme necessity where the perpetrator was under an obligation to expose himself to the danger.[252]

In addition to the principal of proportionality, the Code of the former Yugoslavia affords for mitigation of punishment if the proportionality threshold is not met. There also exists the possibility of complete remission of punishment in cases of particularly mitigating circumstances. The code contains language that prohibits the use of this defense in cases where the accused knowingly exposed themselves to the possibility that they would be found in that extreme situation. Following this examination, the Judges moved on to a survey of jurisdictions which prohibited the use of the duress defense to the crime of murder.

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[252] Article 10, *Amendment to the Penal Code of the Socialist Federal Republic of Yugoslavia*, Promulgated in the Official Gazette, 28 June 1990.

Common Law Nations

Those nations which prohibited the use of the duress defense as a complete defense to a murder charge were primarily from the common law tradition. The nations surveyed included: England, The United States, Australia, Canada, South Africa, India, Malaysia, and Nigeria. The law of England has already been discussed at length in this work, so the codes of other nations will be the focus of this examination.

The United States and Australia tend to take the same view of duress as does England, with a few exceptions found in the US. Canada's Criminal Code permits the accused to be excused from committing the offense in question, as long as the crime involved did not include treason, murder, piracy, attempted murder, sexual assault, robbery, arson, abduction, or hostage taking. A treatise on South African law states 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 other to whom he stood in a protective relationship would follow his refusal.[253]

This passage does not comment on whether it is permissible under South African law to plead duress as a complete defense to a crime of murder in the first degree. Thus, it remains an unsettled portion of South African law.

The Indian Penal Code of 1960, as amended in 1991, provides in section 94 that, "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."[254] This passage clearly shows a prohibition on claiming duress to the crime of murder. Malaysia's Penal Code is based on India's Code and contains nearly the exact language concerning duress.

Section 32 of Nigeria's Criminal Code Act of 1916 (amended 1990) states that a person is not criminally responsible for an act:

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[253] F.G. Gardiner and C.W.H. Landsdown, *South African Criminal Law and Procedure* 5th. ed. (Cape Town: Juta and Co., Ltd., 1946), 84.
[254] Justice V. Raghavan, *Law of Crimes* (New Delhi: Orient Law House, 1991), 161.

> (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 position to execute the threats…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.[255]

Nigeria's Code, like that of India, Malaysia, Canada, and England provides a strict prohibition the use of duress as a complete defense to the crime of murder. Following their examination of common law nations, Judges McDonald and Vohrah turned their attention to nations whose legal systems were neither of the common nor civil law tradition.

Other Nations

In this portion of their opinion, the Judges examined Japanese, Chinese, Moroccan, Somali, and Ethiopian law. The Japanese Penal Code of 1907 (amended 1968) employs the proportionality principle discussed earlier with no specific prohibition against using the defense to answer a murder charge. In addition, it provides for mitigation or remission of sentence if the proportionality threshold is not met.[256] The law of China is very similar to that of Japan. It, too, provides for mitigation or remission of sentence when the harm caused in avoiding a threat is in excess of that which is threatened. Moroccan law holds that no crime was committed in a situation in which the perpetrator of an act could not resist an external force or threat and their position was unavoidable. Again, no specific prohibition against the use of this defense as an answer to a murder charge exists. According to the Judge's Opinion, Somalia's Penal Code of 1962 states, "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."[257] Judges McDonald and Vohrah end their survey of relevant national codes by examining

[255] The Law Revision Committee, Federal Ministry of Justice of Nigeria, *The Laws of the Federation of Nigeria* (Portsmouth: Grosvenor Press Ltd., 1990), Vol. 5.
[256] The Japanese Ministry of Justice, *Criminal Statutes* (translation) (Tokyo, n.d.).
[257] Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 61.

Ethiopia's 1957 Penal Code promulgated by Haile Selassie. Article 67 of this code holds that, "Whoever commits an offence under an absolute physical coercion which he could not possibly resist is not liable to punishment."[258] It is interesting to note here that the language used is "not liable to punishment," it does not necessarily excuse the actor from blame; it simply precludes them from being punished. Article 68 of the same Code goes on to say that in cases where the act was committed under conditions that were able to be resisted, that the actor is liable to be punished. However, it also provides for mitigation of that punishment based on the conditions under which the act was committed.

The Opinion then cites law in Poland and Norway, passed in 1946 which seems to prohibit the use of duress as a defense. Article 5 of the Polish Law Concerning the Punishment of War Criminals states, "The fact that an act or omission was caused by a threat, order or command does not exempt from criminal responsibility."[259] In addition, Article 5 of the Norwegian Law on the Punishment of Foreign War Criminals holds that, "Necessity and superior orders cannot be pleaded in exculpation of any crime referred to in Article 1 of the present law."[260] Both of these laws provide for mitigation of sentence if duress can be proven; the Norwegian law even outlines the possibility of remission of sentence.

Significance of the Survey

Having made an adequate survey of legal systems in both the common and civil law traditions, and additionally citing nations outside those two classifications, Judges McDonald and Vohrah began to assert their findings. Their first task was to identify the general principle of law that they found through their survey. The two found that the general principle that ran through the majority of national law was that an accused person is recognized to be less blameworthy and less deserving of full punishment if he/she acted under duress or urgent necessity. In defining duress, the judges used, "Imminent threats to the life of an accused if he refuses to commit a crime."[261] The two cited the

[258] *Negarit Gazeta*, (Addis Ababa, 1957), Proclamation No. 158 of 1957.
[259] *Law Reports of Trials of War Criminals*, vol. XV, 174.
[260] Ibid.
[261] Joint Separate Opinion of Judge McDonald and Judge Vohrah, III 66.

large number of jurisdictions in which duress was held as a complete defense to all charges. Additionally, even in nations that did not allow duress to be pled as a defense to all crimes, mitigation of punishment was always an option for crimes to which duress was a prohibited defense. The opinion also cited the Polish and Norwegian laws, which were expressly written to try war criminals as laws which do not permit the use of duress as a complete defense, but permitted its use in mitigation of punishment. The concept of proportionality, a common theme in many civil law codes on the subject, also bore attention from the judges. They asserted that because of the proportionality provision, it was questionable whether duress could ever be consistently used in defense of a crime involving the killing of innocents. It was their contention that perhaps civil courts might never consider the harm of killing an innocent to be proportional to the harm in oneself being killed. Finally, the judges cited the concept that duress could not be claimed under the Yugoslav Criminal Code in cases where the perpetrator was under obligation to expose himself or herself to a certain amount of danger.[262]

Judges McDonald and Vohrah concluded that no consistent rule for dealing with the issue of duress existed through the world's legal systems. With that in mind, the judges stated that their decision on this issue would be made in light of the context under which the ICTY was formed; that is, to investigate and prosecute those responsible for "serious violations of international humanitarian law."[263]

The judges accepted the Prosecution's contention that mitigation of punishment would be the most preferable mode for dealing with issues of duress. They cited Lord Simon's opinion in *Lynch v. DPP Northern Ireland* and the majority opinion in *Abbott v. The Queen* as highlighting the threat to society that permitting such a defense as duress to answer the crime of murder might entail. The opinion states, "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."[264] In the case at hand, the judges submitted, their decision would impact international humanitarian law, which has at its core the protection of vulnerable persons in situations of armed conflict. The judges rejected the proposition

[262] Ibid., para. 69.
[263] Ibid., para. 72.
[264] Ibid., para. 75.

that incidence of murder in civil jurisdictions where duress is allowed as a defense is no higher than in common law jurisdictions. The basis for this rejection was that the potential for duress to be brought to bear on an individual within an international armed conflict was far greater than in a peacetime domestic setting. As the result of this, the judges thought it better, in the interest of protection of innocents, not to permit duress to be an avenue to a complete defense in those situations.[265] They felt that those under duress should also fear the legal ramifications of their actions.

Judge McDonald and Judge Vohrah then turned their attention to the issue of whether Erdemović should have been expected to sacrifice his own life when the fate of the Bosnian Muslim men was already sealed. The judges cited the *Masetti* case heard before the Court of Assize of L'Aquila, Italy as having a similar circumstance to the facts of the Erdemović case. The accused in this case was acquitted for participating in the execution of prisoners because the fate of the victims had already been sealed, and nothing the accused could have done would have changed that. In its decision, the court found:

> …the possible sacrifice by Masetti and his men 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.[266]

The judges' opinion rejected the holding in *Masetti* because the judges in that case dealt with a strict utilitarian logic, whereas judges McDonald and Vohrah were primarily concerned with their decisions impact on international humanitarian law. As a result of this differing approach, the judges were not concerned with whether it was better to save ones own life rather than die with condemned; rather, their primary concern was to, "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."[267] The judges go further and indict the application of strict utilitarian logic in these types of situations. They cite the philosophical difficulties that might arise from weighing people's lives against one

[265] Ibid., para. 76.
[266] Decision of the court of Assize of L'Aquila, 15 June 1948 (unpublished; President Cassese's translation of the copy provided by the Registry of the Court of Appeal of L'Aquila).
[267] Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 80.

another, especially given potential factors such as age, race, occupation and social status to consider. The judges assert that a more flexible and effective approach would be to examine each case and determine an accused's fate through mitigation of punishment.

Judges McDonald and Vohrah based their final decisions on the initial basis with which they approached the question of duress. That is, whether duress affords a soldier a complete defense to the charge of killing innocents. They assert that a soldier ought to be expected to exercise greater fortitude than the average person. The judges state that by their nature, soldiers put themselves in harms way and know that they may be called on to kill or die at any moment. It is for this reason that the judges found it intolerable to allow a soldier to use the defense of duress.[268]

As the result of these varied reasons, Judges McDonald and Vohrah found that duress did not afford a soldier a complete defense to a charge of war crimes or crimes against humanity when the underlying offense was the killing of innocents. For this reason, Erdemović's plea was found not to be equivocal in nature. The Appellant's case was remitted to a new Trial Chamber for repleading, as it was found that his initial plea had not been informed. President Cassese took a decidedly different view of the duress issue.

Separate and Dissenting Opinion of President Cassese

President Cassese agrees with the majority with regards to each question decided, except that concerning duress. As a result, his dissent from the majority on this issue will be the only portion of his opinion examined in this work. President Cassese disagreed with the majority, finding that they based their decision too much on policy considerations which had their roots in English common law. He agreed with the majority in finding that no specific international rule existed with respect to this issue. However, he asserted that a general rule dealing with duress did exist and was incorrectly ignored by the majority in favor of making a policy statement.[269] It was President Cassese's opinion that because no special rule of customary international law existed on the issue,

[268] Ibid., III 85.
[269] Separate and Dissenting Opinion of President Cassese, 7 October 1997, para. 11.

duress ought to be available as a defense to any international crime. In addition, he felt the case should be remitted to a new Trial Chamber where the appellant could enter a plea of not guilty and assert a defense of duress. Cassese begins his examination of the duress defense by uncoupling the issues of superior orders and duress. He, like Judges McDonald and Vohrah, felt that while it was possible for the two issues to be linked, it was not necessary for the success of a duress defense that a superior order have been given.

President Cassese then outlines four strict conditions that must be met in order for duress to be available as a defense. These conditions are:

> (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.[270]

These conditions are meant to prevent the possible abuse of the defense perhaps envisaged by its opponents. The proportionality requirement again appears here as an additional safeguard. One must also take note that condition four is important because it precludes the use of the duress defense in situations where the accused knowingly joined a group intent on violating international humanitarian law.[271]

Following this examination, the President turned his attention to examining whether customary international law existed with respect to the issue of duress, as the Prosecution had contended. He criticized the Prosecution's position that the *Stalag Luft III*, *Feurstein*, and *Holzer* cases formed what amounted to customary international law. He argued that *Stalag Luft III* and *Feurstein* were both argued before British military

[270] Ibid., para. 16.
[271] Ibid.

tribunals set up under a Royal Warrant promulgated on June 14, 1945. In addition, he noted that *Holzer* was heard before a Canadian tribunal which was set up under domestic war crimes regulations. As such, Cassese argued, those cases were heard before tribunals which were domestic in nature, rather than international. By contrast, the *Einsatzgruppen* case was heard before an American military tribunal established under Allied Control Council law No. 10. For this reason, the decision in *Einsatzgruppen* was the only one of the cases mentioned which could be said to be truly international in nature.

In addition to questioning the international nature of the *Feuerstein* case, President Cassese examined it with an eye to the Prosecution's contention that it forbade the use of duress as a defense to murder. At the outset of the proceedings, the Prosecutor in the case detailed the fact that obedience to superior orders was not available as a defense to the accused. However, he allowed for the fact that the accused might be acquitted if extreme necessity or compulsion could be proven. The Prosecutor defined this defense as a compulsion so strong so as to steal one's free will. This issue was brought up by the Prosecution in the case in anticipation that the duress defense might be used by the accused. The accused never used this defense during the course of the trial. As a result of this, the Judge-Advocate, in his summation, ruled out the admission of this defense in the case.[272] This ruling was termed an *obiter dictum* by Cassese, meaning it was included in the body of an opinion, but was not a necessary part of the decision. As such, *obiter dicta* do not constitute a binding statement of law. The basis for this *obiter dictum* was the *Dudley and Stephens* case. Cassese argued that because of its nature as an *obiter dictum*, the decision in *Feurstein* did not overrule the previous decision in the *Jepsen* case.

With respect to the opinion of the Judge-Advocate in the *Stalag Luft III* case, President Cassese again questioned the validity of his findings. The opinion in *Stalag Luft III* was based on two sources of law. The first, *Archbold's Criminal Law*, held that duress was not an excuse to the crime of murder. The second source was the opinion of international jurist, Sir Hersch Lauterpacht. Lauterpacht held that duress might be permitted to be used, unless it is to be held that one is not entitled to save one's own life a the expense of victims. The Judge-Advocate, based on these two pieces of opinion,

[272] Ibid., para. 25.

prohibited the use of duress as a defense in the case. However, Cassese pointed out that Lauterpacht left open the possibility of using duress as a defense if one acted under the fear of severe consequences.[273] In addition, the punishment of many of those defendants in this case whom raised the duress defense was death. This indicates that the Court did not believe duress had a part in their case at all, as mitigation of punishment is certainly would have resulted because of its nature as a tenant of English law on the issue of duress. It is for this reason, that Cassese calls into question the Prosecution's holding that *Stalag Luft III* categorically rejected the use of the duress defense to answer the charge of murder.

President Cassese found that *Holzer* was the only case cited by the Prosecution in which the Judge-Advocate clearly and directly prohibited the use of duress as a defense to the crime of murder. Cassese also noted that in the Judge-Advocate's summation, it was explicitly stated that the Court was to apply the Canadian War Crimes Regulations, and not international law.[274] For these reasons, Cassese categorically rejected the Prosecution's contention that duress had become a settled part of customary international law.

Having argued against the prosecution, President Cassese turned toward citing cases in which duress was permitted as a defense, but not employed. These cases included the *Landovery Castle* case[275], *Muller et al.*[276], and the *Eichmann* case.[277] In addition, he noted that duress had been permitted in several cases, but failed to be proved. Included in this group is: *Touvier*[278], *Papon*[279], *Priebke*[280], *Retzlaff et al.*[281] and others.

In further support of his point, Cassese cited the *Masetti* decision. Additionally, he noted the case of *Bernardi and Randazzo* heard before the Court of Assize of Vercelli,

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[273] Ibid., para. 24.
[274] Ibid., para. 26.
[275] *Verhandlungen des Reichstages. I Wahlperiode 1920*, *Band 368*. *Anlagen zu den Stenographischen Berichten Nr 2254 bis 2628*, 2586. English Translation 16 A.J.I.L. 1922, 722-723.
[276] *Annual Digest and Reports of Public International Cases*, 31 Jan. 1949, 1949, 400-403.
[277] *Eichmann* case. 340.
[278] Judgment of the Court of Appeal of Versailles, 2 June 1993, 12.
[279] Unpublished transcript, *Cour d'appel de Bordeaux, Chambre d'accusation, Arrêt du 18 Septembre 1996*, no. 806, 151.
[280] Judgement, *Priebke*, Military Tribunal of Rome, 30 Sept. 1996
[281] *Retzlaff et al.*, Soviet Military Court sitting in Kharkov, 18 Dec. 1943.

Italy.[282] The two men were Italian police officers; they were ordered by their superiors to execute three partisans. When Bernardi protested, he was told that if he did not comply, he, along with the partisans would be shot. Initially, the two were sentenced to 16 years imprisonment. However, when their case was heard before the Court of Cassation, their sentence was quashed because they had acted under duress.[283]

In addition to these Italian cases, Cassese surveyed several post-war German cases. In the case of *Wülfing and K.*[284], Wülfing, an officer in the Army's Special Services ordered K., a sergeant, to execute a German civilian whom he considered to be guilty of instigation of desertion. K. carried out the order, and Wülfing finished off the victim with his pistol. The District court of Hagen found Wülfing guilty of a crime against humanity. K. was found not guilty because he believed he was carrying out a lawful sentence and that he acted under fear that Wülfing would shoot him if he did not comply. The next case considered was the case of *K. and L.* heard before the Court of Assize of Aachen. In this case, K. and L., members of the German Border Police, had been ordered to kill a man by the head of the Aachen Gestapo. K. pled that he had acted under duress. In making their decision in this matter, the Court specifically investigated what international law said concerning the matter, rather than simply relying on German domestic jurisprudence to guide them. They came to five major conclusions; the first was that the Statute of the International Military Tribunal at Nuremberg and Allied Control Council Law No. 10 both forbid the use of a defense of superior orders. However, necessity was not ruled out as a defense. The second conclusion they came to was that because no specific rule concerning duress existed in the Law of the Tribunal, then the general principles of law of each of the Allied Powers must be consulted in order to formulate an opinion. The Court found that neither continental law, nor Anglo-American law ruled out the use of duress as it related to subordinates obeying superior orders. It was also noted that Anglo-American law prohibited the use of the duress defense to answer for very serious offences. The third conclusion they came to was that the drafting history of the Law did not recognize the Anglo-American point of view. Fourth, because there was no clear indication about how duress should be treated in international law, the

[282] Handwritten judgment of the Court of Assize of Turin, *Bernardi and Randazzo*, 25 March 1947.
[283] Separate and Dissenting Opinion of President Cassese, para. 35.
[284] Ibid., para. 37.

court applied what it thought to be generally recognized ruled of criminal law. The restrictive nature of Anglo-American law on duress was not widely recognized internationally, so it was not considered applicable in this case. The court did recognize the general principle that duress was admissible as a defense any time a serious, unavoidable threat to life or limb was present. The fifth finding was that this decision was in accordance with the relevant provisions within the German Criminal Code.[285] As such, K was acquitted, the court having found he acted under duress. Having demonstrated adequate case law supporting his contention, Cassese moved on to addressing the issue of proportionality.

With respect to the proportionality, President Cassese asserted that this is the most difficult requirement of a successful duress defense to satisfy. He claimed that it is possible that this requirement may never be satisfied in cases where one person must chose between their life and the life of a victim. However, Cassese believed that it was for a trial court to decide. Here, he drew a line between that concept and the facts of the Erdemović case. President Cassese asserted that in cases where it is very likely the victims would have died, no matter what an accused's actions were, duress may succeed as a defense. The principal area of contention between his opinion and that of the majority was that President Cassese believed that it is up to a Trial Chamber to decide the applicability of this defense on a case-by-case basis; it ought not be prohibited from the outset.[286] He pointed out that the case-law appeared to permit the use of the duress defense in cases where it is very likely that the victims would have died not matter what the accused's actions were. Further, he added that the basis upon which duress should be judged in an international court should be particularly stringent; given the importance innocent life has in the human rights arena.

Cassese ended his dissent by asserting that law is based on what can reasonably be expected of members of society. It ought not be based on impossibly high standards of behavior which might, in any case, require heroic action and possibly martyrdom.[287] He further criticized the majority opinion's decision on simply permitting mitigation of punishment to serve as the rule in dealing with situations of duress. He claimed:

[285] Ibid.
[286] Ibid., para. 42.
[287] Ibid., para. 47.

> The purpose of criminal law, including international criminal law, is to punish behavior which is criminal, i.e., morally reprehensible or injurious to society, not to condemn behavior which is 'the product of coercion that is truly irresistible' or the choice of the lesser of two evils.[288]

President Cassese's dissent held that Erdemović's plea was equivocal in nature, as it found that duress was an available defense to a soldier accused of crimes against humanity where the underlying offense was the murder of innocents. On this basis, he advised the case be remitted to a Trial Chamber so that the accused could enter a plea of not guilty and the issue of whether he acted under duress could be determined at trial.[289] At this new trial, he recommended the Chamber answer: whether Erdemović joined the 10th Sabotage Unit with the knowledge that they were carrying out activities that were contrary to international humanitarian law; whether Erdemović acted under threat to life and limb in the killing of between 70 and 100 men at the Branjevo Collective Farm; whether he had adequate means to escape the situation in which he found himself and; whether the harm he caused that day was disproportionate to the harm threatened to be inflicted on him if he did not act as he did.[290]

Final Disposition

Dražen Erdemović appeared before a new Trial Chamber on January 14, 1998. This Chamber consisted of Presiding Judge Florence Ndepele Mwachande Mumba of Zambia, Judge Mohammed Shahabuddeen of Guyana, and Judge Wang Tieya of China. On this date, he pled guilty to violating the laws and customs of war. In lieu of Erdemović having to orally re-testify on the facts of his case, transcripts from previous hearings were used. In addition, both the Office of the Prosecutor and the Defense agreed upon the facts of the case. The two sides even went as far as to agree to a plea bargain arrangement, another first in international criminal law. However, the Tribunal did not

[288] Ibid., para. 48.
[289] Ibid., para. 50.
[290] Ibid.

consider itself to be bound by the agreement.[291] On March 5, 1998, the Trial Chamber unanimously sentenced Dražen Erdemović to imprisonment for a term of five years.

[291] Suzannah Linton, "Reviewing the Case of Dražen Erdemović: Uncharted Waters at the International Criminal Tribunal for the Former Yugoslavia," *Liden Journal of International Law* 12 (1999): 265.

III

DEVELOPMENTS AT ROME

The importance of Erdemović's case before the ICTY is evident in the many books and journal articles in which it has been referenced. Legal opinions on the outcome of the case vary as much as those of the Appellate justices. The material written on this subject focuses on what the correct answer to the duress question ought to have been. However, little has been written on the overall importance of this case in the further development of international criminal law. The Rome Statute of the International Criminal Court was formed several months after the *Erdemović* decision was handed down. This work is the product of many years of scholarship, concession and negotiation. It serves as a benchmark for the development of international criminal law, as well as the basis upon which its further development depends. With these two events occurring in similar periods of time, this leads one to question whether the decisions and opinions of the *Erdemović* case had any impact on the final form of the Rome Statute.

This chapter will focus on the development of the Rome Statute from its beginnings following World War II to its current form. Special attention will be paid to the way duress and necessity are discussed within each of the drafts of the Statute, and how these issues were finally dealt with by Article 31 (d) of the final document. Information from representatives at the Rome Conference will be used in order to give insight into the process surrounding the creation of the Statute, and also to determine to what extent, if any, the decision in *Erdemović* impacted the final form of the Statute. Finally, the language of Article 31 (d) will be examined in order to determine if it is an improvement over the holding in *Erdemović*.

Development of the Rome Statute

The Road to Rome

The concept of creating and codifying international law was first proposed by Jeremy Bentham in the late 18th century.[292] Following unsuccessful attempts by the League of Nations and the cataclysm of the Second World War, the United Nations (UN) sought to further this end. The United States sponsored General Assembly Resolution 95 (I): this resolution had two purposes. The first was to affirm the principles of the Nuremberg Charter and the judgment of the Tribunal at Nuremberg. The second was to advise the Committee on the Codification of International Law (CCIL) to develop a standard codification of crimes against the peace and security of mankind.[293] By 1947, the Committee on the Codification of International Law was replaced by the International Law Commission (ILC). The Commission was charged with formulating the principles of international law and with preparing a draft code of crimes against the peace and security of mankind, similar to that which the CCIL had been charged with developing. The UN's Legal Committee recommended to the General Assembly that it adopt a resolution to develop special committee to develop an international criminal code and to examine the feasibility of establishing an international criminal court.[294] This act served to be counterproductive, as it separated the development of a criminal code from the development of the court which would enforce it.

The difficulties in developing this regime only increased as work began. The draft code submitted to the ILC in 1951 had run into a major difficulty. It could not adequately define what entailed a crime of aggression. As such, further work on the subject could not be attempted without solving this problem. In response, a third body was created in order to develop the proper language to define aggression.[295] This further fragmentation of the development of the code only served to delay any progress which may have come on the

[292] Codification Division, Office of Legal Affairs of the United Nations, 1998. *Origin and background of the development and codification of international law*. New York: United Nations International Law Commission. On-Line. Available at: http://www.un.org/law/ilc/, accessed 31 March 2008.
[293] M. Cherif Bassiouni, "The History of the Draft Code of Crimes Against the Peace and Security of Mankind," *Israel Law Review* 27 (1993): 247.
[294] Ibid., 252.
[295] Ibid., 253.

subject. Also in 1951, a draft statute for an international criminal court was submitted by the Special Committee which had been appointed by the General Assembly. As the prospect of losing a degree of sovereignty to an international legal body was unpalatable to many states, especially those occupying positions of power, the 1951 draft statute was roundly criticized however, it was not rejected outright. The General Assembly simply formed a new committee to study the same subject.[296] This new committee made several changes to the document, including making the court more flexible and allowing for voluntary participation. Though these changes made the court more attractive, the General Assembly felt that it would not be prudent to establish a court before a criminal code was developed. As a result of the difficulty in defining aggression, the development of a coherent code would be endlessly delayed. From 1952 to 1974 the General Assembly would appoint four separate Special Committees to explore the crime of aggression. By 1974, the conclusion was made that aggression was to be considered a political issue, not a justiciable crime.[297] Additionally, the International Convention on the Suppression and Punishment of the Crime of Apartheid was promulgated by the UN. The General Assembly directed the UN's Human Rights Commission to develop a statute for an international court by which the Convention might be enforced.[298] This effort came to nothing.

Once the issue of aggression had been decided, the General Assembly indicated that the 1954 Draft Code be reconsidered: this did not happen until 1981. Additionally the 1953 Draft Statute was not ordered to be reconsidered during this time.[299] From 1982 to 1990, the ILC considered the language of the 1954 Draft Code and studied new issues concerning international law that had developed in the years since the Code's inception. Among these new issues were terrorism and international drug trafficking.[300] In addition to efforts by the ILC, the International Law Association, a professional association not affiliated with the UN, developed a draft statute for an international criminal court in

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[296] Ibid., 256.
[297] Ibid., 258.
[298] Jeffrey S. Morton, *The International Law Commission of the United Nations* (Columbia, SC: University of South Carolina Press, 2000), 59.
[299] Bassiouni, "The History of the Draft Code of Crimes Against the Peace and Security of Mankind," 259.
[300] Ibid., 260.

1982 and revised it in 1984.[301] Only in 1990, at the request of Trinidad and Tobago, did the General Assembly direct the ILC to resume its considerations in forming an international criminal court.[302] This request was made in order to combat international drug trafficking.

By 1993, the ILC had produced a new draft statute. This statute was positively received by the General Assembly. Following more work on the statute, the final version was presented to the General Assembly in 1994.[303] Two years later, the ILC submitted its final draft code of crimes against the peace and security of mankind. As the next step in the process of development, the General Assembly created an *ad hoc* committee to discuss the nature and power of the proposed court. The work of this Committee highlighted several areas of concern felt by nations. It had been hoped that this Committee would be the stepping stone to a diplomatic conference which would decide upon the final language of the statute; this was not the case. However, the *Ad Hoc* Committee's work was important in that it reunited the concepts of a statute and code that had been separated for so long.[304] As a result of the difficulties encountered by the *Ad Hoc* Committee, the General Assembly decided to create a new, Prepatory Committee (PrepCom) comprised of member states and non-governmental organizations. This Committee met several times throughout 1996 and 1997. During an intersessional meeting of the Committee, held in January of 1998, a draft was created that brought together several proposals into one coherent text. This meeting was held in Zutphen, the Netherlands; consequently the document created there became known as the 'Zutphen draft.'[305] Though this document was of great importance, it still left much work to be done. The draft was littered with differing opinions placed in brackets; these brackets represented choices in language to be made at a later date.[306] That later date came on

[301] Morton, 60.
[302] United Nations, 1998. *Rome Statute of the International Criminal Court: Overview*. New York: United Nations. On-Line. Available at: http://untreaty.un.org/cod/icc/general/overview.htm, accessed 29 March 2008.
[303] William A. Schabas, *An Introduction to the International Criminal Court*, 2d ed. (Cambridge: Cambridge University Press, 2004), 9.
[304] Ibid., 14.
[305] Ibid., 15.
[306] Ibid.

June 15, 1998 when the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened in Rome.

Representatives from over 160 nations and several international and non-governmental organizations gathered at Rome.[307] The conference was broken up into three main bodies. These bodies were: work groups, Committee of the Whole, and Drafting Committee. Work was first divided up into several work groups which dealt with issues such as general principles of law and procedure. When a portion of the language was agreed upon by consensus, the work group would send it to the Committee of the Whole. This body would then send the language to the Drafting Committee, headed by Cherif Bassiouni.[308] Phillip Kirsch, chair of the Committee of the Whole, released the final form of the Statute on July 17, the final day of the Conference. Having reservations about the document, the US unsuccessfully attempted to rally opposition. In a final act, the US demanded a vote be taken on the Statute. One hundred twenty states voted for the document, twenty-one abstained, and seven voted against, including the US.[309] The Rome Statute entered into force on July 1, 2002. Article 31 (1) (d) of the Statute dealt with the defense of duress.

Development of Article 31 (1) (d)

The 1951 draft statute for an international criminal court made no mention of possible defenses which might be available to the accused. Neither did its revised version in 1953. The only portion of those statutes that could have had anything to do with possible defenses used by an accused is Article 39 (2) (d).[310] This article held that the accused had the right to a fair trial and included in that right was the right to conduct his own defense and be defended by the counsel of his choice. Following in similar fashion, the 1994 draft statute made no mention of possible defenses.

It was not until the *Ad Hoc* Committee's report of 1995 that the mention of possible defenses to crimes is mentioned. Paragraph 87 of the Committee's report states:

[307] Ibid.
[308] Ibid., 17.
[309] Ibid., 18.
[310] M. Cherif Bassiouni, ed. *The Statute of the International Criminal Court: A Documentary History* (Ardsley, NY: Transnational Publishers, 1998), 754.

> This approach would enable the states parties to the statute to participate in the elaboration of the essential rules that would form part of the statute, as well as the elaboration of other important provisions to be included in the rules of the court. It would also give potential States parties a clear understanding of the general legal framework in which the court would operate. Furthermore, it would provide clear guidance to the court, secure the degree of predictability and certainty required for the rights of the accused and the ability of defence counsel to respond to the charges to be fully respected, and promote consistent jurisprudence on fundamental questions of general criminal law, such as *mens rea*, principles of individual criminal responsibility and possible defenses.[311]

In addition to this language, possible defenses were outlined in the notes of the report. Under Annex II (B) (5), titled "Guidelines for consideration of the question of general principles of criminal law," several possible defenses were listed. Among these were: Necessity, Lesser of evils, and Duress/coercion/*force majeure*.[312] Each of these possible defenses was listed under a column titled "grounds for excuse and justification." This is important in that other defenses were listed under a column entitled "Negation of liability." This shows a distinction drawn between the nature of certain defenses and their possible use in future cases.

In 1996, PrepCom outlined several of the defenses listed in the *Ad Hoc* Committee's report in their own report to the General Assembly. Article O discusses the nature of the defense of extreme necessity.[313] Article P covers the defense of duress or coercion. Article P states:

> 1. A person [is not criminally responsible and] is not liable for punishment if the person acts under duress or coercion.
>
> 2. A person acts under duress or coercion if:
> [(a) [[the person reasonably believes that] there is a threat of [imminent] [present] [or otherwise unavoidable] [unlawful] force or use of such force against that person of another person];
> [(a) [the person reasonably believes that] there is a threat of [imminent] [present] [or otherwise unavoidable] death or serious bodily harm to that person or another person;

[311] Ibid., 629-630.
[312] Ibid., 656.
[313] Ibid., 493.

(b) [the person acts reasonably in response to that threat] [the threat could not reasonable have been resisted by [an ordinary] [the] person]; and
[(c) the coerced conduct does not produce a greater harm than the one likely to be suffered (sought to be voided) and is not likely to produce death].

[3. A person does not act under duress or coercion if that person knowingly and without reasonable excuse has exposed himself or herself to that duress or coercion].[314]

It is important to note that Article P (2) (c) contains the principle of proportionality so common among statutes concerning duress. Of even greater importance is that it prohibits the use of the defense in cases involving death or circumstances likely to produce death. Here one sees the common law prohibition illustrated. In the notes following Article P, it is explained that a question to be answered in further work is whether causing death should be permitted in response to a threat.

PrepCom further dealt with this issue during its December, 1997 session. In the Committee's report on decisions made at this meeting, Article L under General Principles of Criminal Law outlined grounds for excluding criminal responsibility. Article L (1) (d) states that a person is not to be held criminally responsible if:

[the person reasonably believes that] there is a threat of [imminent] death or serious bodily harm against that person or another person [or against his or her liberty] [or property or property interests] and the person acts reasonably to avoid this threat, provided that the person's action [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided; [however, if the person has [knowingly] [recklessly] exposed him or herself to a situation which was likely to lead to the threat, the person shall remain responsible][315]

In addition to this, Article L holds that the court is to determine the applicability of each of the grounds for exclusion of criminal responsibility on a case by case basis. This is similar to the idea advanced by President Cassese in his dissenting opinion in *Erdemović*. The prohibition against using this defense in cases where death is caused is still intact. In addition, this prohibition is applied to incidences of extreme necessity,

[314] Ibid., 494. Bracketed sections indicate choices to be made in language.
[315] Ibid., 320.

discussed in Article L (1) (e). The language of Article L (1) (d), as outlined above, appears exactly the same in Article 25 [L] (1) (d) of the 'Zutphen draft.'[316]

In PrepCom's final form of its proposed Draft Statute, the language first used in Article L (1) (d) of its December 1997 report survived unchanged. However, its designation in the Draft Statute was changed to Article 31 (1) (d). It is of importance to note that proposals to change the language contained in this article were made both at the Zutphen Conference and during PrepCom's final deliberations in creating the Draft Statute. In each case, it was proposed that the language, "provided that the person's action [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided," be replaced with, "employing means which are not disproportionate to the risk faced."[317] This change would have eliminated the language prohibiting the use of the duress defense in cases involving death or situations likely to cause death. This change was not made in either case. However, this language would be removed in the final form of Article 31 (1) (d) formulated at the Rome Conference.

As stated in the Rome Statute of the International Criminal Court, Article 31 (1) (d) holds:

> 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 imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
> (i) Made by other persons; or
> (ii) Constituted by other circumstances beyond that person's control.[318]

In addition, the article goes on to state that, "the Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this

[316] Ibid., 250.
[317] Ibid., 146.
[318] Ibid., 54.

Statute to the case before it."[319] There are several important factors present in this statute. The first of these is the language stating that this article is concerned with circumstances which exclude criminal responsibility. These factors are not justifications which would absolve one from punishment. Rather, they are conditions under which it is determined that no criminal culpability exists. The second feature of importance in this article is that a threat of imminent death or serious harm must exist in order to possibly claim duress. In addition, when faced with such threat, the accused must act reasonably in order to avoid it. Finally, if the threat cannot be avoided, the accused must not intend to cause greater harm than they themselves are seeking to avoid. These concepts can be seen in the first three of President Cassese's four conditions upon which the duress defense can be claimed. Of greatest importance, however, is the conspicuous lack of a prohibition against using the duress defense in cases involving death. This prohibition had been a part of every conception of this article to this point. In addition, changes to this language had been proposed and rejected in the drafts leading up to the Rome Conference. This raises the question of how and why this portion of the statute was changed. This issue will be addressed with insight from Dr. Albin Eser of the Max Planck Institute and Ambassador Per Saland of Sweden, both of whom took part in the formation of this important portion of the Statute.

Negotiations Surrounding Article 31 (1) (d)

Dr. Albin Eser participated in the Rome Conference as a member of the German delegation. However, his work on the Statute did not begin in Rome. He, along with Kai Ambos of Germany, Otto Triffterer and Otto Lagodny of Austria, Dorean Koenig of the USA, and Hans Vest of Switzerland had formed a Committee of Experts which prepared an alternative draft statute for an international criminal court during 1995 and 1996.[320] This alternative statute was known as the Siracusa / Freiburg draft. This document did outline possible defenses, including duress. The portion of this document of particular interest is the proposed replacement of Article 33 of the 1994 Draft Statute with modified

[319] Ibid.

[320] Albin Eser, Freiburg, Germany to Author, 27 March 2008.

language and the inclusion of new articles 33a-33q. Article 33j of this draft stated that the court should determine the admissibility of defenses. Article 33l dealt specifically with necessity, coercion and duress. The article states:

> (1) Necessity excludes punishment when the person, by reason of circumstances beyond his control likely to create an otherwise unavoidable private or public harm, engages in conduct to avoid the imminent greater harm likely to be produced by such circumstances, but not likely to produce death.
>
> (2) Necessity can also result from coercion or duress which a person would reasonably be unable to resist.
>
> (3) Military necessity may exclude punishment only as provided by the international law of armed conflict.[321]

Though the Siracusa / Freiburg draft was not explicitly included in the final language of the Statute, Dr. Eser felt that is played an important part in influencing the concept of the Statute.[322] One immediately notices that the prohibition against using duress in response to crimes whose actions are likely to produce death. Dr. Eser added, "When discussing our Freiburg proposal, we had of course also taken into account the Erdemović decision."[323]

Ambassador Per Saland of Sweden served as chair of the working committee which decided upon the final language of Article 31 (1) (d). Ambassador Saland characterized negotiation during the Rome Conference as being the primary means by which decisions on the final language of the Statute were made. He described the process.

> As for the question who suggested what, it has to be remembered that by the middle of the Rome Conference (and that was approximately when the defences/exemptions from criminal responsibility were negotiated), usual procedures of tabling proposals, gathering cosponsors etc. mattered little. The normal pattern was that, after a general discussion in the whole working group, as it had become clear where the sticking points lay, I would make a summary of where we actually stood, outlining what I perceived as the alternatives on

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[321] Art. 33 l, unpublished Siracusa/Freiburg draft statute for an international criminal court, 1996.
[322] Albin Eser, Freiburg, Germany to Author, 28 January 2008.
[323] Ibid.

> different issues and what compromises, or choices, I tentatively saw as necessary to reach a consensus.[324]

At that point in the Conference, reaching a consensus on topics had become the most important task the working group faced. It was Ambassador Saland's job to solve impasses. "The pertinent question was more often than not whether delegations with hard-held views could live with a solution, not whether they thought it right or preferred it."[325] According to Saland, when the group faced an impasse, it was his general practice to call on a small group of eminent jurists who were part of the group, representing nations such as Argentina, Canada, Germany, and the US, to present a proposal for further discussion. This proposal would then be presented to delegations that had shown particular interest in the subject. Following this presentation and discussion, the proposal would be presented to the entire working group.[326] This unofficial group of legal scholars took part in these presentations with the explicit understanding that they were not advancing the interests or views of their nation, rather, they were merely attempting to propose a basis upon which consensus could be drawn.

With respect to Article 31 (1) (d), Ambassador Saland could not clearly remember if *Erdemović* had been used in discussions regarding this portion of the Statute. However, he did recollect it being brought up many times during negotiations at Rome.[327] Ambassador Saland pointed out that cases relating to specific issues in international law were often cited by both sides of a particular issue. One side of an argument would cite a particular case as illustrating the state of development of international law on a given issue, and the opposition would cite the same case in support of its contention that the language needed to be amended.[328] Ambassador Saland suspected that this was the case with *Erdemović* with respect to the admissibility of a duress defense in response to a charge of murder. In addition, he noted that there were deep divisions within the working group on this issue, because of the ways different national jurisdictions conceived of this matter. Members of the Canadian delegation submitted the final language of the statute to

[324] Per Saland, e-mail message to author, December 12, 2007.
[325] Ibid.
[326] Ibid.
[327] Ibid.
[328] Ibid.

the working group through the informal manner described by Ambassador Saland.[329] Despite the ambiguity of *Erdemović's* exact role in the negotiations at Rome, the case can be seen as having served as both a contemporary legal precedent issued by the ICTY, and as an example of an injustice which needed to be corrected by the Rome Statute. What is for certain is that the decision on the final language of the Article31 (1) (d) was more a child of compromise and negotiation than an attempt at formulating sound law.

Criticisms of Article 31 (1) (d)

In his criticism of Article 31 (1) (d), Ilias Bantekas notes that the language of this article is based, as Ambassador Saland pointed out, in compromise.[330] He argued that this was the case because of inflexible views on the concept of duress. It was his assertion that this process had produced a poor article. First among his criticisms is that the final version of the Statute combines the two separate but related issues of duress and necessity into one single subparagraph. In addition, he noted that the final form contained no provision explicitly prohibiting the use of the duress defense in the case of murder. He argued that this left the issue open, rather than explicitly accepting or denying its admissibility. However, Bantekas did praise some aspects of the article. He praised President Cassese's dissent in *Erdemović*, saying that it was held in high regard among international jurists. In addition, he went on to say that it had influenced developments within the formation of the ICC.[331] In his praise, he pointed out Cassese's use of proportionality as a key component of a successful duress defense. He pointed out that this doctrine proved to be flexible; in traditional instances of duress where one is forced to choose between their life and the life of another, it may never be satisfied. However, in situations where there is a high probability the victim will die no matter what the accused might have done, it may be successfully proven.[332]

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[329] Roy S. Lee, ed. *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Cambridge, MA: Kluwer Law International, 1999), 208.
[330] I. Bantekas, in: Dominic McGoldrick, Peter Rowe, and Eric Donnelly, eds. *The Permanent International Criminal Court: Legal and Policy Issues* (Portland, OR: Hart Publishing, 2004), 274.
[331] Ibid., 275.
[332] Ibid., 276.

Dr. Eser also authored a commentary on Article 31.[333] Dr. Eser found the document to be incomplete and its title, "grounds for excluding criminal responsibility," to be deceptive. He felt it misleading in that it is not the only article which deals with issues which might exclude criminal responsibility. Additionally, the article does not outline every defense which may be put forth on behalf of an accused. Among these non-addressed defenses were: consent of the victim, conflict of interests, reprisals, general or military necessity, diplomatic immunity, and the *tu quoque* argument.[334] Dr. Eser also makes note of the specific language, "grounds for excluding criminal responsibility," as being of continental, or civil law origin, rather than common law. This language, he claimed, allowed the question of whether the Article 31 views the circumstances enumerated therein to be justifications or excuses for what would otherwise be criminal conduct. He carries this argument through to his examination of Article 31 (1) (d). He sees this portion of the article as especially flawed because of its combination of duress and necessity. Dr. Eser views duress as excusing a criminal action, while necessity justifies an action. In Dr. Eser's opinion, combining these two differing concepts is a major flaw.

In outlining the specific language of the article, Dr. Eser distinguishes four necessary components; these are: the conduct to be excluded from criminal responsibility, elements of duress, requirements for actions taken to avoid the threat, and subjective intent.[335] With respect to conduct to be excluded from responsibility, Dr. Eser points out that the defense only applies to crimes within the purview of the Court, specifically, articles 5-8.

In outlining elements of duress, Eser notes that the person must see themselves or those around them as exposed to a threat from persons of circumstances which are out of their control. The consequence of these circumstances or threats must be threat of imminent death or serious bodily harm. Finally, the specter of the threats must make that person feel unable to withstand them, and yield to committing a crime. The act taken to

[333] A. Eser, in: O. Triffterer, ed. *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 537.
[334] Ibid., 543.
[335] Ibid., 551.

avoid the threat must represent a last resort in which no other means are available which would allow the person to escape the situation.

With respect to proportionality, Dr. Eser finds difficulty in the article's blending of duress and necessity.

> The subjective conception of the "lesser evil" – principle is the crucial point of this defence: different from classical "necessity" on the one hand, which would require a balancing of conflicting interests and offer justification if the person objectively rescues the greater good at the cost of the minor, and different from classical "duress" on the other hand, providing an excuse regardless of the greater or lesser harm, if the person could not be fairly expected to withstand the threat…it is not required that the person avoids the greater harm by his criminal conduct, but in subjective terms he must intend to do so.[336]

Here one can see why blending the two concepts within one body of language can be problematic. Eser feels more work needs to be done in order to refine and strengthen this portion of the Statute. However, despite the flaws pointed out in his analysis, he considers this article to be an important part of the Rome Statute. He sees the importance of defending the rights of the accused and their access to a fair and vigorous defense, no matter what charge they face.[337]

The development of the Rome Statute proved difficult. As such, the principal force at work in its creation was seeking consensus among delegates. This led to compromise on several areas, especially contentions ones, as was the case with Article 31 (1) (d). It is principally the child of compromise. However, the decision in *Erdemović* was likely used by both sides of the debate concerning duress. As the product of compromise, Article 31 (1) (d) has been criticized by several legal commentators. However, it is now the definitive statement concerning the application of the defense of duress in international criminal law.

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[336] Ibid., 552.
[337] Ibid., 554.

Conclusion

The issue of duress within international criminal law is of great importance, as it is directly related to the fairness with which one is tried before a court of law. In his paper on the *Erdemović* case, former International Criminal Tribunal for Rwanda Judge, Daryl Lim Tze Wei, asserts that the ICTY's judgment in Erdemović was the correct one. He noted its founding as a vehicle through which the international community could express its outrage at the crimes which occurred during the wars of the breakup of the Former Yugoslavia. This sentiment echo's Judge McDonald and Judge Vohrah's opinion in *Erdemović*. Its primary considerations are based upon the nature of the Court and possible public policy implications which informed the decision not to allow duress to be used by Erdemović. Wei asserts, "It is to be a vehicle through which the international community expresses its outrage at the atrocities committed in the former Yugoslavia. It should therefore prosecute crimes that come before it robustly and not make concessions."[338]

With respect to Judge Wei, permitting an accused person to claim duress as a defense to a charge involving murder is not a concession. It is, and should be, part of an international legal system which seeks to promote the protection of innocent people as well as respect for the rule of law. Implicit in this respect is holding fairness to the victim, society, and the accused in equal regard. Preventing an accused from defending themselves by pleading duress erodes this fairness. If facts in a given case are such that the accused could not have been reasonably been expected to act any differently, and in truth, acted by selecting the lesser of two evils, why must they be condemned?

Some would argue that mitigation of punishment is the proper way to deal with cases of duress. The notion of mitigation is recognition that some aspect of a given crime necessitates reduced punishment or no punishment at all. However, even if punishment is fully remitted, the guilt of the accused stands on record. The accused still has dirty hands. If one's actions are not blameworthy, as remission of punishment would suggest, then

[338] *Daryl Lim Tze Wei, "Rethinking Erdemović*: Beyond the Clash of Laws," *Singapore Law Review* 23 (2003): 83.

why should one be judged guilty? Mitigation and remission do provide a measure of flexibility to the court. However, they ignore the underlying condemnation which a conviction implies.

Also noted in Judges McDonald and Vohrah's opinion is the public policy argument which holds that if it is known duress is available as a defense, those seeking to do harm will be emboldened. This argument does not bear out in national jurisdictions in which duress is permissible as a defense to any crime. In their own opinion, the judges admit that this is the case, yet reject the proposition equating behavior on a national level with possible behavior on an international level. What the judges ignore is that claiming one acted under duress does not automatically exculpate them from charges.

According to Judge Cassese, duress should by its nature be difficult to prove. This difficulty allows the prosecution the opportunity to prove that the accused did not act under duress, and should thus be convicted. The strict conditions under which duress should apply are outlined in Judge Cassese's dissent.[339] It is these conditions which guarantee that duress is not successfully utilized in cases which do not warrant it. The most difficult of Cassese's proposed conditions to prove is that of proportionality. If the court is not convinced that the alleged crime committed was less serious than the crime the accused sought to avoid, then the defense fails. It is quite possible that a court might never find the proportionality provision to be satisfied. However, it would be their decision to make on a case by case basis. As noted earlier, Cassese's dissent in *Erdemović* is a widely respected piece of legal reasoning. It is based on international law, not policy implications. The availability of duress to answer the crime of murder allows the court ultimate flexibility. The court has the power to accept that duress has been successfully proven and completely exculpate the accused. This is an option that a court acting under the majority opinion in *Erdemović* would not have. In addition, if certain elements of duress are present, but not all of them have been proven, the court may chose to mitigate punishment. Finally, if none of the elements of duress are proved, the court may act as it chooses in judging the accused. It is Cassese's proposal, not that of Judges McDonald and Vohrah, which provides most flexibility.

[339] See P.82

This flexibility exists in Article 31 (1) (d)'s lack of a prohibition on claiming duress when the act has resulted in death. While it is likely that the *Erdemović* case played a role in the negotiations regarding this article, the true nature of its use in negotiations remains unclear. Further research must be done in order to determine the exact impact of this case on the formation of the Rome Statute. With a focus on producing a workable Statute that each nation could tolerate, the delegates' concerns were centered on building a consensus rather than formulating sound law. This can be seen primarily in the combination of the duress defense and the necessity defense into one paragraph. Although the exact impact of the *Erdemović* case at Rome cannot be determined, it is still a case of great importance. Despite its weaknesses, Article 31 (1) (d) was correct in not prohibiting the use of the duress defense when the crime involves the death of innocents. The International Criminal Court will, by nature, hear cases of the most serious crimes known to man. As such, the Court's proceedings should be viewed as being as just as possible. The inclusion of this article assures a measure of this fairness.

APPENDIX

Annan, Kofi.. n.d.. *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35 (1998) Srebrenica Report.* United Nations, New York, USA. Accessed February 5, 2008. Available at http://www.haverford.edu/relg/sells/reports/UNsrebrenicareport.htm

Burg, Steven, and Paul Shoup. *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention*. Armonk, New York: M.E. Sharpe, 1999.

Gow, James. *Triumph of the Lack of Will: International Diplomacy and the Yugoslav War*. New York: Columbia University Press, 1997.

Honig, Jan, and Norbert Both. *Srebrenica: Record of a War Crime*. New York: Penguin Books, 1997.

Netherlands Institute for War Documentation . 2002. *Srebrenica: Reconstruction, Background, Consequences and Analyses of the Fall of a Safe Area*. Netherlands Institute for War Documentation. Available at http://193.173.80.81/srebrenica/

Rhode, David. *Endgame: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre Since World War II*. New York: Farrar, Straus and Giroux, 1997.

Silber, Laura, and Allan Little. *Yugoslavia: Death of a Nation*. United States: TV Books, Inc., 1995.

Suljagić, Emir. *Postcards from the Grave*. London: Saqi Books, 2005.

SELECTED BIBLEOGRAPHY

ICTY Documents

International Criminal Tribunal for the Former Yugoslavia. 6 October 1995. Rules of Procedure and Evidence. Rev. 6., Rule 62.

Prosecutor v. Erdemović. IT-96-22-PT. 22 May 1996.

__________. IT-96-22-PT. 31 May 1996.

__________. IT-96-22-T. 19 Nov. 1996.

__________. IT-96-22-T. 20 Nov. 1996.

__________. IT-96-22-T. 29 Nov. 1996.

__________. Sentencing Judgment. IT-96-22-T. 29 November 1996

__________. IT-96-22-A. 26 May 1997.

__________. Judgment. IT-96-22-A. 7 October 1997.

__________. Joint Separate Opinion of Judge McDonald and Judge Vohrah. 7 October 1997.

__________. Separate and Dissenting Opinion of President Cassese. 7 October 1997.

__________. Separate and Dissenting Opinion of Judge Li. 7 October 1997.

__________. Separate and Dissenting Opinion of Judge Stephen. 7 October 1997.

__________. Sentencing Judgment, IT-96-22-T*bis*. 5 March 1998.

International Cases and Codes

Abbott v. The Queen. 1976. 3 All England Reports.

Allied Control Council Law No. 10

Annual Digest and Reports of Public International Cases. 1949. 31 Jan. 400-403.

Article 10, *Amendment to the Penal Code of the Socialist Federal Republic of Yugoslavia*. Promulgated in the Official Gazette, 28 June 1990.

Bernardi and Randazzo case. 25 March 1947. Handwritten judgment of the Court of Assize of Turin.

Código Penal para El Distrito Federal. 56th ed. 1996.Editorial Porrua, S.A., Mexico.

Conso, Giovanni, ed. 1987. *Codice Penale*, 5th ed. Milano: Giuffré.

Eichmann v. Attorney-General of the Government of Israel. 1962. 36 ILR 277.

Federal Ministry of Justice of Nigeria, The Law Revision Committee. 1990. *The Laws of the Federation of Nigeria*. Vol. 5. Portsmouth: Grosvenor Press Ltd.

Gardiner, F.G. and C.W.H. Landsdown. 1946. *South African Criminal Law and Procedure* 5th. ed. Cape Town: Juta and Co., Ltd.

Japanese Ministry of Justice. n.d. *Criminal Statutes*, translation. Tokyo.

Landovery Castle case. 1922. English Translation in American Journal of International Law. Vol 16. Original text in *Verhandlungen des Reichstages*. *I Walhperiode 1920*, *Band 368*. *Anlagen zu den Stenographischen Berichten* Nr 2254 bis 2628, Berlin.

Ley de Código Penal de la República de Nicaragua. 1995. BITECSA.

Lynch v. Director of Public Prosecutions for Northern Ireland. 1975. 1 All England Reports

Masetti case. Decision of the court of Assize of L'Aquila. 15 June 1948. Unpublished; President Cassese's translation of the copy provided by the Registry of the Court of Appeal of L'Aquila.

McGoldrick, Dominic, Peter Rowe, and Eric Donnelly, eds. 2004. *The Permanent International Criminal Court: Legal and Policy Issues*. Portland, OR: Hart Publishing.

Negarit Gazeta, 1957. Proclamation No. 158 of 1957. Addis Ababa.

Papon case. unpublished transcript of Judgement of 18 Sep. 1996. *Cour d'appel do Bordeaux, Chambre d'accusation. Arrêt du 18 septembre 1996*. no. 806.

Priebke case. 30 Sept. 1996. Judgment of Military Tribunal of Rome.

R v. Dudley and Stephens. 1884. 14 QBD 273 DC.

Raghavan, V. 1991. *Law of Crimes*. New Delhi: Orient Law House.

Retzlaff et al. case. 18 Dec. 1943, Soviet Military Court sitting in Kharkov.

Siracusa/Freiburg draft statute for an international criminal court, unpublished. 1996.

Touvier case. 2 June 1993. Judgment of the Court of Appeal of Versailles.

Triffterer, Otto, ed. 1999. *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*. Baden-Baden: Nomos Verlagsgesellschaft.

Verhandlungen des Reichstages. *I Wahlperiode 1920*. *Band 368*. *Anlagen zu den Stenographischen Berichten Nr 2254 bis 2628*, 2586. English Translation 16 A.J.I.L. 1922, 722-723.

Warsaw Ghetto case. 1974. Decision of Court of Assize of Dortmund, 31 Mar. 1954. Vol. XII.

Other Sources

ABC News Nightline. Aug. 2. 1996. *Portrait of a War Criminal*. 30 min. DVD.

Bass, Gary. 2000. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton: Princeton University Press.

Bassiouni, M. Cherif. 1993. The History of the Draft Code of Crimes Against the Peace and Security of Mankind. *Israel Law Review* 27. 247-67.

__________. ed. 1998. *The Statute of the International Criminal Court: A Documentary History*. Ardsley, NY: Transnational Publishers.

Fletcher, George. Trans. 1978. *Rethinking Criminal Law*. Boston/Toronto: Little, Brown and Company.

Goldstone, Richard. 2000. *For Humanity*. New Haven: Yale University Press.

Guest, Ian. 1995. *On Trial: The United Nations, War Crimes, and the Former Yugoslavia*. Washington: Refugee Policy Group.

Hampson, Francoise. 1993. *The Case for a War Crimes Tribunal*. London: David Davies Memorial Institute of International Studies.

Hazan, Pierre. 2004. *Justice in a Time of War*. College Station, TX: Texas A&M University Press.

Honig, Jan and Norbert Both. 1997. *Srebrenica: Record of a War Crime*. New York: Penguin Books.

International Criminal Tribunal for the Former Yugoslavia. 2001. *The Path to the Hague: Selected Documents on the Origins of the ICTY*. The Hague: United Nations.

Kerr, Rachel. 2004. *The International Criminal Tribunal for the Former Yugoslavia*. New York: Oxford University Press.

Lee, Roy S. ed. 1999. *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results*. Cambridge, MA: Kluwer Law International.

Lewis, Ken. 1998. *Military Tribunal Sitting in the Palace of Justice Nuremberg, Germany: Duress Needed for Plea of Superior Orders*. British Columbia: The Einsatzgruppen Archives. On-Line. Available at: http://www.einsatzgruppenarchives.com/trials/duress.html. accessed 18 March 2008.

Linton, Suzannah. 1999. Reviewing the Case of Dražen Erdemović: Uncharted Waters at the International Criminal Tribunal for the Former Yugoslavia. *Liden Journal of International Law* 14 (1999): 251-270.

Meron, Theodor. 1993. The Case for War Crimes Trials in Yugoslavia. *Foreign Affairs* 72 (Summer): 122-36.

Morris, Virginia and Michael Scharf, Eds.1995. *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*. Vol. 2. Irvington-on-Hudson, NY: Transnational Publishers, Inc.

Morton, Jeffrey S. 2000. *The International Law Commission of the United Nations*. Columbia, SC: University of South Carolina Press.
O'Brien, James. 1993. The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia. *American Journal of International Law* 87 (Oct.): 639-659.

Robertson, Geoffrey. 2000. *Crimes Against Humanity*. New York: The New Press.

Rhode, David. 1997. *Endgame: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre Since World War II*. New York: Farrar, Straus and Giroux.

Schabas, William A. 2004. *An Introduction to the International Criminal Court*. 2d ed. Cambridge: Cambridge University Press.

Scharf, Michael. 1997. *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg*. Durham, NC: Carolina Academic Press.

United Nations. 1998.Codification Division, Office of Legal Affairs of the United Nations. *Origin and background of the development and codification of international law*. New York: United Nations International Law Commission. On-Line. Available at: http://www.un.org/law/ilc/. accessed 31 March 2008.

__________. International Criminal Tribunal for the Former Yugoslavia. 1994. *Annual Report*.

__________. Report of the Secretary-General Pursuant to General Assembly Resolution 53/35. 1998. *Srebrenica Report*.

__________. Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), U.N. Doc. S/25704.

__________. 1998. *Rome Statute of the International Criminal Court: Overview*. New York: United Nations. On-Line. Available at: http://untreaty.un.org/cod/icc/general/overview.htm. accessed 29 March 2008.

__________. United Nations Security Council. 1993. Resolution 819.

__________. United Nations Security Council. 1993. Resolution 836.

__________.United Nations War Crimes Commission. 1949. *Law Reports of Trial of War Criminals*. Vol. XI. London: H.M. Stationary Office.

Original Research

Eser, Albin. 2008. Letter to author, 28 January.

_________. 2008. Letter to author, 27 March.

Saland, Per. 2007. e-mail message to author, 12 December.

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