

Cover Sheet

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ISSUE ADDRESSED: The defenses of duress and necessity in international law.

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DURESS AND NECESSITY IN INTERNATIONAL LAW

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### Texts and Periodicals

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**Dore**, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders* 56 Ohio State Law Review 665 (1995). (Item "O")

**Dressler**, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 Southern California L. Rev. 1331, 1347-49 (1989). (Item "M")

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*R. v. Howe*, [1987] 1 All ER 771. (Item "U")

*Trial of Alfried Felix Alwyn Krupp von Bohlen Und Halbach and Eleven Others*, U.S. Military Tribunal. Nuremberg. 17 November 1947-30 June 1948. Case No. 58. The United Nations War Crimes Commission. *Law Reports of Trials of War Criminals*. Vol. X. London 1949. (Item "V")

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MODEL PENAL CODE § 2.09(1)-(2).

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## I. Introduction and Summary of Conclusions

This memorandum will examine and analyze the approaches taken by several jurisdictions to the criminal defenses of duress and necessity. Specifically, the memorandum focuses on whether the defenses of duress and necessity should be available to those charged with genocide.

The defendants in Rwanda are charged with genocide. Given the unique nature of this charge, authority directly on point is absent. The core act in a genocidal campaign is the wrongful taking of human life, albeit it on a mass scale with the objective of extinguishing a certain group of people. Consequently, views on the application of the duress and necessity defenses to murder is most closely analogous.

Varying views of the defenses taken by different nations will be reviewed. The memorandum will offer an analysis of the doctrines in light of the special circumstances in Rwanda.

Section II of the memorandum briefly examines the facts of the Rwandan situation. Section III, the heart of the memorandum, contains an analysis of the defenses. In section III (A) the general nature of the defenses of duress and necessity is discussed. Section III (B) examines the status of the defenses in the United States. The treatment of the defenses in other nations is then addressed in section III(C). The recent assertion of the defense in the Yugoslavian War Crimes Tribunal is reviewed in section III(D). The memorandum concludes with section IV where the applicability of the defenses to the Rwandan defendants is discussed.

It is the conclusion of this memorandum that neither duress nor necessity provides a valid defense to those charged with genocide or crimes against humanity. It is the position of this memorandum that allegations of duress should only be given consideration as a mitigating factor at the sentencing stage of the war crimes trials.

## II. Factual Background

In 1994 between 500,000 and 1,000,000 "Tutsis and moderate Hutus [were murdered] throughout Rwanda."<sup>1</sup> This surge of murder was set off by the shooting down of a plane carrying the Rwandan President, Juvenal Habyarimana.<sup>2</sup> The killings, however, were by no means spontaneous. In the time leading up to the genocide Hutu militia groups were trained "on methods of mass murder. . . ."<sup>3</sup> The Rwanda War Crimes Tribunal is charged with the responsibility to prosecute those individuals alleged to have committed genocide and crimes against humanity.

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<sup>1</sup> VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 47 (1998).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 52.

### III. Legal Discussion

#### A. The General Nature of the Defenses of Duress and Necessity

The defense of duress is most commonly focused on human coercion directed specifically at the defendant which overcomes his free will.<sup>4</sup> A defendant who has a gun put to his head and is told he will be shot if he refuses to participate in a robbery is said to have acted under duress.

Unlike duress, which is centered on a specific threat directed at the defendant which constitutes coercion, necessity is more concerned with the forces of nature, or general circumstances, which present the defendant with "a choice of evils."<sup>5</sup> Breaking into a home for shelter when

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<sup>4</sup> See BLACK'S LAW DICTIONARY 504 (6<sup>th</sup> ed. 1990).

<sup>5</sup> "In the case of . . . duress, it is the intentional threats of another person that are the source of the danger, while in the case of necessity the danger is due to other causes, such as forces of nature, human conduct other than intentional threats of bodily harm, etc." *Hibbert v. Her Majesty The Queen*, [1995] 2 S.C.R. 973. The same

one is trapped out in a violent storm is a common example of necessity.<sup>6</sup>

Necessity is commonly seen as a "justification," while duress "is more commonly an excuse."<sup>7</sup> The classification of

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distinction is also recognized in Israeli law. "Duress deals with a crime committed in submission to an unlawful demand under threat of grievous harm. Necessity concerns situations in which events and circumstances, rather than human threats, create the danger of injury which the actor seeks to avert by injuring another." Arnold Enker, *Duress, Self-Defense and Necessity in Israeli Law*, 30 *Israel L. Rev.* 188, 190 (1996).

<sup>6</sup> See, e.g., LAFAYE & SCOTT, *CRIMINAL LAW* § 5.4(a) (2d ed. 1986). "With the defense of necessity, the traditional view has been that the pressure must come from the physical forces of nature (storms, privations) rather than from other human beings." *Id.*

<sup>7</sup> See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 *Southern California L. Rev.* 1331, 1347-49 (1989). See also R. PERKINS & R. BOYCE, *CRIMINAL LAW* 1059 (3d ed. 1982).

necessity as a justification flows from its logical foundation--a choice of evils was presented and the lesser of the two was elected by the defendant.<sup>3</sup> Put simply, the defendant did the wrong thing for the right reason.

Duress, conversely, recognizes that the conduct was wrong but sees the act as something less than volitional--

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*But see* LAFAVE & SCOTT, *supra* note 6, at § 5.3. "One who, under the pressure of an unlawful threat from another human being to harm him (or to harm a third person), commits what would otherwise be a crime may, under some circumstances, be justified in doing what he did and thus not be guilty of the crime in question."

<sup>8</sup> See Dressler, *supra* note 7, at 1349 n. 124. "When the law tolerates, permits, or actively encourages otherwise wrongful, socially harmful conduct, we say that the law *justifies* the act. Self-defense, defense of third persons, and crime prevention are among the recognized modern justification defenses. On the other hand, we recognize *excuse* defenses when we do not blame the actor for his unjustified conduct." *Id.* (emphasis in original). See also PERKINS & BOYCE, *supra* note 7, at 1067.

the defendant was somehow forced to perform the criminal act. For this reason, the conduct is excused.<sup>9</sup>

Pure necessity would not be applicable in the current situation as the defendants do not allege that forces of nature, or general circumstances, presented them with a choice of evils. The current defendants assert that they were compelled to kill by threats of violence. Their allegations are more properly focused on an allegation of duress. For this reason this memo will primarily focus on the duress defense.<sup>10</sup>

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<sup>9</sup> *Id.* However, some commentators see duress as having the same foundation as necessity. See LAFAYE & SCOTT, *supra* note 6, at 5.3. "The rationale of the defense of duress is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person." *Id.*

<sup>10</sup> However there is also the view that the two concepts are so closely related as to negate any true distinction.

"There is, of course, an obvious distinction between duress and necessity as potential defences . . . this, however,

B. Status of the Duress Defense in the United States

1. Basic Elements of the Defense in the United States

The basic elements of the duress defense in the United States are: (1) the defendant must be threatened with significant harm-death or serious bodily injury, (2) the threat must be of immediate harm, (3) the threatened harm must be illegal, (4) the defendant must have no reasonable opportunity to escape from the coercive situation, and(5) the defendant must not have placed himself voluntarily in a situation in which he could expect

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is, in my view, a distinction without a relevant difference, since on this view duress is only that species of the genus necessity which is caused by wrongful threats. I cannot see that there is any way in which a person of ordinary fortitude can be excused from the one type of pressure on his will rather than the other." *R. v. Howe*, [1987] 1 All ER 771, 777.

to be subject to coercion, such as joining a criminal organization.<sup>11</sup>

At common law the threat had to be of death or serious bodily injury. This strict standard has been relaxed: "[t]he force used or threatened is sufficiently intense if a person of reasonable firmness, placed in the same situation, would have been unable to resist."<sup>12</sup> The threat must be of harm to the person; threats to damage property

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<sup>11</sup> Claire O, Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 Arizona L. Rev. 251, 254 (1995). This last element could be of particular importance with the Rwandan defendants. Those who joined the militias and went through the training could be said to have voluntarily entered into an organization in which they should have foreseen being faced with the very coercive forces they now assert justify their conduct. However, additional factual findings would be needed to determine if their initial entry into the militias was volitional.

<sup>12</sup> 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 51 (14<sup>th</sup> ed. 1978).

will not suffice.<sup>13</sup> In addition, the defendant's belief must be reasonable and the threat must be continuous with no chance to escape.<sup>14</sup> Whether or not there was sufficient coercion is typically a question for the jury.<sup>15</sup>

## 2. Use of the Duress Defense in Non-Homicide Crimes

Duress is recognized as a defense, in some form, in almost every state in America.<sup>16</sup> It has been applied to a wide range of offenses.

Duress has been recognized, in holdings or dictum, as a defense to the offenses of armed robbery, attempted robbery, arson, bigamy, burglary, conspiracy to commit larceny, forgery, illegal presence in the country, malicious damage, mutiny, perjury, prison escape, receiving stolen property, riot, sale of illegal drugs, treason, and unlawful ammunition. Case law is

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 177(a) (1984);

TORCIA, *supra* note 12, § 51.

divided regarding the applicability of the defense to rape.<sup>17</sup>

The United States Military also recognizes the defenses of coercion and duress.<sup>18</sup> To successfully plead the defenses, under the military code, there must be a threat of imminent death or serious bodily injury to the actor or a innocent third party.<sup>19</sup> The actor must have a reasonable apprehension that the harm will be done, and this apprehension must continue throughout the act.<sup>20</sup> In addition, if there is any reasonable opportunity for the accused to avoid committing the act without the threatened harm coming about then the defenses do not apply.<sup>21</sup>

### 3. Duress as a Defense to Homicide

The prevailing view on the application of duress to homicide crimes in America is the common law view: duress is not a defense to homicide. Blackstone's famous quote sum's up this view: "[H]e ought rather die himself than

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<sup>17</sup> See Dressler, *supra* note 7 at 1342.

<sup>18</sup> United States Manual for Courts-Martial § 916(h) (1995).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

escape by the murder of an innocent."<sup>22</sup> American courts have consistently refused to excuse the taking of another's life to save one's own.<sup>23</sup> The United States military also refuses to give the defense effect when the offense charged is the killing of an innocent person.<sup>24</sup>

American courts recognize that logically there is no way that duress can excuse a homicide.<sup>25</sup> To take an

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<sup>22</sup> 4 Blackstone Commentaries 30.

<sup>23</sup> See Perkins, *supra* note 7, at 1055. "From first to last the common law has held firm to the proposition that one may not choose between oneself and another, who may live and who must die, by intentionally killing an obviously innocent and unoffending person in order to preserve one's life." *Id.* "[D]uress cannot justify murder . . . duress cannot justify the intentional killing of (or attempt to kill) an innocent third person." LAFAYE & SCOTT *supra* note 6 at 5.3 (b).

<sup>24</sup> United States Manual for Courts-Martial § 916(h) (1995).

<sup>25</sup> Nor could duress "justify" the act, as necessity may be found to do. Who could say that the defendant's killing of an innocent third party, when weighed in the balance, was a lesser evil than the defendant being killed?

innocent life in order to save ones own is to shift a burden, who will suffer, in a way that neither morals nor logic can accept.<sup>26</sup>

As explained above, the common law of the various American jurisdictions will not allow duress to excuse or justify a homicide. In order for the defense to have any effect a legislative body must enact a statute recognizing the defense.<sup>27</sup> There have been some efforts to establish a statutory duress defense that would apply to murder.

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<sup>26</sup> See PERKINS & BOYCE, *supra* note 7, at 1055. "The criminal law is a moral code and if an excuse were recognized in such a case [where the defendant claims they were forced to act] this would declare that such an intentional killing is morally acceptable." *Id.*

<sup>27</sup> See F. BAILEY, H. ROTHBLATT, *CRIMES OF VIOLENCE: HOMICIDE AND ASSAULT*, § 626. "And in the absence of a specific statute on the point, even the fact that the accused's life or safety was in peril will not justify the killing." *Id.*

The Model Penal Code would allow the defense of duress to apply to any crime, including homicide.<sup>28</sup>

It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.<sup>29</sup>

However, this view has generally not been followed.<sup>30</sup> The majority of the American states have continued to follow the common law rule disallowing the defense in homicide cases.<sup>31</sup>

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<sup>28</sup> MODEL PENAL CODE § 2.09(1)-(2). (The Model Penal Code is a proposed uniform criminal code promulgated by the American Law Institute. It is up to each state whether to adopt the code in whole, in part or not at all).

<sup>29</sup> *Id.*

<sup>30</sup> See Dressler, *supra* note 7 at 1346.

<sup>31</sup> See *supra* notes 22-26 and accompanying text.

#### 4. Duress as a Mitigating Factor

Some American states allow duress to mitigate murder to manslaughter, or alternatively, first degree murder to second degree murder.<sup>32</sup> Other states will allow duress to

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<sup>32</sup> See Minn.Stats.Ann. § 609.2 (1996). "Whoever does any of the following is guilty of manslaughter in the first degree . . . (3) Intentionally causes the death of another person because the actor is coerced by threats made by someone other than his co-conspirator and which cause him reasonably to believe that his act is the only means of preventing imminent death to himself or another." *Id.*

Under the Minnesota Statute one so convicted can be sentenced to not more than 15 years and/or fined not more than \$30,000.00 *Id.*; See also Ariz.Rev.Stat.Ann. § 13-1103(A) (4) (1997); "A person commits manslaughter by: 4. Committing second degree murder . . . while being coerced to do so by the use or threatened immediate use of unlawful deadly physical force upon such person or a third person which a reasonable person in his situation would have been unable to resist. . . ." *Id.* See also Wis.Stat.Ann. §§ 939.46 (1997). "A threat by a person other than the

be raised by defendant's as a mitigating factor at the sentencing stage.<sup>33</sup> Where the defense is limited in application to reducing the sentence it is often called "incomplete duress".

The Federal Sentencing Guidelines also call for leniency in sentencing when it is shown that the defendant "committed the offense because of serious coercion . . . or actor's coconspirator which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and which cause him or her so to act is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2<sup>nd</sup>-degree intentional homicide." *Id.*

<sup>33</sup> See Robinson, *supra* note 16 at § 105(b) n. 11. Absent a statute on point, there is authority that within the range of permissible sentences for the crime charged, the coerced actor should get a lighter sentence than a non-coerced actor would have received. See LAFAVE & SCOTT *supra* note 6 at 5.3(d).

duress. . . ."<sup>34</sup> Under the Sentencing Guideline, federal court's can impose a sentence below the range proscribed for the offense where coercion or duress are shown to have caused the defendant to undertake the criminal act.<sup>35</sup>

Those that would give effect to the doctrine would limit it by the notions of self-responsibility and balancing the evil avoided against the evil done. The greater the evil urged on the defendant, the greater his resolve against it should be. "A jury might also rightly expect people to manifest the utmost moral strength-even, at some point, to choose death-when they have reason to know that they are playing a part, even a minor role, in an especially barbaric scenario, *such as the Holocaust.*"<sup>36</sup>

##### 5. Criminal Responsibility of the Coercer

Though beyond the scope of the question presented, there is the related issue of the criminal liability of the party who is said to have exerted the coercion. Under American law there is authority that the coercer is also

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<sup>34</sup> U.S.S.G. § 5K2.12 (Supp. 1995).

<sup>35</sup> *Id.*

<sup>36</sup> Dressler, *supra* note 7 at 1374 (emphasis added).

criminally liable for the crime they compelled another person to commit.<sup>37</sup>

The act of coercion itself is a crime in some states. For example, Oregon has , by statute, imposed criminal liability up one compels another the engage in criminal conduct.<sup>38</sup>

A person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain . . . by means of instilling in the other person a fear that . . . the actor or another will: (a) unlawfully cause physical injury to some person. . . .<sup>39</sup>

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<sup>37</sup> See LAFAVE & SCOTT, *supra* note 6 at 440.

<sup>38</sup> Or.Rev.Stat. § 163.275 (1990).

<sup>39</sup> *Id.*

## C. Treatment of the Duress Defense in Other Nations<sup>40</sup>

### 1. The Defense of Duress is Recognized in Most Nations

Most English speaking nations recognize the defense of duress in some form. Canada recognizes it under both their common law and by statute. The defense in Australia is also recognized by statute and by common law. Israel recognizes it by statute. England recognizes it under their common law.

In Germany the coercion based defense is referred to as one of necessity. There it is recognized by statute.

Canada has, by statute, recognized an excuse-based defense of duress:

A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is

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<sup>40</sup> Due to language barriers, the main focus of this section is on English speaking nations. However, for an examination of the defense in non-English speaking nations the reader is referred to the Appeals Chamber ruling in *Prosecutor v. Erdemovic* (Case No. IT-96-22-A) 7 October 1997.

committed is excused from committing the offence if the person believes that the threats will be carried out . . . but this section does not apply [to] . . . murder . . . [or] attempted murder. . . .<sup>41</sup>

Canada also recognizes duress under its common law. In a recent ruling, Canada's highest court examined the duress defense and opined that it can operate in one of two distinct ways.<sup>42</sup> It can negate the requisite *mens rea* of the charged offense or serve as a defense.<sup>43</sup>

If the crime with which the defendant is charged contains as an element that "an actor's motives or his or her immediate desires have . . . direct relevance" then duress could "negate" the requisite *mens rea*.<sup>44</sup> The court opined that typically the requisite *mens rea* requires only the intent to perform the criminal act.<sup>45</sup> According to the court, what actually motivated the defendant to perform the criminal act is typically not part of the *mens rea*

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<sup>41</sup> Criminal Code, R.C.S., 1985, c. c-46.

<sup>42</sup> *Hibbert v. Her Majesty The Queen* [1995] S.C.R. 2.

<sup>43</sup> *Id.* at 21.

<sup>44</sup> *Id.* at 12.

<sup>45</sup> *Id.*

element.<sup>46</sup> Specifically regarding the *mens rea* for murder, the court noted that if "the accused means to cause the victim bodily harm that he knows is likely to cause death . . ." <sup>47</sup> the *mens rea* element is met, whether or not the defendant subjectively desires the death to occur.<sup>48</sup> The effect of duress on the *mens rea* is not an issue with the common law defense.<sup>49</sup>

Israel law also contains statutorily based defenses of duress and necessity. The defenses of duress and necessity are contained in the Israel Penal Law:<sup>50</sup> duress in section 21<sup>51</sup>, and necessity in section 22A.<sup>52</sup> The Israeli Penal Law traces its roots to British law.<sup>53</sup> The current Israeli

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 17.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2.

<sup>50</sup> See Enker *supra* note 5 at 188.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> The Israel Penal Law "was in considerable measure merely a Hebrew translation of the original Criminal Code Ordinance" promulgated by the British in 1936. *Id.* The Criminal Code Ordinance provision regarding duress traced its roots, in turn, to "section 94 of the Indian Penal Code

statutory provision on duress flowed from Section 17 of the British Criminal Code Ordinance. That provision held:

Except murder and offences against the state punishable with death, no act is an offence which is done by a person who is compelled to do it by threats which at the time of doing it reasonably cause the apprehension that instant death or grievous bodily harm to that person will otherwise be the consequence: Provided that the person doing the act did not, of his own accord, place himself in the situation by which he became subject to such constraint.<sup>54</sup>

Section 22A was added to the Penal Law by the Israeli Knesset in 1992.<sup>55</sup> This section addresses the defense of necessity. The defense of necessity applies to:

an act or omission that was required to be done immediately in order to prevent the danger of

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of 1860, which has long been thought to be a finer example of legal craftsmanship than other English criminal codes."

*Id.* at 191.

<sup>54</sup> *Id.* at 189.

severe injury to his [the actor's] life, liberty, body or property, or to those of another person, stemming from circumstances, provided that the actor could not prevent the injury in any other manner, and the injury he caused was not disproportionate to the injury he sought to prevent.<sup>56</sup>

England also recognizes the defense of duress, however, it does so by common law. Duress has long been recognized in England as a complete defense to a wide range of crimes.<sup>57</sup> "[T]he defence is of venerable antiquity and wide extent. In a long line of cases duress has been treated as a matter of defence entitling an accused to a complete acquittal."<sup>58</sup>

Speaking in general regarding the defense of duress, the English House of Lords has opined that duress will not act to negate the requisite *mens rea*. Even when forced to act by coercion, the defendant makes a conscious and calculated decision to undertake the wrongful act,

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<sup>55</sup> *Id.* at 195.

<sup>56</sup> *Id.* at 195.

<sup>57</sup> *R. v. Howe* [1987] 1 All ER 771, 776.

according to the House of Lords.<sup>58</sup> "The theory that the party acting under duress is so far deprived of volition as to lack the necessary criminal intent has been clearly shown to be fallacious. . . ."<sup>60</sup>

The House of Lords has stated that, when successfully pleaded, the defense of duress recognizes that a reasonable

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<sup>58</sup> *Id.* at 776-77.

<sup>59</sup> *Id.* at 777. "The second unacceptable view is that . . . duress as a defence affects only the existence or absence of mens rea. The true view is stated in *Lynch's* case . . . 'the decision of the threatened man whose constancy is overborne so that he yields to the threat, *is a calculated decision to do what he knows to be wrong*, and is therefore that of a man with, perhaps to some exceptionally limited extent, a 'guilty mind'. But he is at the same time a man whose mind is less guilty than is he who acts as he does but under no such constraint.' (The first emphasis is mine.)'"

<sup>60</sup> *Id.* at 783.

choice of evils was made and, consequently, the defendant is entitled to a complete acquittal.<sup>61</sup>

The English House of Lords was also called on to determine whether the test for the duress defense applies

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<sup>61</sup> *Id.* "[T]he defence of duress . . . is put forward as a 'concession of human frailty' whereby a conscious decision (it may be coolly undertaken) to sacrifice an innocent human life is made as an evil lesser than a wrong which might otherwise be suffered by the accused or his loved ones at the hand." *Id.* at 782. The House of Lords rejected the validity of this position. "Other considerations necessarily arise where the choice is between the threat of death or a fortiori of serious injury and deliberately taking an innocent life. In such a case a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead, he is embracing the cognate but morally disreputable principle that the end justifies the means." *Id.* at 780.

an objective or subjective standard.<sup>62</sup> It was determined that the test is objective in nature, but takes into account the subjective conditions of the particular defendant.

[T]he definition of duress, whether applicable to murder or not . . . contain[s] an objective element . . . and this must involve a threat of such a degree of violence that 'a person of reasonable firmness' with the characteristics and in the situation of the defendant could not have been expected to resist."<sup>63</sup>

Australian common law recognizes duress as a defense to criminal conduct.<sup>64</sup> The Australian common law has laid out some core elements of the defense:

(i) under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act and (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield

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<sup>62</sup> *Id.* at 773.

<sup>63</sup> *Id.* at 775.

<sup>64</sup> BRETT FISSE, HOWARD'S CRIMINAL LAW 540-41 (1990).

to the threat in the way the accused did and (iii) the threat was present and continuing, imminent and impending . . . and (iv) the accused reasonably apprehended that the threat would be carried out and (v) he was induced thereby to commit the crime charged and (vi) the crime was not murder, nor any other crime so heinous as to be excepted from the doctrine and (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application and (viii) he had no means, with safety to himself, of preventing the execution of the threat, then the accused, in such circumstances at least, has a defense of duress.'" <sup>65</sup>

The status of the duress defense in Australian law is somewhat unsettled. "In *Hurley* in 1967 Winneke C.J. and Pape J. observed with restrained understatement that the

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<sup>65</sup> *Id.* (citing *Hurley* [1967] V.R. 526 at 543).

'whole body of law relating to duress is in a very vague and unsatisfactory state.'"<sup>66</sup>

German law refers to the defense as one of necessity, but its focus includes human coercion. Most German substantive criminal law is contained in the German Penal Code, or Strafgesetzbuch.<sup>67</sup>

Two sections of the German Penal Code address necessity. It is addressed both as a justification and as an excuse. Section 34 of the Code focuses on necessity as a justification (Rechtfertigender Notstand).<sup>68</sup> Under this section conduct which otherwise would be criminal is lawful if undertaken to avoid imminent danger to a protected interest and if the interest so protected outweighs the harm done to protect it.<sup>69</sup> Various conduct, which would otherwise be criminal, has been found lawful under this principle: use of another's car without permission, destruction of property, breaking and entering, and driving while under the influence of alcohol to name a few.<sup>70</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> HERIBERT SCHUMANN, INTRODUCTION TO GERMAN LAW 383 (1996).

<sup>68</sup> *Id.* at 392.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 393.

When used as a justification, the doctrine in German law rests on the conclusion that weighed in the balance the harm done was a lesser evil than the harm thereby avoided. Consequently, the conduct "does not constitute a legal wrong."<sup>71</sup>

The German Penal Code also recognizes necessity as constituting an excuse (Entschuldigender Notstand).<sup>72</sup> This section of the Code provides that where the defendant acted under "extreme emotional pressure, which considerably impair[ed] his ability to conform to the requirements of law," he will not be held criminally responsible.<sup>73</sup> This defense is unavailable if the defendant created the very situation that they assert supports the necessity claim, or if he has a legal duty to withstand the pressure, say as "a police officer or a fireman."<sup>74</sup>

## 2. Duress will not Constitute a Complete Defense to Murder

Of the nations surveyed for this memorandum, the prevailing view is that, when applied to homicide, duress will not constitute a complete defense. Where it is

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 396.

<sup>73</sup> *Id.* at 397.

statutorily based, the language of the statute excludes homicide from its application. Where the defense is based in common law, judicial pronouncements prohibit its application to homicide.

For example, Canada's Criminal Code states, in laying out the parameters of the duress defense, "but this section does not apply [to] . . . murder . . . attempted murder. . . ." <sup>75</sup>

Israeli law is particularly strict in its application of the duress defense to murder. When the charge is murder the defense is given no effect--it is not a complete defense, it will not allow for a reduction in charge, and it cannot be used to grant leniency in sentencing. <sup>76</sup>

The English House of Lords has recently held, in *R. vs. Howe*, that duress is not a defense to murder. <sup>77</sup> The decision dealt with two cases in which individuals charged with murder pled duress as a defense. <sup>78</sup> The House of Lords examined prior jurisprudence emanating from their court and

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<sup>74</sup> *Id.*

<sup>75</sup> Criminal Code, R.C.S., 1985, c. c-46.

<sup>76</sup> Enker, *supra* note 5, at 203.

<sup>77</sup> *R. v. Howe* [1987] 1 All ER 771.

<sup>78</sup> *Id.* at 772.

concluded that duress cannot extend to murder. The House of Lords noted that in cases other than murder, committing a crime may be the lesser of two evils if the commission of the crime thereby avoids serious harm to a person. However, when the election made is to kill an innocent to save one's own life, or that of a loved one, "a man cannot claim that he is choosing the lesser of two evils."<sup>79</sup> The House of Lords concluded that duress provides no defense for either an actual killer or one who aids and abets the killer.<sup>80</sup>

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<sup>79</sup> *Id.* at 780.

<sup>80</sup> *Id.* at 778. Consider also the famous British case in which necessity was brought out as a defense to murder, *Regina v. Dudley and Stephens*, 14 Q.B. 273 (1884). In this case the crew of a yacht were lost on the ocean in an open boat without food or water. Eventually it was decided to kill one of their number who was in a sick and helpless condition and feed on his body for survival. When rescued, the crew members were tried for murder. Their plea of necessity was rejected and they were convicted and

The Court was also asked to answer the question: "[c]an one who incites or procures by duress another to kill or to be a party to a killing be convicted of murder if that other is acquitted by reason of duress?"<sup>81</sup> The answer provided to this certified question was an unequivocal yes.<sup>82</sup>

The prevailing view in Australia is that murder, and "any other crime so heinous" are excluded from the defense.<sup>83</sup> Australian Codes also exclude murder from the realm of the duress defense.<sup>84</sup> The matter has not come

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sentenced to death. Their sentences were subsequently commuted to six months in prison. *Id.*

<sup>81</sup> *R. v. Howe*, *supra* note 77, at 773.

<sup>82</sup> *Id.* at 782.

<sup>83</sup> FISSE, *supra* note 64 at 541 (citing to *Hurley* [1967] V.R. 526 at 543). See also Stanley Yeo, *Voluntariness, Free Will and Duress*, 70 *The Australian Law Journal* 304 (1996) at 312 n. 36. "Both the common law and most Code provisions on duress deny the defence to a charge of murder." *Id.*

<sup>84</sup> *Id.* at 544. "Duress does not apply to murder under the Queensland and Western Australian Codes, s. 31, or under the

before the Australian High Court.<sup>85</sup> If and when it does it seems probable that the High Court would look to the English House of Lords decision in *Howe*, (rejecting the application of the duress defense to murder), as persuasive authority.

### 3. Some Authority Applies Necessity to Murder

Under German criminal law necessity will excuse homicide. Section 35 of the German Penal Code addresses this point.<sup>86</sup> In a case where "the offender's own life or the life of his spouse, child, or close friend is at stake and can only be saved by killing a stranger" the level of guilt is diminished to a point which will not support holding him criminally responsible.<sup>87</sup> The offender is not totally absolved of responsibility, but unless the circumstances indicate otherwise, he is said to have

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Tasmanian Code, s. 20. Compare Northern Territory Code, ss 40-41." *Id.* at n. 6.

<sup>85</sup> *Id.* at 547.

<sup>86</sup> Schumann, *supra* note 67, at 397.

<sup>87</sup> *Id.*

insufficient culpability to be found criminally liable.<sup>88</sup> In essence necessity is seen as a mitigating factor strong enough to excuse the conduct.

#### 4. Duress and Necessity as Mitigating Factors

The Israeli statutory provision which recognizes the necessity defense states that it is inoperable as a defense "if the act caused the death of a person."<sup>89</sup> However, necessity can be presented in calling for leniency at the sentencing stage.<sup>90</sup> The Israeli Penal Law does not allow allegations of duress as mitigating factors at the sentencing stage.<sup>91</sup> It has been opined that the exclusion of duress from mitigating factors under the Penal Law is not the consequence of intentional statutory design, but rather of the "piecemeal manner" in which the Penal Law has been amended.<sup>92</sup>

The English House of Lords has rejected the application of duress as a mitigating factor. The view that duress is

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<sup>88</sup> *Id.*

<sup>89</sup> Enker, *supra* note 5, at 201.

<sup>90</sup> *Id.* at 203, citing section 22c.

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

<sup>92</sup> *Id.*

analogous to provocation or could diminish the responsibility of the actor, for example, from murder to manslaughter, has been rejected.<sup>93</sup>

D. Recent Application of the Duress Defense to Charges of War Crimes: *The Prosecutor v. Drazen Erdemovic*<sup>94</sup>

The foregoing sections have reviewed the treatment of the defenses of duress and necessity in several nations. Its use by Yugoslavian International War Crimes Tribunal provides a new forum in which to review the doctrines. Whether the findings of the Yugoslavian Tribunal are in any way binding on the Rwandan proceedings is an issue beyond the scope of this memorandum.

The Yugoslavian War Crimes Tribunal recently addressed the duress defense as it applies to crimes against humanity and war crimes. While the holdings of the Trial Chamber and the Appeals Chamber do not establish, conclusively, the

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<sup>93</sup> R. v. Howe, *supra* note 77, at 782.

<sup>94</sup> Erdemovic (IT-96-22-T).

effect to be given to the defenses, their approach provides some guidance.<sup>95</sup>

On November 29, 1996, the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian law Committed in the Territory of Former Yugoslavia since 1991 entered its sentencing judgment in the case of *Erdemovic*.<sup>96</sup> Drazen Erdemovic was accused of committing crimes against humanity and a violation of customs of war.<sup>97</sup> On May 31, 1996 he pled guilty to committing crimes against humanity; the charge of violation of customs of war was dismissed.<sup>98</sup>

Erdemovic explained his actions by asserting that he was forced to participate in the executions. "When I refused they told me: If you're sorry for them, stand up,

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<sup>95</sup> Whether charges of genocide differ greatly enough from those of war crimes, so as to effectively distinguish the two in analysis of the duress defense, is an issue beyond the scope of this memorandum.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 2.

<sup>98</sup> *Id.* at 3.

line up with them and we will kill you too. I am not sorry for myself but for my family . . . I could not refuse because then they would have killed me."<sup>99</sup>

The Trial Chamber noted that "these factors may mitigate the penalty" and "might go so far as to eliminate the *mens rea* of the offense and therefor the offense itself."<sup>100</sup> The Trial Chamber saw the defenses of duress and obedience to superior orders as closely related.

Under the Statute governing the proceedings, however, obedience to superior orders is explicitly excluded as a valid defense.<sup>101</sup> The only effect to be given to an assertion of obedience to superior orders is to reduce the penalty "should the International Tribunal determine that justice so requires."<sup>102</sup>

The alleged duress was purported to be connected to, and have flowed from, an "order from a military

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<sup>99</sup> *Id.* at 5 (citing to Transcript, initial appearance hearing, 31 May 1996. P9. (IT-96-22-T,D241)).

<sup>100</sup> *Id.* at 7.

<sup>101</sup> *Id.* (citing Article 7(4) of the Statute).

<sup>102</sup> *Id.* at 7 (citing to (S/25704. para. 57)).

superior."<sup>103</sup> It was noted that the Statute "provides no guidance" on the defense of duress. The Trial Chamber asserted that "at most" the Statute would treat the claim of duress as "a mitigating circumstance."<sup>104</sup>

In the absence of direct guidance from the Statute, the Trial Chamber deferred to an examination of "post-World War Two international military case-law."<sup>105</sup> The Trial

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<sup>103</sup> *Id.* This could distinguish the Rwandan cases from the Erdemovic ruling. As to those Rwandan defendants who were members of the military or other government organization, the cases may be similar. However, for the third tier defendants, those civilians allegedly forced into participation, their lack of affiliation to an organized military would distinguish them from the Erdemovic facts, and perhaps nullify the opinions expressed in the opinion.

<sup>104</sup> *Id.* (citing to paragraph 7 of the Statute).

<sup>105</sup> *Id.* at 7. It would seem that the Tribunal should have conducted a more expansive review of the doctrine than it did, looking at more jurisdictions. "The International Tribunal itself will have to decide on various personal defenses which may relieve a person of individual criminal

Chamber cited to an analysis of approximately 2,000 cases done by the United Nations International Law Commission which found that nine nations, in their post World War II tribunals, found duress as "a complete defense."<sup>106</sup> The Trial Chamber found three elements present in all successful assertions of duress to an alleged "violation of international humanitarian law":<sup>107</sup>

- (I) the act charged was done to avoid an immediate danger both serious and irreparable:

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responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations." Report of the Secretary-General, UN Doc. S/25704. The reasons for the limited examination of the doctrine are not explained in the decision.

<sup>106</sup> *Id.* But see *Krupp*, *infra* note 128, at 1436, noting that the United Nations War Crimes Commission was unaware of any cases in which duress constituted a complete defense to war crimes.

<sup>107</sup> *Erdemovic*, *supra* note 94.

(II) (ii) there was no adequate means of escape:

(III) (iii) the remedy was not disproportionate to the evil"<sup>108</sup>

A key factor guiding the Trial Chamber's analysis was the presence of an order from a military superior. While the Trial Chamber did not explicitly rule out a duress defense in a non-military setting, its analysis was restricted to such a setting by implication.<sup>109</sup>

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<sup>108</sup> *Id.* at 8 (citing *Krupp*, discussed at *infra* note 128).

Logically, this element alone should rule out the doctrine in most, if not all, circumstances when the act was the taking of a human life.

<sup>109</sup> "Accordingly, while the complete defence based on moral duress and/or a state of necessity *stemming from superior orders* is not ruled out absolutely, its conditions of application are particularly strict. They must be sought not only in the very existence of a superior order - which must be proven - but also and especially in the circumstances characterizing how the order was given and how it was received." *Id.* (emphasis added). Later in its

The Trial Chamber opined that the case by case analysis required an examination of both "the objective and subjective elements characterising duress or the state of necessity. . . ." <sup>110</sup> Whether there was a "duty to disobey" or "the moral choice to do so or to try to do so" were seen as weighing heavily in the determination of the validity of the asserted defense.

The Trial Chamber concluded that where Erdemovic had failed to provide evidence to support his claim of duress, it could not constitute a complete defense. <sup>111</sup> Consequently, the application of duress was deferred to the

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decision when discussing duress as a mitigating circumstance the Trial Chamber analyzed duress in the context of "the extreme necessity in which Drazen Erdemovic allegedly found himself when placed under duress by the order and threat from his hierarchical superiors as well as his subordinate level within the military hierarchy." *Id.* at 46.

<sup>110</sup> *Id.* at 9.

<sup>111</sup> *Id.* at 10

sentencing stage, where it would be treated as a mitigating circumstance.<sup>112</sup>

The Trial Chamber opined that there are four pivotal questions to be considered in deciding if and how the alleged duress should mitigate the sentence.

[1] Could the accused have avoided the situation in which he found himself?

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<sup>112</sup> However, immediately prior to reaching this conclusion the Trial Chamber noted that "[w]ith regard to a crime against humanity . . . the life of the accused and that of the victim are not fully equivalent." *Id.* The accused is said to not to have just harmed an individual but "humanity as a whole." *Id.* In the balancing of what evil was avoided by the defendant's acts and the evil committed, and in the balancing of the force placed upon the defendant's exercise of his free will versus the harm done by him, this conclusion by the Trial Chamber would weigh heavily against the defendant. Harm to humanity is a substantially greater wrong than harm to a particular individual.

[2] Was the accused confronted with an insurmountable order which he had no way to circumvent?

[3] Was the accused, or one of his immediate family members, placed in danger of immediate death or death shortly afterwards?

[4] Did the accused possess the moral freedom to oppose the orders he had received? Had he possessed that freedom, would he have attempted to oppose the orders?<sup>113</sup>

As the only evidence in support of the alleged duress was the defendant's testimony, the Trial Chamber determined that it was "unable to accept the plea of extreme necessity."<sup>114</sup>

Erdemovic eventually appealed, and on October 7, 1997 the Appeals Chamber entered its judgment.<sup>115</sup> The availability of the duress defense was one of the issues

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<sup>113</sup> *Id.* at 48.

<sup>114</sup> *Id.*

<sup>115</sup> *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-A, 7

October 1997.

raised in the appeal.<sup>116</sup> After surveying the laws of various nations it was concluded that "duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives."<sup>117</sup> It would seem, however, that the issue is not conclusively resolved as the decision was a three to two split.

#### **IV. Application of Duress to the Rwandan Situation**

The defense of duress should be given effect in the current cases to the same extent as it is by the world's nations. "The International Tribunal itself will have to decide on various personal defenses which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principals [sic] of law recognized by all nations."<sup>118</sup> The

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<sup>116</sup> See Judgement of the Appeals Chamber, *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-A, 7 October 1997.

<sup>117</sup> *Id.* Joint Separate Opinion of Judge McDonald and Judge Vohrah, at sec. 88.

<sup>118</sup> Report of the Secretary-General, UN Doc. S/25704.

authorities analyzed for this memorandum concur, with minor exception, that the duress defense is not generally available for the crime of murder. The defendants in Rwanda are charged with genocide. Given the unique status of a charge of genocide, current authority on point is lacking. However, for the same reasons that duress is generally not available for murder, it should not apply to genocide.

A. Duress Would Not Negate the Mens Rea for Genocide

Criminal conduct is made up of two components: the *mens rea* (the requisite mental intent)<sup>119</sup>, and the *actus reus* (the physical act)<sup>120</sup>. It could be argued by the defendants that they were forced to act, and thus lacked the requisite *mens rea*. As each defendant's circumstances would be unique, the validity of such an assertion would need to be determined on a case-by-case basis. However, the knowledge of most defendants would likely negate such a claimed defense.

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para.58.

<sup>119</sup> BLACKS LAW DICTIONARY 985 (6<sup>th</sup> ed. 1990).

Jurisdiction to prosecute for genocide was extended to the Rwandan Tribunal by Article 2(1) of the Rwandan Tribunal Statute.<sup>121</sup> Article 2 also provides a definition of genocide.<sup>122</sup> "Genocide . . . comprises certain crimes (such as killing . . .) committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."<sup>123</sup>

Any defendant who participated in the carrying out of killings "with knowledge of 'the ultimate objective'" would meet the *mens rea* element of genocide.<sup>124</sup> This would be true whether the particular defendant planned the killings, incited others to kill, or physically took part in the actual killings.<sup>125</sup>

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<sup>120</sup> *Id.* at 36.

<sup>121</sup> MORRIS & SCHARF *supra* note 1, at 164.

<sup>122</sup> *Id.* at 166.

<sup>123</sup> Rwandan Tribunal Statute Article 2.

<sup>124</sup> MORRIS & SCHARF *supra* note 1, at 172-73.

<sup>125</sup> "Genocide is the only crime for which a person may be separately charged, prosecuted and punished by the Rwanda Tribunal not only for the primary offense consisting of the actual commission of the crime under Article 2(3)(a), but also for the related secondary offenses of conspiracy,

The "ultimate objective" of the Hutu participants was the destruction of the Tutsis. Any defendant who committed a prohibited act while conscious of this objective would meet the *mens rea* for genocide under Article 2. The statute does not further require that the defendant undertaking the prohibited act with knowledge of the ultimate goal subjectively desire the particular outcome.

Indeed, for the architects of the genocidal campaign and the military personnel who orchestrated the killings no logical argument can be supported that they unwillingly participated in the events. Allegations of duress would not weigh much in their cases.

The local rural individuals who were forced to participate would present the best duress argument. Yet all that is required for them to have met the statute is that they committed a prohibited act with knowledge of the goal.

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incitement, attempt or complicity under Article 2(3)(b) to (e) of its statute." *Id.* at 182-83.

B. Those who willingly joined an organization cannot later claim that they were coerced by that same organization to participate in genocide.

As discussed above, a common requirement for a effective assertion of the duress defense is that the defendant did not voluntarily associated himself with the very group he now asserts forced him to act. One who joins an organization has undertaken a voluntary choice to associate with a group. Any subsequent assertion that the group then forced him to kill sits on a much weaker foundation than if they were truly an innocent party.

The underpinning of a duress defense is that your actions were not of your own volition. But one who has joined a militia has undertaken a volitional act with foreseeable consequences and cannot logically claim that they were forcibly taken from the status of a bystander to one of a murderer.

However, a defendant could make the argument that they were forced to join the militias in the first place. Such an assertion would need to be judged on a case by case basis.

C. The evil committed by the defendant cannot be disproportionate to the evil thereby avoided.

Prior authorities who have examined the duress defense have consistently weighed the threat directed at the defendant and the act performed in response by the defendant.<sup>126</sup> The act undertaken cannot be a 'greater evil' than that thereby avoided.

For example, this balancing test was articulated in some of the post-W.W. II Tribunals cited to by the Trial Chamber in Yugoslavia in the recent holding in the Erdemovic case.<sup>127</sup>

A balancing test weighing the evil committed against the harm thereby avoided was central in many of the cases. For example, in the *Krupp* case it was noted, "[w]hat was the evil which confronted the defendants and what was the remedy that they adopted to avoid it?"<sup>128</sup> The *Krupp*

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<sup>126</sup> See *supra* notes 22-26 & 77-80.

<sup>127</sup> See *infra* notes 128-31.

<sup>128</sup> *Trial of Alfried Felix Alwyn Krupp von Bohlen Und*

*Halbach and Eleven Others*, U.S. Military Tribunal.

Nuremberg. 17 November 1947-30 June 1948. Case No. 58.

Tribunal went on to opine that the act undertaken by the defendant cannot be "disproportionate to the evil."<sup>129</sup> In *Krupp*, the Tribunal concluded that this test weighed against the defendants: the harm avoided, economic loss, was outweighed by the evil done, use of slave labor.<sup>130</sup>

This same balancing test was articulated by the Judge Advocates in other of the Tribunals. In the trial of Gustav Alfred Jepsen argued that the defense should not be given effect unless "the evil threatened [the defendant] was on balance greater than the evil which he is called upon to perpetrate."<sup>131</sup>

The Rwandan defendants presumably "saved" their lives, and that of their families, by participating in mass murder. While they were faced with an unimaginable choice,

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The United Nations War Crimes Commission. *Law Reports of Trials of War Criminals*. Vol. X. p. 147, 149. London 1949.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 150.

<sup>131</sup> *Trial of Gustav Alfred Jepsen and Others*, cited to at

The United Nations War Crimes Commission. *Law Reports of Trials of War Criminals*. Vol. XV. p. 172. London 1949.

weighed in the balance their election resulted in greater suffering than their refusal would have.

D. Those who can present credible evidence to support an allegation that their actions were the result of duress should be allowed to present it as a mitigating factor at the sentencing stage.

The taking of the life of an innocent should not be excused, or said to be justified, because the killers were forced to act. However, where it can be credibly shown that the defendant was truly forced to act, it should be considered as a mitigating factor at the sentencing stage. As discussed above, those who, of their own volition, entered into the militias should be denied the defense. However, to those defendants who were truly transformed from innocent bystander to participant in the genocide, justice should allow a mitigation in the punishment.

In the spectrum of criminal offenses, and the correlating punishments proscribed, the gravity and wrongfulness of the offense charged is what determines the appropriate remedy for society. The taking of an innocents life is of the most heinous offense possible. Yet even

within this category of crime distinctions must be recognized if the truly evil actors are to be punished in a manner commensurate with the wrongfulness of their acts.

The Rwandan Tribunal cannot give a death sentence, the maximum potential punishment proscribed is life imprisonment.<sup>132</sup> Thus, in the spectrum of potential punishments set out by the United Nations life in prison defines the far end. If the punishment imposed by the Tribunal is to reflect the wrongfulness of the act and the harm done then, within the spectrum of punishments available, some leniency is called for.

This differentiation could be achieved in one of two ways. A defendant who makes a credible showing that he was truly forced to act by threats of death directed at him or his family could be given a sentence lower than life in prison. Such leniency would be denied those whose actions were not coerced. A second way to achieve the distinction would be to impose a single life sentence on defendant

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<sup>132</sup> Rules of Procedure and Evidence of the Rwandan Tribunal (as amended in January and July 1996), Rule 101, U.N. Doc. ITR/3/Rev.2, *reprinted in* volume II.

whose actions were truly coerced, and multiple *consecutive* sentences on defendants who were not coerced.

#### V. Conclusion

Of the nations surveyed for this memorandum, the prevailing view is that neither duress nor necessity constitutes a complete defense for one charged with taking the life of an innocent. The authorities split on whether one who legitimately asserts that they were forced to act is entitled to plead that as a mitigating factor. Applying this to the Rwandan defendants, none should be absolved based on a claim of coercion, but in proper cases it should constitute a mitigating factor at sentencing.