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Duress, Demanding Heroism and
Proportionality: The Erdemovic Case
and Beyond

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**DURESS, DEMANDING HEROISM AND
PROPORTIONALITY**

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TABLE OF CONTENTS

A Case that Probes the Theoretical Underpinnings of the Defense of Duress – Prosecutor v. Drazen Erdemovic.....	3
I. Chronicles of a Confusion Foretold: The Opinions in the Erdemovic Case.....	8
A. The Majority Opinion: Duress as a Justification.....	8
B. Judge Cassesse’s Dissenting Opinion: Duress as a Half-Way House Between Justification and Excuse.....	12
II. The Nature of the Duress Defense and its Availability in Cases of Murder.....	17
III. Should Duress be a Defense to a Crime Involving the Killing of Dozens of Innocent Human Beings?.....	22
A. Proportionality, Demanding Heroism, and the “Seriousness of the Offense” Thesis.....	22
B. Beyond the “Hard Choice” and “Involuntariness” Theories of: Duress as an “Understandable Choice”.....	31
C. Communitarian Obligations, Proportionality, and the “Understandable Choice” Theory of Duress.....	39
1. Voluntarily Assumed Obligations of Self-Sacrifice and Proportionality Standards.....	40
2. Involuntarily Assumed Obligations that Require Performance of Self- sacrifice and More Stringent Proportionality Standards.....	42
3. Communitarian Family Obligations and Laxer Standards of Proportionality.....	45
4. Understandability and the Capacity to Prevent the Harm Threatened from Occurring.....	46
IV. Applying the “Understandable Choice” Theory to the Erdemovic Case.....	51
Conclusion.....	54

DURESS, DEMANDING HEROISM AND
PROPORTIONALITY

A CASE THAT PROBES THE THEORETICAL UNDERPINNINGS OF THE DEFENSE
OF DURESS – *PROSECUTOR V. DRAZEN ERDEMOVIC*

*Prosecutor v. Drazen Erdemovic*¹ is one of the most difficult cases that any court has ever faced regarding the defense of duress. There, the International Criminal Tribunal for the former Yugoslavia (ICTY) tried the soldier Erdemovic for crimes against humanity. He was charged with systematically killing Muslim men and children in July of 1995 as a member of the Bosnian Serb army. Initially, he refused to take part in the shootings, but his superiors threatened to kill him if he did not comply. At trial, Erdemovic confessed that he succumbed to the threats and killed close to seventy people. Ultimately, the question before the ICTY Appeals Chamber was whether the defense of duress is available when the offense charged is a crime against humanity.

After struggling to come to grips with the problem, a majority of the justices in the ICTY concluded that, according to customary international law, duress is not a defense to murder. In contrast, the dissenters believed that duress could, *in principle*, exclude responsibility for the killing of innocent human beings. However, they concluded that the defense of

¹ *Erdemovic*, ICTY (Appeals Chamber), judgment of October 7, 1997.

duress is subject to strict proportionality requirements. Thus, they ultimately conceded that in light of the grave harm caused when crimes against humanity are committed, it would be nearly impossible to establish the requisite proportionality between the harm effected and the harm averted.

Certainly, the question before the ICTY in *Erdemovic* was a momentous one. Determining whether duress should be a defense to a crime against humanity requires us to delve deeply into the justification/excuse distinction in to order address three foundational problems that cut straight to the heart of criminal law theory: (1) is duress a justification or an excuse? (2) is the common-law rule disallowing duress as a defense to murder sound? and (3) is it proper to condition the availability of the defense on the existence of strict proportionality between the harm caused by the defendant's actions and the harm averted?

Unfortunately, the justices who took part in the *Erdemovic* case did not adequately address these fundamental queries. They seemed to assume that the defense raised was a justification, even though a plausible argument could have been made in favor of classifying it as an excuse. Therefore, the justices failed to examine whether Erdemovic was actually claiming that his wrongful act should be excused because he was subjected to coercion and not whether his act was justified because he did the right

thing when he killed innocent civilians. The fact that they ignored this is all the more surprising when one considers that many, if not most, scholars believe that the defense of duress is an excuse and not a justification.²

Complicating the matter is the fact that, even if one were to conclude that duress functions as an excuse, it is not evident that it should be a defense to every crime. Many have suggested that duress should not be a defense to murder.³ Since a crime against humanity typically involves the commission of many murders, it can also be argued that duress should not excuse people who wrongfully commit such crimes. In order to ascertain whether it is correct to excuse those who commit murder or crimes against humanity because they were coerced, it is necessary to examine the rationale that justifies excusing people who perform wrongful acts. Even though some have tackled the question regarding whether the rationale for excusing actors should compel us to accept duress as a defense to murder, a

² See, e.g., Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. Cal. L. Rev. 1331 (1989) (*hereinafter*, *Exegesis*). See also, Kyron Huigens, *Duress Is Not a Justification*, 2 Ohio St. J. Crim. Law 303 (2004) and MARKUS DUBBER, *CRIMINAL LAW: MODEL PENAL CODE 251* (Foundation Press, 2002). The drafters of the Model Penal Code also believed that duress was an excuse and not a justification. See MODEL PENAL CODE AND COMMENTARIES §2.09, page 373 (the problem of Section 2.09- [duress]-, then, reduces to the question of whether there are cases where the actor cannot justify his conduct under Section 3.02- [choice of evils]-, as when his choice involves an equal or greater evil than that threatened, but where he nonetheless should be excused because he was subjected to coercion . . .).

³ See, e.g., JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 448 (2d ed., 1960). Several courts have also held that duress is not a defense to grave crimes such as murder. See *State v. St. Clair*, 262 S.W. 2d 25, 27 (Mo. 1953), *Nall v. Commonwealth*, 271 S.W. 1059 (1925).

similar analysis is wanting in the context of crimes against humanity.

Finally, it is unclear whether a defendant should be able to successfully plead duress when the harm caused was of epic proportions. It may very well be that, under certain extreme circumstances, society could legitimately require the coerced actor to do everything in his power, even if this means that he should sacrifice his own life, to avert the grave harm that will be inflicted if he succumbs to the threat. Therefore, it would make sense to ask whether a defendant such as Erdemovic should not be absolved of responsibility in view of the fact that the harm he inflicted (death of dozens of people) is significantly graver than the one he averted (loss of his life). A satisfactory answer to this question necessarily requires an elucidation of the role of proportionality in the context of excuse defenses.

I will undertake an examination of these three problems in four parts. In Part I, I will probe the opinions in the *Erdemovic* case with the purpose of demonstrating that both the majority and the dissent treated the duress defense as if it were a claim of justification. This, however, as I will argue in Part II, is injudicious. Properly understood, duress is an excuse, not a justification. In this part I will also argue that, in light of the nature of the defense, it is unwise to disallow claims of duress when the offense charged is murder.

In Part III, I will attempt to show that the arguments in favor of permitting the defendant to claim duress as a defense to the crime charged weaken as the seriousness of the offense increases. This contention, which I call the “seriousness of the offense” thesis, provides us with intuitive support for distinguishing cases in which the defendant pleads duress to a crime involving the killing of one human being from those in which the actor claims coercion as a defense to the killing of dozens or hundreds of persons. While our sensibilities seem to point in the direction of allowing the defense in cases of the former type, they do not appear to support permitting the claim in situations of the latter type.

I find theoretical support for the intuitions upon which the seriousness of the offense thesis is grounded in what I dub the “understandable choice” theory of duress. According to this theory, a coerced actor is properly excused when his decision to engage in wrongful conduct finds sufficient understanding amongst the community to warrant an exemption from liability. In the latter portion of Part III I point out two factors that should be taken into account when making the aforementioned determination, namely: (1) whether the defendant had a legal duty to resist the threats he faced, even if doing so would lead to his death, and (2) if the actor would have avoided harm to the victims by choosing not to capitulate to the

coercion.

Finally, in Part IV I apply the understandable choice theory of duress to the facts in the *Erdemovic* case. After balancing the competing considerations, I conclude that the defendant should have been able to claim duress as a defense to the killing of dozens of civilians. Since the civilians would have died anyway at the hands of other soldiers, resisting the threats would have been useless. Even though this fact does not provide us with sufficient reasons to negate the wrongfulness of the defendant's act (i.e. justify the conduct), it should afford us with enough reasons to exempt him from responsibility (i.e. excuse the defendant).

I. CHRONICLES OF A CONFUSION FORETOLD: THE OPINIONS IN THE ERDEMOVIC CASE

A. THE MAJORITY OPINION: DURESS AS A JUSTIFICATION

Three of the five justices who composed the ICTY at the time when the *Erdemovic* case was decided ruled that duress is not a defense to murder or to crimes against humanity.⁴ In doing so, they adopted the common law rule that duress is not a defense to the killing of innocent human beings. After examining the writings of common law scholars such as Blackstone and Stephen, they concluded that “[i]f national law denies recognition of

⁴ See the Joint Separate Opinion of Justices McDonald and Vohrah and the Separate and Dissenting Opinion of Judge Li. They are available online at <http://www.un.org/icty/cases-e/index-e.htm>.

duress as a defence in respect of the killing of innocent persons, international criminal law can do no less than match that policy since it deals with murders often of far greater magnitude.”⁵

This conclusion was greatly influenced by Hale’s famous assertion that “if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant’s fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact for he ought rather to die himself, than kill an innocent.”⁶ Underlying the position adopted by the majority is the known adage that it can never be right to kill an innocent human being since a rule infringing this maxim would violate the “special sanctity that the law attaches to human life.”⁷ Consequently, no one should have a legal right to choose that one innocent person be killed instead of another.⁸

As I have discussed at length elsewhere,⁹ these are exactly the same

⁵ Joint Separate Opinion of Justices McDonald and Vohrah, paragraph 75. Justice Li expressed in paragraph 12 of his Separate Opinion that he agreed with Justices McDonald and Vohrah’s views regarding the applicability of the duress defense to the case at bar.

⁶ MATHEW HALE, *I PLEAS OF THE CROWN* 51 (1800), cited in paragraph 71 of the Joint Separate Opinion of Justices McDonald and Vohrah.

⁷ *R. v. Howe and Others*, 1 All ER 771, at 785 (1987), cited in paragraph 71 of the Joint Separate Opinion of Justices McDonald and Vohrah.

⁸ *Id.*

⁹ See Luis E. Chiesa, *Normative Gaps in the Criminal Law*, 10 New Crim. L. Rev. 102 (2007).

considerations that underpin the common law rule that one cannot justify the killing of an innocent (*i.e.* non-harmful) person by way of the necessity or choice of evils defense.¹⁰ However, one important difference between the common law position that necessity is not a defense to murder and the opinion that duress should also never be raised as a defense to a crime involving the death of an innocent human being is that necessity is a justification while duress is usually considered an excuse.

The importance of the aforesaid fact should not be understated. Justifications negate the wrongfulness of the act, while excuses merely exclude the actor's culpability without eliminating the wrongful nature of the conduct. Therefore, when an actor claims to be justified, he is asserting that he has a right to engage in the *prima facie* prohibited conduct.¹¹

If Joe alleges to have justifiably killed Mary in self-defense, for example, he is claiming that he had a right to avert Mary's wrongful attack even if that meant infringing upon the *prima facie* prohibition against killing

¹⁰ See, e.g., *R. v. Dudley and Stephens*, 14 QBD 273 (1884).

¹¹ For a cogent defense of the idea that justifications confer rights to infringe the prohibitory norm, see EUGENIO RAÚL ZAFFARONI, *DERECHO PENAL PARTE GENERAL* 590 (Ediar, 2nd ed., 2002) (justification attaches when the prohibitory norm is "qualified" in such a manner that it is recognized that justified actors are "exercising a right" to engage in a *prima facie* wrongful action). Fletcher prefers say to that justifications confer "privileges" to infringe the prohibitory norm. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 562-566 (Oxford, 2000) (*hereinafter*, *RETHINKING*). I do not think that there is an important difference between Fletcher's description of justifications as the exercise of privileges and my definition of justifications as the exercise of a right. See Fletcher's *in passim* statement that "justifications generate rights" in George P. Fletcher, *The Right and the Reasonable*, 98 Harv. L. Rev. 949, 978 (1985).

people (*i.e.* homicide). On the other hand, when an actor claims to be excused, he is not asserting to have a right to engage in the prima facie wrongful conduct.¹² Excused actors merely contend that they should be exculpated because they did not perform the admittedly wrongful act in a blameworthy manner.¹³ Thus, if Joe alleges to have killed Mary while he was insane, he is certainly not claiming that he had a right to harm Mary. However, he seeks to be exonerated because he did not kill Mary in a blameworthy manner since he was insane when he committed the offense.¹⁴

One can now readily see why asking, as the majority of the justices in *Erdemovic* appeared to do, whether the coerced defendant had a “right” to kill innocent civilians is only relevant if the actor was alleging to have committed the offense in a justified manner. However, if the defendant’s claim in *Erdemovic* was merely that he should have been excused for having wrongfully killed innocent civilians, it seems clear that inquiring

¹² B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1991 *Duke Journal of Comparative and International Law* 169, 170, fn 9 (asserting that justifications confer a right to engage in the prima facie prohibited conduct, whereas excuses do not).

¹³ Owen S. Walker, *Why Should Irresponsible Agents be Excused?*, *The Journal of Philosophy*, Vol. 66, No. 10, pp. 279 (1969) (stating that excuses render violators of norms blameless). *See also*, Sanford H. Kadish, *Excusing Crime*, 75 *Cal. L. Rev.* 257, 261 (1987) (asserting that excuses deny blame for a harm done).

¹⁴ At this stage of the article I chose to illustrate the nature of excuses by way of the insanity defense because there is some debate with regards to whether other claims, such as self-defense or duress, constitute justifications or excuses. However, there is no controversy about the fact that insanity is an excuse. Thus, as Professor Kim Ferzan has stated, insanity is the “classic instance” of an excuse. Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 *Arizona L. Rev.* 213, 218 (2004).

whether he had a privilege or a right to commit murder is entirely irrelevant. Evidence offered to prove that he was coerced would be pertinent to establishing whether he should not be blamed for having killed innocent civilians (excuse) but not for demonstrating that he did not act wrongfully (justification).

Having conceived the case as one of justification, the justices, following the common law, concluded that Erdemovic could not plead duress as a defense to a crime against humanity. Nonetheless, they did not consider that his claim might have been examined as one of excuse. As I will attempt to demonstrate later in this article, doing so might have changed the outcome of the case.

B. JUDGE CASSESSE'S DISSENTING OPINION: DURESS AS A HALF-WAY
HOUSE BETWEEN JUSTIFICATION AND EXCUSE

Judge Cassese, dissenting in the Erdemovic decision, criticized the majority's approach to the question of whether duress should be a defense to a crime against humanity. He particularly disapproved of the conclusion that the common law rule against raising duress as a defense to a crime involving the death of innocent persons should be adopted in the international arena.¹⁵ In short, his argument can be summarized as follows:

¹⁵ See Justice Cassese's remarks in paragraph 11(ii) of his Separate Dissenting Opinion.

- (1) Under international law, the general rule is that duress can be pleaded as a defense as long as several stringent requirements are met;
- (2) No customary rule of international law has crystallized regarding whether duress can be raised in a case involving war crimes or crimes against humanity;
- (3) In the absence of a specific rule of international criminal law governing the subject, the general rule regarding duress should apply to the case of crimes against humanity. Therefore, a claim of duress can be raised in these types of cases as long as the strict requirements that condition the availability of this defense under traditional international law are met.

Judge Cassese thoroughly examined the applicable case-law on the subject and concluded that the evidence in favor of an exception to the general rule that duress can be pleaded as a defense to any crime was scarce and, in any case, inconclusive.¹⁶ Additionally, he cited several Italian and

¹⁶ *Id.*, paragraph 44.

German cases that provided support to his claim that duress could be raised as a defense to a crime involving the murder of innocent human beings.¹⁷

However, Judge Cassese concluded that duress could only be a defense to the killing of innocent civilians if the harm caused was less than the one averted. By inserting this strict proportionality requirement, he infelicitously attached a justificatory-type constraint to the defense of duress. This confuses the difference between the choice of evils and duress defenses and, consequently, between justifications and excuses. Since necessity is a justification, it seems proper to limit the scope of the defense by requiring that the harm averted be greater than the harm caused. Only then should the conduct not be regarded wrongful.

However, if Erdemovic was claiming that his admittedly wrongful act should be excused because of duress, it would not make much sense to subject his claim to *stringent* proportionality requirements.¹⁸ By definition, excused conduct is wrongful conduct. Consequently, the reason why the excused actor is acquitted is because the circumstances in which the offense

¹⁷ *Bernardi and Randazzo*, Decision of the Italian Court of Cassation of July 14, 1947; *Srá*, et al, Decision of the Italian Court of Cassation of November 6, 1947; *S & K*, Decision of the *Landgericht* of Ravensburg of May 21, 1948.

¹⁸ I do not mean to imply that proportionality never plays a role when determining whether an actor should be excused. It might be coherently argued that someone under duress should refuse to engage in an act that causes a great deal more harm than the harm avoided. However, the proportionality requirement that could attach in the context of claims of excuse is much more lax than the one that is traditionally employed in the context of justifications.

was committed indicate that it would be unfair to blame him for the commission of his wrongful act. Whether or not the excused actor's conduct was the lesser of two evils is, in principle, irrelevant. Therefore, as Professor Paul Robinson has correctly pointed out, limiting the scope of excuse defenses by conditioning their availability upon the existence of strict proportion between the harm caused and the harm averted would:

Erroneously imply that the actor must avoid a *greater* harm to receive an [excuse] defense. Such a requirement undermines the rationale for [excuse defenses]. As [our previous discussion] illustrates, justifications encourage conduct that creates a net benefit, while excuses exculpate actors who cause a net harm but who are blameless.¹⁹

As a result of this, if the defendant in *Erdemovic* were alleging that it would be unfair to punish him for his wrongful act because he was coerced into killing innocent persons, his claim would be one of excuse and not of justification. If that was the case, Judge Cassese's decision to limit the availability of the duress defense to instances where the actor chose the lesser evil should be cast into doubt.

Unfortunately, the drafters of the Rome Statute of the International Criminal Court seemed to follow Cassese's position regarding duress. Hence, according to the Rome Statute, duress is a defense if, and only if, "the person does not intend to cause a greater harm than the one sought to

¹⁹ PAUL H. ROBINSON, II CRIMINAL LAW DEFENSES 367-368 (West, 1984).

be avoided”.²⁰ This provision blurs the justification/excuse distinction under international criminal law, since it conditions the availability of the defense upon a proportionality requirement characteristic of justifications, even though duress is considered by many to be an excuse.²¹ Until now, quite surprisingly, international law scholars have uncritically accepted the Rome Statute’s take on the subject. Gerhard Werle, for example, recently stated that duress can only be pleaded as a defense when the crime committed is “on balance, the lesser of two evils.”²²

If we adopt Justice Cassese’s and the Rome Statute’s position that duress should be conceived as a variation of the justificatory necessity defense that is only available when the actor chooses the lesser of two evils, it seems clear that duress would seldom, if ever, be a defense to a crime against humanity involving the commission of multiple murders. The evil of killing many civilians will always be equal to or greater than the evil of killing the coerced actor.²³ Consequently, it would be nearly impossible for

²⁰ Article 31(d) of the Rome Statute of the International Criminal Court.

²¹ See, e.g., FLETCHER, *supra* note 11, at 831-833. See also, Kent Greenawalt, *Natural Law and Political Choice: The General Justification Defense - Criteria for Political Action and the Duty to Obey the Law*, 36 Catholic L. Rev. 1, 24-25 (1986) (suggesting that duress, as opposed to the lesser evils defense, is an excuse, not a justification).

²² GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 147 (T.M.C. Asser Press, 2005).

²³ It might be argued that the evil of killing civilians could be considered less evil than the killing of the coerced actor if all his victims would have died anyway for certain.

defendants such as Erdemovic to prove that they chose the lesser evil when they committed the crime. However, if duress were considered an excuse, there would be no need to restrict its scope by requiring that the harm caused by the actor be strictly proportionate to the one prevented.²⁴ The most relevant consideration would be whether the actor should be blamed and punished for having committed the crime while under coercion to do so.

It is precisely this claim -- that duress is an excuse that should not be subjected to stringent proportionality standards -- that I wish to defend in the next part of this article.

II. THE NATURE OF THE DURESS DEFENSE AND ITS AVAILABILITY IN CASES OF MURDER

As has been previously stated, to establish whether the duress defense functions as a justification or as an excuse, we should ask whether it negates the wrongfulness of the act (justification)²⁵ or the blameworthiness of the actor (excuse).²⁶ The best way to determine this is to analyze a paradigmatic case of exculpatory duress in order to ascertain

²⁴ It should be noted that continental criminal law theorists also believe that an actor can have a valid duress claim even if he inflicts more harm than the one averted. See, for example, JUAN J. BUSTOS RAMÍREZ & HERNÁN HORMAZÁBAL MALARÉE, II LECCIONES DE DERECHO PENAL 380-387 (Trotta, 1999).

²⁵ DUBBER, *supra* note 2, at 251.

²⁶ *Id.*

whether the defendant should be acquitted because he did the right thing or because he performed a wrongful act in a non-blameworthy manner.

Say, for example, that Larry threatened to kill Joe and his family if he refused to help him rob the First National Bank. If Joe decided to help Larry rob the bank in order to save himself and his family, most of us would not convict him of robbery because he acted under “duress.” Although it seems obvious that Joe should be exonerated, it is not altogether evident why this should be so. Is it because robbing the bank was the right thing to do, or is it because, even though robbing the bank was a wrongful act, it would be unjust to punish Joe for his wrongdoing?

It seems to me that we should conclude that Joe committed an unjustified act that should nevertheless be excused. We would be hard pressed to believe that robbing a bank in order to avoid personal harm is conduct that society would like to encourage or tolerate. However, the nature of justified acts is such that they ought to be encouraged, or at least tolerated, by society.²⁷ Of course, we might be willing to acquit the coerced actor who robs the bank out of compassion for his circumstances,²⁸ but not because we think that others should opt to rob banks when faced with

²⁷ Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 University of Chicago L. Rev. 729, 749 (1990).

²⁸ On the relationship between our practices of excusing and our sentiments of compassion, see generally Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 Yale L. J. 1331 (1997).

similar threats. It might be argued that the State should not punish its citizens for failing to resist threats to which most of us would have also succumbed. This does not mean, however, that such a failure ought not to be condemned. Acquittal in these cases is more the product of a concession to human frailty than of a societal determination that the actor's conduct was, on balance, not wrongful.²⁹

Even though there are good reasons to conclude that Joe's act should not be justified, the same cannot be said about whether it should be excused. Excuses express understanding for the actor who, because of extreme circumstances or personal disabilities, cannot be fairly expected to abstain from committing the wrongful act.³⁰ Thus, in order to determine if Joe's robbing of the bank should be excused, we need to ask whether a reasonable person in his position would have also elected to commit the crime. Usually, it would be unfair to punish someone for succumbing to a threat that a normal law abiding citizen would have been unable to resist. In Joe's case, it seems quite clear that it would be unfair to punish him for deciding to rob the bank in order to avoid harm to himself and his family. Most of us would have chosen the same course of action. Consequently, Joe's

²⁹ Jeremy Horder, *Autonomy, Provocation and Duress*, 1992 Crim. L. Rev. 706, 707.

³⁰ B. Sharon Byrd, *Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction*, 33 Wayne L. Rev. 1289, 1290 (1987).

wrongful act should be excused. His conduct, however, remains wrongful. Society should condemn the acts of those who yield to threats and inflict harm on innocent persons. Nonetheless, it appears sensible not to punish such actors in light of the fact that the coercion they were subjected to makes their decision to engage in the criminal act an understandable one. All in all, their conduct, though wrongful, is not blameworthy.³¹

If it is true, as I have attempted to show by way of this hypothetical, that duress is an excuse, it would, as a general rule, be improper to limit its availability to cases where the actor chose the lesser evil. The reason why excused actors are acquitted is because it is not fair to blame them for their actions, not because they did not engage in wrongful acts. Thus, the only pertinent inquiry is whether we could have reasonably required the defendant to overcome the coercion and resist the threats. Consequently, whether or not the harm caused by the coerced actor was greater than the one averted is, as a general rule, not determinative.³²

³¹ Recently, Peter Westen and James Mangiafico argued that duress is better conceived as a justification. See Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse – And Why it Matters*, 6 Buff. Crim. L. Rev. 833 (2003). Their position, though provocative is, in the end, unconvincing. For a good refutation of Westen and Mangiafico's arguments, see Huigens, *supra* note 2.

³² See ROBINSON, II CRIMINAL LAW DEFENSES, *supra* note 19, at 368 (stating that the concerns underpinning the notion that duress should only be available when the actor's conduct avoided a greater harm than the one caused are "misplaced").

If duress is an excuse, the common law blanket rule excluding it as a defense to murder should be rejected. Granting an excuse to an actor who kills under coercion is not tantamount to recognizing that he had a right to kill the victim.³³ In these cases, the harm averted by the actor was not greater than the one produced and, in consequence, his conduct is still considered wrongful. However, in most cases, someone who wrongfully kills an innocent human being while under coercion should not be punished when it is determined that most of us would have done the same thing.³⁴ In these instances, punishing those who succumb to the threat to commit murder would typically not be justifiable either on utilitarian or deontological grounds. Notice that, from a utilitarian perspective, it can be cogently argued that people who kill a stranger in order to avoid harm to themselves or their loved ones are not deterrable by the criminal sanction. On the other hand, from a deontological standpoint, it can be persuasively posited that punishing someone who succumbed to a threat to which the majority of us would have also yielded to is unjust. Hence, as the drafters of the Model Penal Code have stated, imposing punishment in such cases is,

³³ *Id.* at 368-369.

³⁴ See, e.g., Steven J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 San Diego L. Rev. 359 (2006). See additionally, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 326 (Lexis, 3rd ed., 2005); FLETCHER, *supra* note 11, at 830-831.

almost invariably, “bound to be an ineffective threat [and would] be divorced from any moral base”.³⁵

III. SHOULD DURESS BE A DEFENSE TO A CRIME INVOLVING THE KILLING OF DOZENS OF INNOCENT HUMAN BEINGS?

A. PROPORTIONALITY, DEMANDING HEROISM, AND THE “SERIOUSNESS OF THE OFFENSE” THESIS

Both crimes against humanity and murder involve the killing of innocent human beings. Therefore, if duress should be a defense to murder, it could also be conceived as a defense to a crime against humanity. However, a majority of the justices in *Erdemovic* seemed to suggest that, even if it is accepted that duress should be a defense to murder, it does not follow that it should also be a defense to the large-scale killings of innocent civilians.³⁶ According to these judges, crimes against humanity, unlike a discrete act of murder, “affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location.”³⁷ As a result of this, they contend that a crime against humanity is a more heinous offense than murder and, for that reason, defendants should not be allowed

³⁵ *Id.*

³⁶ *See* paragraph 75 of the Joint Separate Opinion of Justices McDonald and Vohrah.

³⁷ *Id.* at paragraph 21.

to plead duress as a defense to a crime against humanity even if they are allowed to do so when charged with murder.³⁸

I will dub the aforementioned argument the “seriousness of the offense” thesis. Proponents of this thesis hold that, even though duress is usually a defense to any crime, it may properly be disallowed when the social harm caused by the commission of the offense is extremely disproportional to the harm averted. In order to test the viability of this thesis, I propose that we evaluate the following hypotheticals:

- (1) *The Coerced Murderer Case* – Hugo threatened to take the life of Angel’s son if he refused to kill Gary, an innocent third person. Angel capitulated to the threat. He was charged with murdering Gary. Angel pleaded duress.
- (2) *The Coerced Terrorist Case* – Frank threatened to kill Jerry, a well-known maker of explosives, if he refused to help him build a bomb that was to be placed inside a federal building. Jerry succumbed to the threat and helped Frank build the bomb and place it inside the building. Over one hundred innocent people died when the bomb

³⁸ It is said that, all things being equal, a crime against humanity is a graver offense than a discrete murder because of the “collective nature” of the victim. See Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of National Law Analogy and the Potential of International Criminal Law*, 43 *Stanford J. of International Law* 39, 59 (2007).

exploded. Jerry was charged with murdering the people inside the building. He pleaded duress.

- (3) *The Nuclear Bomb Case* – Jack is a nuclear physicist who was employed by the federal government to help with the design of nuclear bombs. Lazarus threatened to kill Jack’s family if he refused to design, manufacture, and help him detonate a nuclear bomb over Los Angeles. Jack yielded to the coercion and helped Lazarus get the nuke and drop it over L.A. Over half a million people died. Jack was charged with murdering the people who died when the nuke exploded. He pleaded duress.

Arguably, the harm caused in the *coerced murderer case* is less serious than the one caused in the *coerced terrorist case*. The harm produced in the *nuclear bomb case*, however, is clearly graver than the ones caused in the other two cases. Applying the “seriousness of the offense” thesis to these three hypotheticals would yield the following results:

- (1) *The Coerced Murderer Case* – Since the harm produced by the defendant (death of Gary) is not much graver than the one averted (death of Angel’s son), there are good arguments in favor of permitting the actor to plead duress as a defense to the crime charged.

(2) *The Coerced Terrorist Case* – The harm wreaked by the defendant (death of one hundred people) is greater than the loss prevented (death of himself and his family). In spite of this, it is not evident whether the harm produced was of an extremely graver magnitude than the one averted. However, plausible arguments could be put forth that, in light of the large number of deaths caused by the defendant's action, he should not be able to plead duress as a defense to the crime charged.

(3) *The Nuclear Bomb Case* – The harm caused by the defendant's action (death of over half a million people) is much greater than the one prevented (death of his loved ones). Undoubtedly, the harm produced was extremely disproportional to the one averted. Therefore, if one assumes that Jack could have avoided causing such grave harm by not yielding to the threat, there are compelling reasons in favor of disallowing duress as a defense to the offense charged.

The arguments in favor of allowing the defendant in the *Coerced Murderer Case* to plead the duress defense while at the same time disallowing the defense in the *Nuclear Bomb Case* are sound. Even though

the *Coerced Terrorist Case* is a closer call, the “seriousness of the offense” thesis provides us with intuitive support in favor of punishing the defendant.

There seems to be some support in the philosophical literature for the seriousness of the offense thesis. Several well-known scholars seem to believe that individuals may be required to perform heroic acts of self-sacrifice if that is the only way of saving numerous lives. Professor Joshua Dressler, for example, has expressed that:

Society...has a right to expect a person to demonstrate a higher level of moral strength when ordered to kill a hundred innocent children than when commanded to kill one. 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.³⁹

Similarly, Professor Fletcher has stated that “if the cost in human lives is sufficiently high we could properly expect someone to resist threats to his own life.”⁴⁰ Likewise, Professor Paul Robinson concluded in his treatise on criminal law defenses that:

It is reasonable to assume that given threats of equal gravity, **the resistance of the person of reasonable firmness would be directly related to the seriousness of the compelled offense.** The law-abiding person may be unable to resist

³⁹ Dressler, *Exegesis*, *supra* note 2, at 1374.

⁴⁰ FLETCHER, *supra* note 11, at 833.

coercion if he must commit forgery to avoid the threat but able to resist the same threat if he must kill an innocent.⁴¹

The intuitions grounding the seriousness of the offense thesis also seem to be shared by criminal law theorists on the other side of the Atlantic. Spanish commentators Bustos and Hormazábal, for example, have asserted that “although [duress] allows for an exemption from punishment in cases in which the harm caused is greater than the one [avoided], the harm caused cannot be disproportionately greater [than the one averted]”.⁴²

These scholars are hinting at the possibility that, under certain circumstances -- such as when the harm that the coercer wants the actor to inflict is extremely disproportional to the one averted -- it might be proper for society to demand that the agent resist the threat even if this means that he should sacrifice his own life. Although this conclusion is intuitively appealing, it raises several problems. Notice that accepting this thesis would lead to punishing the defendants in the coerced terrorist and nuclear bomb cases for failing to heroically choose to sacrifice their lives so that many people can live. This is contrary to the principle that the law has no right to demand that people engage in acts of heroism.

⁴¹ ROBINSON, *supra* note 19, at 367 (emphasis added).

⁴² BUSTOS RAMÍREZ & HORMAZÁBAL MALARÉE, *supra* note 24, at 387.

This principle is so entrenched in our criminal law that the drafters of the Model Penal Code expressly stated that the exculpation afforded pursuant to the duress defense is premised on the idea that it would be socially debilitating to “demand that heroism be the standard of legality.”⁴³ After all, “the standard is that of the reasonable man, not the reasonable hero.”⁴⁴ Moreover, for the law to demand heroic self-sacrifice from us would be hypocritical since most men of reasonable moral firmness are incapable of abiding by such a high standard.⁴⁵

In my opinion, this does not seem to be a convincing rationale for not demanding that ordinary people act in heroic ways, since, as Professor Dressler has rightly pointed out:

It is not inevitably hypocritical for a juror to concede that most people in the same situation, including the juror, would have acted as the defendant did, yet still believe that the coerced actor deserves to be punished. As long as the juror believes that the juror also would be deserving of punishment (and, presumably, would accept it) in the same situation, there is no hypocrisy.⁴⁶

An additional problem with the seriousness of the offense thesis is that it cannot be easily reconciled with the widely defended “hard choice” and

⁴³ MPC §2.09, at 374-375.

⁴⁴ Alan Reed, *Duress and Provocation as Excuses to Murder: Salutory Lessons from Recent Anglo-American Jurisprudence*, 6 *Journal of Trans. L. and Policy* 51, 55 (1996).

⁴⁵ MPC §2.09, at 374-375.

⁴⁶ Dressler, *supra* note 2, at 1368-1369.

“involuntariness” theories of duress. According to the “hard choice” theory of duress, an actor is excused when the coercive situation puts him in the undesirable position of having to decide to preserve either his interests or the interests of others. Those who face this “do it or else” situation do not act culpably if they choose to harm others because we believe that a reasonable person facing the same hard choice would have acted in the same manner.⁴⁷ The “hard choice” theory of duress cannot adequately explain the “seriousness of the offense” thesis because the actors in both the coerced terrorist and nuclear bomb case faced an “unfairly hard choice.” Thus, contrary to our intuitions regarding these cases, they should both be acquitted under this popular conception of the duress defense.

The same results follow from an examination of the so-called “involuntariness” theory of duress.⁴⁸ According to this theory, duress exculpates actors whose choice making capabilities are substantially reduced by the coercive situation that generates the defense. This reduction

⁴⁷ For an examination and defense of the “hard-choice” theory of excuse and duress, *see generally* Stephen J. Morse, *Deprivation and Desert*, in *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW* 124-125 (William C. Heffernan and John Kleinig, ed., 2000); *see also* Michael S. Moore, *Responsibility and the Unconscious*, 53 S. Cal. L. Rev. 1563, 1567, 1663-1664 (1990).

⁴⁸ The involuntariness theory of duress has informed various state supreme court decisions about the scope and nature of the defense. *See, e.g.*, *State v. Rouleau*, 204 Conn. 240, 528 A.2d 343 (Conn., 1987) (stating that since the effect of duress is to “reduce the person to a state of involuntariness,” the prosecution should bear the burden of disproving the defense beyond a reasonable doubt). *See also*, *People v. Graham*, 57 Cal.App.3d 238, 129 Cal.Rptr. 31 (Cal.App., 1976) (asserting that a claim of duress “casts doubt on the **voluntariness** of the [defendant’s] acts”)

in the actor's capacity to choose not to yield to the threat makes his choice to engage in the wrongful act tantamount to a decision that has been forced upon him. Thus, it has been stated that the actor's choice to save his interests at the expense of the interests of others is in reality "no choice at all" and that duress exculpates the actor because his capacity to choose to do otherwise is "absent" in light of the coercion.⁴⁹ In a similar vein, an English court has asserted that duress is an excuse when the coercion faced by the defendant "overbears" his will to such a degree that the offense committed can "no longer" be considered to be the consequence of the "voluntary acts" of the accused.⁵⁰

This theory is also incompatible with our intuitions regarding the correct solution to the coerced terrorist and nuclear bomb cases. Even though the seriousness of the offense thesis would lead us to convict both defendants, they would be acquitted under an "involuntariness" theory of duress because the coercion they were subjected to significantly reduced their ability to choose not to commit the crime.

Despite the logical appeal of the seriousness of the offense thesis, it seems fair to say that, in view of the aforementioned problems, "[v]ery much more needs to be said about duress...and in particular about whether

⁴⁹ DUBBER, *supra* note 2, at 251.

⁵⁰ *Regina v. Hudson*, 2 All E.R. 244 (Crim. App., 1977).

the law can properly sometimes demand heroism of us.”⁵¹ Thus, in the next section I will attempt to elaborate an alternative conception of the duress defense that can adequately account for the seriousness of the offense thesis without falling prey to the problems that plague the hard choice and involuntariness theories. Before doing so, however, I will try to demonstrate why these two conceptions of duress cannot satisfactorily explain many features of the defense.

B. BEYOND THE “HARD CHOICE” AND “INVOLUNTARINESS” THEORIES OF:
DURESS AS AN “UNDERSTANDABLE CHOICE”

Contrary to what some well-known scholars have argued, I believe that the exculpatory nature of the duress defense does not lie in the fact that the coercive situation substantially reduced the “choice making capabilities” of the actor, in the extremely hard nature of the choice faced by the person coerced, or in the “involuntariness” of the actor’s decision to engage in the conduct. Regarding the hard choice theory, there are myriad examples of cases in which we would convict someone even though his decision to commit the offense was the product of an extremely unfair and hard choice. No one would doubt, for example, that someone who yields to a threat to cause serious bodily harm to an innocent person in order to avoid losing everything that he owns should be punished even though his decision to

⁵¹ R.A. Duff, *Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 *Buff. Crim. L. Rev.* 147, 177, n. 48 (2002).

engage in the conduct constitutive of the offense was the consequence of an unfair and hard choice.

Regarding the involuntariness theory, it should be noted that the coerced actor's decision to yield to threats is not really involuntary.⁵² Even though the choice that he faces is a difficult one, he still has the capacity to choose not to capitulate to the coercive demands. Thus, describing his conduct as involuntary is either false or misleading.⁵³ Furthermore, the law routinely authorizes imposing unmitigated punishment on defendants who lack a substantial capacity to control their acts. Take, for example, the case of a defendant who, in a moment of temporary loss of self-control, shoots and injures someone who had just finished raping his wife. Although the defendant in this case had his choice-making capabilities substantially reduced by the situation he faced, the law affords him no partial or full excuse for his conduct.⁵⁴ If defendants in this context are not excused in

⁵² Westen & Mangiafico, *supra* note 31, at 901 (stating that situations of duress "differ significantly" from instances in which involuntariness is deemed to be a defense to criminal liability).

⁵³ Perhaps because of the misleading nature of the assertion that duress gives rise to a claim of involuntariness, Professor Stephen Morse has pointed out that the involuntariness inherent in duress is "metaphorical." See Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 Virginia L. Rev. 1025, 1056 (2002).

⁵⁴ It should be pointed out that had the victim in this hypothetical case died, the defendant would have a valid "heat of passion" claim that would reduce his responsibility from murder to manslaughter. In my opinion, allowing "passion" as a partial defense to murder and disallowing it in other contexts is somewhat arbitrary. For a convincing argument in favor the creation of a generic claim of "partial responsibility" available as a defense to any crime, see Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 Ohio S. Journal of Crim. Law 289 (2003).

spite of their impaired volitional faculties, it is unclear why they should be exempted from responsibility when the alleged involuntariness is the product of coercion.

An inquest into German criminal law doctrine and an examination of Section 35 of the German Penal Code further illustrates the shortcomings of the “hard choice” and “involuntariness” conceptions of duress. According to said section, duress is a defense when the coerced actor “commits an unlawful act to avert [an imminent danger to life, limb or freedom] from himself, a relative or person close to him.”⁵⁵ Notice that the defense does not apply if the coerced actor yields to the threat so that harm to property can be avoided. Thus, even though my Aunt María loves Roxy, her three-year-old yorkie as if she were her child, she would not be entitled to a duress defense under Section 35 of the German Penal Code if she chose to destroy the property of another in order to avoid harm to her beloved dog. It is difficult to make sense of this limitation under a “hard choice” or “involuntariness” theory of duress. Aunt María loves Roxy very, very much. Consequently, there is no reason to doubt that choosing between the wellbeing of her dog and causing harm to the property of a stranger represents an “unfairly hard choice” for her. Also, in light of the incredible,

⁵⁵ German Penal Code § 35.

almost maternal, love that she feels for Roxy, her capacity to choose not to harm her dog is substantially reduced by the coercive situation. Alas, even if her choice is a very difficult one and her decision is not free from unfair constraints, she has no duress defense according to German criminal law doctrine.

The limitations that Section 35 of the German Penal Code imposes on the duress defense are not unique to continental legal systems. The drafters of the Model Penal Code also intended to limit the defense in a similar manner. Even though at first glance the provision contained in Section 2.09 of the MPC appears to provide a defense to anyone who yields to threats as long as it is demonstrated that a “person of reasonable firmness” in the actor’s situation would have also succumbed to the coercion, the commentaries of the MPC make it clear that some threats should never give rise to a valid claim of duress. Thus, the commentaries to Section 2.09 state that:

Given the nature of the problem [regarding the proper limits of the duress defense] and the criteria proposed for its solution, it is reasonable to confine the exculpation to the case where force against the person of the actor or another, or the threat thereof, is the instrument of coercion....[W]hen the claimed excuse is that duress was irresistible, *threats to property or even reputation cannot exercise sufficient power over persons of “reasonable firmness” to warrant*

*consideration in these terms.*⁵⁶

It turns out that, despite its apparently broader formulation, the MPC duress provision is almost identical in scope to the duress provision of the German Penal Code. Whereas threats to the life or limb of the coerced actor might provide him with a valid excuse under the German Penal Code and the MPC, threats to property or other legally protected interests will not afford him with a defense under either code. Hence, my Aunt María would not fare better in an MPC jurisdiction, for a threat of harm to her dog is, as a matter of law, not sufficient coercion to warrant an exemption from criminal responsibility.

The best way of explaining this limitation on the scope of the defense is by conceiving the exculpation afforded to those who act under duress as the product of a societal determination that the choice to engage in harmful conduct in order to avoid harm to our interests or the interests of our loved ones is sufficiently comprehensible to warrant an exemption from punishment, while the choice of harming others to avert harm to a dog is not. Thus, as the German scholar Claus Roxin has asserted:

The truth is that the [limitations set forth in Section 35 of the Penal Code] [are] explained by the fact that only in [the cases that fall within the scope of the text of the provision] does the wrongful act performed [under duress] find

⁵⁶ MPC Section 2.09, at 375. (emphasis added).

sufficient understanding amongst [the public] that the [exculpation] seems defensible.⁵⁷

Therefore, according to this conception of duress, which I will dub the “understandable choice” theory, the gist of the defense lies in the “understandable” or “comprehensible” nature of the choice made by the coerced actor and not in the “psychological pressure” or “unfair choice” created by the threat.⁵⁸ Of course, this is not to say that the emotional pressure produced by the threat or the inequitable nature of the choice generated by the coercion should not be taken into account when examining whether the actor should not be punished in view of the fact that his decision to engage in harmful conduct is understandable. However, the existence of either or both of these circumstances does not conclusively establish that the actor should not be held responsible for engaging in the wrongful act. Sometimes we might reasonably conclude that, notwithstanding the extreme pressure suffered by the actor and the unfair choice that he faced, his motivations for action do not generate sufficient “understanding amongst the public” to warrant an exemption from punishment. This is precisely what happens in the case of my Aunt María.

⁵⁷ CLAUS ROXIN, *DERECHO PENAL PARTE GENERAL* 909 (translated by Luzón Peña) (Civitas, 2nd Ed., 2000).

⁵⁸ *Id.*

Various Spanish commentators have advanced similar conceptions of the duress defense. Professor Varona Gómez, for example, has stated that we usually excuse people who act under duress because we understand that the coerced actor “cannot turn away from his concrete interests when he is evaluating the [dilemmatic choice with which he is confronted].”⁵⁹ This, in turn, leads the person who acts under duress to “give more weight to his own personal interests and to those of his loved ones” than to the interests of strangers.⁶⁰ By exculpating coerced actors who choose to avoid personal injury at the expense of harming others, the State is acknowledging that, even though from an objective point of view the interests of a person who acts under duress are not of more weight than the interests of the innocent victim who is harmed by him, it is comprehensible that citizens attach more value to their own ends than to the ends of the strangers or of the community.⁶¹ That is, society generally considers that the coerced actor’s conduct is wrongful, but understandable.⁶² In a similar vein, Bustos

⁵⁹ DANIEL VARONA GÓMEZ, UNA RECONSTRUCCIÓN DE LA EXIMENTE DESDE UNA TEORÍA DE LA JUSTICIA 122 (Comares, 2000) (my translation).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Professor Larry Alexander also appears to believe that the understandability of the actor’s decision to engage in a wrongful act is an essential feature of excuse defenses. *See, e.g.,* Larry Alexander, *Self-Defense, Justification and Excuse*, *Philosophy and Public Affairs*, Vol. 22, No. 1, at 53 (1993) (stating that excuses represent “*understandable* though regrettable human reaction[s]” to extreme circumstances) (emphasis added).

Ramírez and Hormazábal Malarée have claimed that coerced individuals should be excused because their decision to prefer their own interests over those of others is socially comprehensible. In light of the understandability of such preferences, the law should not punish those who solve the dilemmatic choice by harming others in order to avoid personal injury.⁶³

Asking whether the coerced actor's decision to engage in the wrongful act is understandable from a societal perspective can better explain the "seriousness of the offense" thesis than asking if the actor faced an unfairly hard choice or whether his act was voluntary or the product of his free will. While it is clear that a person who kills many people in order to save himself or his loved ones faces an "unfairly hard choice" and that his capacity to freely choose to resist the threats was significantly reduced by the coercive situation, it is not altogether clear whether his decision to engage in such an act finds sufficient understanding amongst the community to warrant an exemption from punishment. This is particularly the case when the actor's decision to perform the wrongful act jeopardizes the continued existence of the community, which can often occur if the offense committed by the coerced defendant is a crime against humanity.

⁶³ BUSTOS RAMÍREZ & HORMAZÁBAL MALARÉE, *supra* note 24, at 380-381.

It is difficult to believe that an actor who chooses to save himself by wiping out a significant number of members of the community will provoke sufficient feelings of understanding amongst the public to justify relieving him of criminal responsibility. On the other hand, while a society might legitimately require nothing less than heroic self-sacrifice from its citizenry when the cost of not doing so is to imperil the very existence of the community, it may properly decline to demand such a high level of courage when the interests at stake are not as monumental.

In view of the abovementioned considerations, the “understandable choice” theory provides us with a better vehicle to explain the seriousness of the offense thesis than its competitors. However, the limitations that should be grafted onto the duress defense in light of this theory remain unexplored. In the remaining section I will elaborate in more detail a couple of factors that should be taken into account when determining whether the coerced actor’s conduct is understandable from a societal viewpoint. As we will see, these factors ultimately determine what degree of proportionality, if any, should exist between the harm caused and the harm averted in order for the duress defense to be successfully pleaded.

C. COMMUNITARIAN OBLIGATIONS, PROPORTIONALITY, AND THE “UNDERSTANDABLE CHOICE” THEORY OF DURESS

1. VOLUNTARILY ASSUMED OBLIGATIONS OF SELF-SACRIFICE AND PROPORTIONALITY STANDARDS

Whether a coerced actor's decision to harm a third party in order to avoid harm to his personal interests generates sufficient understanding amongst the public to warrant exempting him from criminal liability depends in large part on whether the actor breached his communitarian obligations when he chose to engage in the wrongful act. Thus, it has been said that duress should be disallowed as a defense when "the persons involved had assumed a special duty to protect the collectivity."⁶⁴ This is most evidently the case when the coerced actor capitulates to the threats even though in the past he had voluntarily assumed obligations of self-sacrifice that required him not to succumb to such threats.⁶⁵

Cases involving law enforcement agents, firefighters, soldiers and seamen represent paradigmatic examples of these types of situations.⁶⁶ In determining, for example, whether to excuse a police officer who was coerced into harming an innocent third party in order to avoid harm to himself, one should not only consider what a person of reasonable firmness

⁶⁴ ROXIN, *supra* note 47, at 914-915.

⁶⁵ FRANCISCO MUÑOZ CONDE, *TEORÍA GENERAL DEL DELITO* 174 (Tirant Lo Blanch, 3rd ed. 2004) (stating that the duress defense should be disallowed when the defendant had assumed the obligation to sacrifice his interests for the well-being of the community).

⁶⁶ GÜNTHER JAKOBS, *DERECHO PENAL PARTE GENERAL* 694 (translation Cuelo Contreras & Rodriguez de Murillo) (Marcial Pons, 1995).

would have done in his situation, but also what duties police officers typically owe to innocent third parties. When evaluating the coerced police officer's claim of duress, the decisive consideration seems to be that he had a duty to resist threats to his life in order to keep innocent third parties out of harm's way. It seems reasonable to conclude that, in light of this voluntarily assumed duty of self-sacrifice, a police officer who fails to protect innocent people by yielding to unlawful threats will not generate a sufficient degree of understanding amongst the community as to justify an exemption from punishment. Thus, as one leading German criminal law theorist has aptly pointed out:

The [duty] to control the instinct of self-preservation is...required of those who have assumed the obligation to tolerate [threats] in light of their profession, even when the threats endanger their lives. [The reason for this is that] it is in precisely these circumstances when the community should be able to rely on them.⁶⁷

Whether the coerced actor has voluntarily assumed duties of self-sacrifice has a profound effect on the degree of proportionality that society is willing to require in order for the actor to be able to successfully plead duress. While a claim of duress will typically prosper even when the harm caused by the defendant is greater than the one averted, this is surely not the

⁶⁷ HANS HEINRICH JESCHECK & THOMAS WEIGEND, *TRATADO DE DERECHO PENAL* 523 (translation by Olmedo Cardenete) (Comares, 5th ed., 2003).

case when the actor had voluntarily assumed a duty of self-sacrifice that required him not to yield to the coercion giving rise to the defense. In the latter cases it seems proper to deny the actor's duress claim unless the harm averted by submitting to the threat is significantly greater than the one caused by complying with the coercer's demands. Thus, a police officer should not be exempted from liability if he yields to a threat to kill an innocent person in order to avoid suffering grave bodily harm. However, he could be relieved of responsibility if he gives way to a demand to steal property in order to avoid being killed.

It should be noted that the average person would have a sound duress claim in both cases. However, since police officers have voluntarily assumed duties of self-sacrifice that require them to "control their instinct of preservation" more than the average person, they would only have a valid duress defense in the latter case.

2. INVOLUNTARILY ASSUMED OBLIGATIONS THAT REQUIRE PERFORMANCE OF SELF-SACRIFICE AND MORE STRINGENT PROPORTIONALITY STANDARDS

Although most duties of self-sacrifice are voluntarily assumed, there are some instances in which such obligations are involuntarily imposed. This is most evident in the case of familial relationships, such as the ones

that exist between a parent and his child.⁶⁸ Thus, for example, a father has a duty to resist threats to his life if the cost of yielding to the coercion is the death of his small child. This involuntarily imposed obligation surely affects whether the parent should be able to successfully plead duress as a defense to a crime involving harm to his child. It is difficult to see how a father's decision to save his own life at the expense of the life of his child will generate sufficient understanding amongst the community to justify relieving him of criminal responsibility.

The existence of such communitarian duties of self-sacrifice warrants a reexamination of the degree of proportionality that should be required in order for a parent to successfully plead duress as a defense to an offense involving harm to his children. In these instances it seems fair to require that the parent tolerate greater harm to his interests than we would demand from a person who is not related to the child. Hence, a father will only be able to plead duress as an excuse to harming his child if the harm avoided by yielding to the coercion was significantly greater than the one caused to the child by capitulating to the threats. This represents an inversion of the proportionality analysis that is undertaken in the typical

⁶⁸ ROXIN, *supra* note 47, pp. 920.

duress case that does not involve the existence of communitarian duties of self-sacrifice that demand that the coerced actor resist the threats.⁶⁹

Involuntary obligations of self-sacrifice also arise in circumstances in which the only way for a coerced actor to protect his interests is by causing a harm that is grossly disproportional to the threatened harm. Consequently, a coerced actor has a duty to suffer moderate physical injury if the only way of avoiding such injury is by killing an innocent third party.⁷⁰ Similarly, a defendant should not be able to excuse the killing of hundreds or thousands of people by pointing out that he would have been killed had he decided to act in a different manner. The reason for this is that society requires that we assume minimum obligations of solidarity towards our fellow citizens in order to make life in community possible. Thus, notwithstanding the unfairly hard choice faced by the defendant and the substantial reduction of choice making capabilities that the coercive situation produces, a person who decides to inflict a grossly disproportionate harm to the one averted will most probably not find sufficient understanding amongst the community to warrant an exemption from punishment.

⁶⁹ Involuntary duties of self-sacrifice arising out of familial relationships may extend to case other than those involving a parent and his child. Thus, for example, a husband may have similar obligations towards his wife. *Id.*

⁷⁰ *Id.*

3. COMMUNITARIAN FAMILY OBLIGATIONS AND LAXER STANDARDS OF PROPORTIONALITY

The drafters of the MPC appear to believe that it makes sense to conclude that a coerced actor may cause more harm when attempting to save a loved one than when trying to save himself.⁷¹ This position is grounded in the fact that “danger to a loved one may have greater impact on a person of reasonable firmness than a danger to himself.”⁷² While this might be true, the stronger argument in favor of this contention seems to be that there are communitarian duties stemming from familial relationships that allow for coerced actors to inflict more harm than what would be allowed absent such a relationship. Once again, this can be more clearly grasped in cases involving a parent and his child. While people have an obligation to do everything in their power to keep their children free from harm, they do not have a similar obligation to keep themselves out of harm’s way. As a result of this, it seems reasonable to allow a coerced actor to inflict more harm when the lives of his children are at stake than when his own life is threatened.

In these cases the coerced actor’s decision to harm a third party in order to save his child is understandable both because of the difficult nature

⁷¹ MPC, Sec. 2.09, at 376.

⁷² *Id.*

of the choice he faced *and* because by saving his child's life he is fulfilling his communitarian duty to protect his family. In contrast, when a coerced defendant chooses to harm an innocent person merely to safeguard his own personal interests, the understandability of the decision will not be bolstered by a finding that the actor satisfied his family obligations by choosing to harm the third party. This leads to a modification of the standard of proportionality that typically conditions the availability of the duress defense. More disproportionality between the harm caused and the one averted will be allowed in cases where the actor yields to the coercion in order to save his loved ones than in cases that do not involve such interests.

4. UNDERSTANDABILITY AND THE CAPACITY TO PREVENT THE HARM THREATENED FROM OCCURRING

Another important consideration to take into account when determining if a coerced actor should be exempted from penal liability is whether he could have avoided harm to the parties that he injured by choosing to resist the treats. This factor appeared to be determinative for Judge Cassese in the *Erdemovic* case, for in his dissenting opinion he argued that a coerced actor who kills innocent human beings should be relieved of criminal responsibility if "it is highly probable, if not certain, that if the person acting under duress had refused to commit the crime, the

crime would in any event have been carried out by persons other than the accused.”⁷³

Judge Cassese’s position seems to be grounded in the belief that in these instances deciding to kill the innocent people constitutes the lesser evil, since “the evil threatened (the menace to [the life of the coerced actor] and his subsequent death) would be greater than the remedy (his refraining from committing the crime, i.e., from participating in the execution).”⁷⁴ Thus, he is suggesting that these types of cases should be treated as a variation of the justification commonly known as the “choice of evils” defense.

This lesser evil argument can be illustrated by way of the following example taken from Judge Cassese’s dissenting opinion. Suppose that “a driver of a van transporting victims to a place of execution is told by the executioners he must shoot one of the victims or he himself will be shot.” Assuming that “[t]he victims who are at the execution site will certainly die in any event,”⁷⁵ shooting the innocent victim would constitute the lesser evil because:

⁷³ Prosecutor v. Drazen Erdemovic, dissenting opinion of Judge Cassese, paragraph 44.

⁷⁴ *Id.*

⁷⁵ *Id.* at paragraph 47.

(1) If the driver resists the threats, he will be killed. Shortly thereafter, the innocent person that he was ordered to kill will die anyway. Thus, two people will die if the driver resists the threat.

(2) If the driver yields to the threat, his life will be spared, but an innocent victim will die. Thus, one person will die if he capitulates to the threat.

(3) Since two people will die if the driver resists the threats and one will die if he gives way to the coercion, the decision to succumb to the threat and kill the innocent victim would constitute the lesser evil.

In light of this logic, Judge Cassese concluded that, even though “the crime committed under duress must be, on balance, the lesser of two evils,”⁷⁶ someone who is coerced into “participating in the killing of...civilians who would be killed in any case by the other[s]” has a valid duress defense.⁷⁷

Judge Cassese’s contention is objectionable because it presupposes an oversimple calculus of what constitutes the lesser evil. Besides comparing the number of people that would have been killed had the coerced actor resisted the threats with the amount of people that would have been killed had he yielded to the coercion, one should also take into

⁷⁶ *Id.* at paragraph 16.

⁷⁷ *Id.* at paragraph 50.

consideration that by giving way to the threats the actor is aiding someone else in the commission of a wrongful and heinous act. This collaboration in the perpetration of a crime is, in and of itself, an “evil” that should count against yielding to the threats. Thus, as the philosopher Frances Kamm has suggested, these types of decisions are “not merely a matter of weighing the lives saved versus the life lost,” for the agent’s moral integrity is compromised by his forced involvement in the production of evil.⁷⁸

Similarly, Professor Robinson has aptly stated, “the harm to the social order inherent in unjustified aggression” should be taken into account when balancing evils. Scholars in continental legal traditions also argue that the evil inherent in human collaboration with wrongful conduct is a relevant consideration when determining whether conduct constitutes the lesser evil. Thus, one Spanish criminal law scholar has asserted that when balancing evils one must keep in mind that:

The law compares “evils”, not “personal interests”. [This is crucial], since the gravity of an “evil” is not only determined by the value of the “personal interest” harmed, but by the *way* in which it is harmed as well. Since a harm produced by nature does not allow for an assessment of anything else besides the personal interest harmed, the gravity of the “evil” in such a case is equal to the importance of the injured interest. However, the “evil” caused [by the conduct of another] entails not only the harming of a personal interest,

⁷⁸ Frances M. Kamm, *Responsibility and Collaboration*, Philosophy and Public Affairs, Vol. 28, No. 3, 172-173 (1999).

but, additionally, a perturbation of the social order... Thus, [a valid lesser evils defense requires that the personal interest saved] be sufficiently more important [than the one harmed] to compensate for the additional [harm] that the [perturbation of the social order entails].⁷⁹

In view of these considerations, it is not necessarily the case, as Judge Cassese seems to believe, that killing X amount of people is automatically a lesser evil than killing X+1 amount of people. When engaging in such delicate balancing of interests one must take into account not only the lives at stake, but also the evil that the coerced actor's aggression represents. Thus, in the case of a coerced actor who saves himself by killing many people who were soon going to die anyway, one must balance not only the number of lives sacrificed and saved, but the evil implicit in the actor's collaboration in the wrongful conduct of the coercer as well. Whether this additional consideration is sufficiently strong to tilt the balance against considering that the coerced actor's conduct constituted the lesser of two evils is unclear.

Fortunately, there is no need to engage in this delicate balancing act. The fact that the coerced actor's victims were going to soon die anyway is clearly relevant to determining whether the actor's conduct generates sufficient understanding amongst the public to warrant an exemption from

⁷⁹ SANTIAGO MIR PUIG, *DERECHO PENAL PARTE GENERAL* 463-464 (B de F, 7th ed., 2004).

criminal liability. Although this is not necessarily determinative when examining if the actor's conduct is justified because it constitutes the choice of the lesser evil, it appears to be decisive when evaluating whether his act should be *excused* because of the coercion.

Thus, even though there are good reasons to believe that a coerced actor who harms an innocent victim acts wrongfully even if the same harm would have surely been inflicted by another party, the fact that the harm would have been inflicted even if the actor had not succumbed to the coercion provides us with a sound reason to excuse his conduct.⁸⁰ In these cases there is no need to inquire upon whether the harm caused was proportional to the one averted in order to determine whether to excuse the coerced actor. Since he effectively lacked the capacity to prevent the harm threatened from occurring, it would be unfair to punish him for deciding to save his life instead of choosing to die to protect innocent people who were going to die anyway. In sum, yielding to the coercive threats in these cases should be deemed to be wrongful, but perfectly understandable and, hence, not punishable.

IV. APPLYING THE "UNDERSTANDABLE CHOICE" THEORY TO THE *ERDEMOVIC* CASE.

⁸⁰ Professor Kent Greenawalt, for example, has stated that the argument that coerced conduct that causes harm to an innocent human being should be excused but not justified "has some power". Greenawalt, *supra* note 21, at 25.

Analyzing the *Erdemovic* case in light of the understandable choice theory of duress is no easy task. As I have attempted to demonstrate in previous sections, whether the defendant faced an unfairly hard choice or whether his choice-making capabilities were reduced by the coercive situation are relevant factors, but neither of these considerations is decisive under the understandable choice theory of duress. While actors who face unfairly hard choices or whose will is overborne by the threats generally find sufficient understanding amongst the community to warrant an exemption from liability, there are some instances in which this will not be the case.

Coerced actors will typically be punished for yielding to threats that presented them with an unfairly hard choice if they had a duty not to capitulate to such coercion. Such duties can be voluntarily assumed, as in the case of firefighters and police officers. However, they can also be involuntarily imposed, such as in the case of obligations arising out of familial relationships. Furthermore, we have a general obligation grounded on communitarian duties of solidarity toward our fellow citizens to not give way to threats when doing so will produce harm that is grossly disproportionate to the one averted.

In light of various of these factors, there are reasons to

believe that the defendant in the *Erdemovic* case should **not** be able to claim duress as a defense to the killing of dozens of civilians. Chief amongst these considerations is the fact that, as a soldier, he had an obligation to protect innocent non-combatants. In the standard case, a soldier is required to resist threats to his life or bodily integrity in order to protect innocent people. While the law should not generally demand that most of us resist threats to our lives in order to avoid harm to third parties, it is perfectly legitimate to require such a degree of courage from people who, like soldiers, have certain duties towards to the general populace.

The seriousness of the offense thesis also provides us with good arguments for convicting the defendant in *Erdemovic*. Even though claiming duress as a defense to a single murder is not particularly problematic, allowing it as a defense to a crime involving the killing of dozens of people is more complicated. Whereas it is not difficult to see how a coerced actor who kills one innocent person in order to avoid death can generate sufficient understanding from the community to be exempted from punishment, it is unclear whether someone who kills an inordinate amount of people will find the same degree of comprehension from the public.

These factors seem to be trumped, however, by the fact that the defendant in the *Erdemovic* case did not have the capacity to prevent the

deaths of the innocent civilians that he killed in order to save his life. Any resistance on his part would have ultimately been futile, since the civilians would have died anyway at the hands of other soldiers who were more than willing to kill them. As a result of these considerations, punishing him for not symbolically resisting the coercion seems unduly and unnecessarily harsh.

It should be noted, however, that, contrary to what Judge Cassese seemed to be arguing in his dissenting opinion, this consideration does not make Erdemovic's decision to kill the innocent civilians any less wrongful. The conclusion that the defendant chose the lesser evil when he participated in the execution of more close to 70 innocent people is dubious, at the very least. Nevertheless, there is a compelling case in favor of considering that the fact that he was not going to be able to save the victims by not capitulating to the threats should be a sufficient reason to excuse his wrongful conduct.

CONCLUSION

A majority of the justices in the *Erdemovic* case believed that duress should not be a defense to a crime against humanity. They justified their decision by appealing to the old common-law rule that disallows the defense whenever the defendant is charged with a crime involving the

killing of innocent human beings. This rule is based on the idea that killing an innocent human being should never be considered the lesser of two evils.

In my opinion, the aforementioned rule is unsound. Properly understood, duress is an excuse. Therefore, actors who commit a crime under duress are acquitted out of compassion for their circumstances. Their conduct, however, remains wrongful. Hence, coerced defendants are excused because, in light of the circumstances that surrounded their action, their choice to engage in wrongdoing is understandable and not because they chose the lesser evil. Consequently, a rule allowing an actor to plead duress only when his conduct averted a greater evil improperly conditions the availability of the excuse on the existence of justificatory-type circumstances that make the act performed, on balance, the right thing to do under the circumstances. This should lead us to reject the common-law rule that duress should not be a defense to murder because the killing of an innocent human being cannot ever be considered the right thing to do.

The situation is different, however, when the coerced actor pleads duress as a defense to a crime involving the killing of numerous human beings. As the seriousness of the offense increases, the arguments in favor of allowing the defendant to plead duress get progressively weaker. Thus, the fact that the coerced defendant in the *Erdemovic* case killed dozens of

people counts as an argument against his contention that he should be allowed to plead duress as a defense to the crime charged. Another sound reason to deny his duress claim is that soldiers have a duty not to kill innocent civilians, even if doing so entails that he should resist threats to his life.

Ultimately, despite the abovementioned considerations, I believe that Erdemovic should have been allowed to plead duress. Since he was not going to be able to save the lives of the civilians that he killed if he had decided not to yield to the threats, it would be unfair to punish him for choosing to yield to the coercion in order to save his own life. Hence, although the fact that he lacked the capacity to prevent the death of the civilians should not be considered a sufficient reason to justify his conduct, it affords us with compelling grounds for excusing his admittedly wrongful act.