UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-96-22-A

Date: 7 October 1997

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Antonio Cassese, President**
Judge Gabrielle Kirk McDonald
Judge Haopei Li
Judge Ninian Stephen
Judge Lal Chand Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **7 October 1997**

THE PROSECUTOR

v.

DRA@EN ERDEMOVI]

SEPARATE AND DISSENTING OPINION OF JUDGE STEPHEN

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Payam Akhavan

Counsel for the Accused:

Mr. Jovan Babi}

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Accordingly, while the complete defence based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application are particularly strict. They must be sought not only in the very existence of a superior order - which must first be proven - but also and especially in the circumstances characterising how the order was given and how it was received. In this case-by-case approach - the one adopted by these post-war tribunals - when it assesses the objective and subjective elements characterising duress or the state of necessity, it is incumbent on the Trial Chamber to examine whether the accused in his situation did not have the duty to disobey, whether he had the moral choice to do so or to try to do so. Using this rigorous and restrictive approach, the Trial Chamber relies not only on general principles of law as expressed in numerous national laws and case-law, but would also like to make clear through its unfettered discretion that the scope of its jurisdiction requires it to judge the most serious violations of international humanitarian law.
>
> With regard to a crime against humanity, the Trial Chamber considers that the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole.
>
> On the basis of the case-by-case approach and in light of all the elements before it, the Trial Chamber is of the view that proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided. Thus, the defence of duress accompanying the superior order will, as the Secretary-General seems to suggest in his report, be taken into account at the same time as other factors in the consideration of mitigating circumstances.
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> In conclusion, the Trial Chamber, for all the reasons of fact and law surrounding Dra`en Erdemovi}'s guilty plea, considers it valid.[6]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[21] Lord Hale, *Pleas of the Crown*, (1800) vol. 1, at p. 51.
[22] *Lynch, supra n. 13*, at pp. 681 – 82.
[23] *R. v. Dudley and Stephens*, [1881 - 5] All ER, at p. 61.
[24] *See Trial of Valentin Feurstein and Others, Proceedings of a Military Court held at Hamburg* (4 – 24 Aug. 1948), Public Record Office, Kew, Richmond, file n. 235/525; *Law Reports*, vol. XV, at p. 173; *Record of Proceedings of the Trial by Canadian Military Court of Robert Hölzer and Walter Weigel and Wilhelm Ossenbach held at Aurich, Germany* (25 Mar. – 6 Apr. 1946), vol. 1, p. 1*; Law Reports*, vol. V, at p. 16.

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

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

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

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

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

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

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

> When the opinion is expressed that our law recognises compulsion as a defence in all cases except murder, and that opinion is based on the acceptance that acquittal follows because the threatened party is deprived of his freedom of choice, then it seems to me to be irrational, in the light of developments which have come about since the days of the old Dutch and English writers, to exclude compulsion as a complete defence to murder if the threatened party was under such a strong duress that a reasonable person would not have acted otherwise under the same duress. The only ground for such an exclusion would then be that, notwithstanding the fact that the threatened person is deprived of his freedom of volition, the act is still imputed to him because of his failure to comply with what has been described as the highest ethical ideal. In the application of our criminal law in the cases where the acts of an Appellant are judged by objective standards, the principle applies that one can never demand more from an accused that that which is reasonable, and reasonable in this context means, that which can be expected of the ordinary, average person in the particular circumstances. It is generally accepted, also by the ethicists, that for the ordinary person in general his life is more valuable than that of another. Only they who possess the quality of heroism will intentionally offer

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

> their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person. I do not think that such a exception to the general rule which applies in criminal law, is justified.[29]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> It seems to me plain that the reason that it was for so long stated by writers of authority that the defence of duress was not available in a charge of murder was because of the supreme importance that the law afforded to the protection of human life and that it seemed repugnant that the law should recognise in any individual in any circumstances, however extreme, the right to choose that one innocent person should be killed rather than another.[47]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Done in English and French, the English being authoritative.

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Ninian Stephen
Judge

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

[Seal of the Tribunal]