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Excuses, Justifications, and Duress at the International Criminal Tribunals

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EXCUSES, JUSTIFICATIONS, AND DURESS AT THE INTERNATIONAL CRIMINAL TRIBUNALS

Noam Wiener*

ABSTRACT

This article examines the application of the defense of duress by international criminal tribunals through analyzing opposing theoretical approaches to justifications and excuses. The purpose of this examination is twofold. First, the article offers a framework for duress's application by examining scholarly approaches to duress and by analyzing the application of the defense by international tribunals. This analysis includes the tribunals constituted following the Second World War and International Criminal Tribunal for the Former Yugoslavia (ICTY). Second, the article provides insight into the underlying rationales that guide judges at the international tribunals in the last decade through the judges' application of the defense.

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A. INTRODUCTION

This article examines the application of the defense of duress by international criminal tribunals by exploring the criminal law paradigms (consequentialist or deontological) to which the judges at these tribunals adhere. The premise of this article is that although judges and other practitioners may consider the differences between deontological and consequentialist approaches to punishment academic or theoretical, the result of acting according to one paradigm or the other significantly changes the result of the criminal trial. Following a detailed analysis of the defense of duress and the different ways it can be applied as an excuse or a justification by deontologists and consequentialists, the article concludes that judges at the Nürnberg Military Tribunals following the Second World War (NMTs) applied duress from a deontological perspective, while judges today approach the defense from a consequentialist angle.

During the guilt stage of the trial, judges are mostly concerned with the actions and the corresponding mental state of the accused, *i.e.* with the perpetrator's culpability. At the sentencing stage, however, judges often concern themselves with a wide variety of factors: the effects of sentencing on society, the

character of the perpetrator, and his chances of rehabilitation.¹ By focusing on the criminal act (*actus reus*), and whether it was committed with the requisite intent (*mens rea*), the judges ask whether the defendant is indeed culpable of the crime with which he has been charged. This is, as will be elaborated on below, a deontological retributive approach to criminal law. Thus, even judges who do not normally approach criminal law from a deontological perspective, at this stage of the trial they are constrained within the retributive paradigm.²

However, exceptions to this rule exist in the form of defenses. Examining the exceptions in order to study the rule has a long tradition in legal philosophy. As Peter Westen argues, “a unitary theory of criminal excuses [is the] mother lode of criminal responsibility scholarship.”³ This article will not attempt to provide a unitary theory of criminal excuses. But it will attempt to comprehend the way the International Criminal Tribunal for the Former Yugoslavia (ICTY) understands guilt by examining the manner in which it has applied the duress defense.

Among the various criminal defenses, duress is particularly contentious. This contention does not arise because of disagreement regarding the validity of duress, but because of the lack of agreement on the conditions that allow the use of duress as a defense, and, more basically, because no consensus exists as to whether it is an excuse or a justification.⁴ Different and distinctive approaches to the defense of duress stem from consequentialist and from retributivist approaches to punishment, and by examining the manner in which the ICTY has decided to apply the defense, one should be able to gain insight to the approach that guide judges as they apply duress in one way or

¹ Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice* 93 MICH. L.R. 1915, 1923 (1995).

² The most notable attempt to inject consequentialist social factors to the guilt stage in the United States in the last fifty years was Judge Bazelon’s “rotten social background” doctrine, which failed to gain a foothold in American jurisprudence; see David Bazelon, *The Morality of the Criminal Law*, 39 S. CAL. L. REV. 385 (1976).

³ Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW AND PHILOSOPHY 289 (2006).

⁴ Peter Westen and James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse – and Why It Matters*, 6 BUFF. CRIM. L. R. 833, 945 (2003).

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another.

Following this introduction, in section *B* the article provides a very brief exposition of the difference between the consequentialist and the deontological approaches to criminal law and explains why deontological retributivism is the more convincing justification for punishment. Section *C* examines the definition of duress, mainly in regards to the severity of the threats that can create duress, and the scope of the crimes for which it can provide an excuse. Section *C(i)* begins with brief comparative account of various statutes that define duress, before examining the defense as it is described in the Rome Statute of the International Criminal Court. Following the examination of the statutory language, the article concludes that understanding the different approaches to duress necessitates determining if it is to be applied as an excuse or as a justification. Thus, Section *C(ii)*, distinguishes between these two types of defenses. Section *D* reexamines the defense of duress as either an excuse or a justification, and describes how it would be applied in each circumstance. Having provided the theoretical background, section *E* examines how the NMTs applied the defense in cases brought before it in the 1940s, and how the ICTY applied the defense in the Erdemović case. Finally, section *F*, concludes by suggesting how the lessons of the Erdemović case may be used when the question of duress arises again before international criminal tribunals.

B. THE DEONTOLOGICAL RETRIBUTIVISM AND THE
CONSEQUENTIALISM, TWO PARADIGMATIC APPROACHES TO
CRIMINAL LAW

The deontological retributivist and the consequentialist criminal law paradigms provide distinct approaches to the question “why punish,” and accordingly provide different answers to dilemmas that arise in the process of determining whether and how much to punish.⁵ The discussion below examines how applying the defense of duress would be affected by the choice of different approaches to criminal law; but to better understand the discussion, a brief explanation of each criminal

⁵ ANDREW VON HIRSCH, *DOING JUSTICE, THE CHOICE OF PUNISHMENTS*, 6 (1976).

law paradigm is provided.

In broad brush strokes, two paradigms or approaches to criminal law have been put forth by criminal law theorists. One paradigmatic perspective on criminal law is consequentialism, which justifies punishment by the good consequences that the punishment creates.⁶ Among consequentialists there are those who favor deterrence as the most important rationale for sentencing,⁷ others favor incapacitation,⁸ expressivism,⁹ or rehabilitation.¹⁰ These consequentialist justifications for punishment do conflict with each other at times, and do not always bring about the same results. Thus, for example, punishment that aims to rehabilitate may not be severe enough to deter, or punishment that is severe enough to deter may not be sufficient to express a sufficient amount of opprobrium required to fulfill an expressivist goal.¹¹ However, common to all these justifications is the principle that punishment is not justified in-and-of-itself, but rather that it is an evil that should only be used because, as a result of its use, some beneficial consequences will be attained in the future.¹² Thus, to consequentialists, even though punishment is harmful and causes pain, it is necessary because it may prevent greater pain and harm in the future.¹³ That is, punishment is only morally justified as long as the costs incurred are no greater than the benefits that will be attained.¹⁴

The other paradigmatic perspective of criminal law is deontological retributivism. Deontologists claim that for an action

⁶ Cesare Beccaria, *Of Crimes and Punishment*, in ALLESANDRO MANZONI, THE COLUMN OF INFAMY 11 (Kenlem Foster & Jane Grigson trans. 1964) (1764).

⁷ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 189 (Oxford, Clarendon Press 1907) (1789).

⁸ See, e.g., C.L. TEN, CRIME, GUILT, AND PUNISHMENT, A PHILOSOPHICAL INTRODUCTION 7-8 (1987).

⁹ Mohamed M El Zeidy, *The Gravity Threshold Under the Statute of the International Criminal Court*, 19 CRIM. L.F. 35, 45 (2008) (El Zeidy criticizes the Pre-Trial Chamber for not focusing on the individual victims).

¹⁰ DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE, THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA, 46-48 (2nd. ed. 2002).

¹¹ Or vice versa; because these goals are all different, there is no reason to assume that the same sentence would satisfy all different justifications.

¹² Ten, *supra* note 8, at 8.

¹³ Bentham, *supra* note 7, at 170.

¹⁴ Beccaria, *supra* note 6.

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to be justified, it must have inherent value.¹⁵ According to Kantian deontology, because human beings have a free will and an inherent ability to will to do good, behavior that respects that free will have inherent value.¹⁶ The fundamental Kantian deontological claim, therefore, is that individuals ought to be treated as ends, worthy unto themselves, rather as means, or tools, used by others.¹⁷ Thus, for punishment to be justified, the act of punishment itself ought to have moral value, whether or not it produces beneficial results in the future. Retributivism is deontological because it considers punishment to be a good unto itself.¹⁸ According to retributivists, when a perpetrator chose to commit a crime, she made a conscious choice to break the law and must therefore be held responsible for her culpable action.¹⁹ Without punishment there would be no manifestation to the criminal prohibition.²⁰

Deontological retributivists critique consequentialist justifications for punishment by pointing out that consequentialists instrumentalize the perpetrators of crimes by using them as a means to achieve societal goals.²¹ Thus, a perpetrator sentenced severely to deter others is not punished purely because of the wrongness of his actions, but is also made into an instrument by the state for the deterrence of others who may commit crimes in the future. Expressivists consider the punishment, and consequently the person being punished, as a tool for expressing societal norms.²² Deontologists consider the humanity of the perpetrator, and his free will, to be the very reason why he may be punished,²³ and therefore consider rationales that subject the free will to the good of others to be anathema to criminal punishment.²⁴

¹⁵ IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, IN *PRACTICAL PHILOSOPHY, THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT* 50 (Mary J. Gregor trans.) (2005) (1785).

¹⁶ *Id.*

¹⁷ *Id.* at 80.

¹⁸ MARK TUNICK, *HEGEL'S POLITICAL PHILOSOPHY* 35 (1992).

¹⁹ HEGEL, *PHILOSOPHY OF RIGHT* §100 (H.B. Nisbet trans., 2003) (1820).

²⁰ *Id.* §97 (German language in Brackets omitted).

²¹ KANT, *supra* note 15, at 473.

²² Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 *MICH. J. INT'L L.* 265, 312 (2012).

²³ TUNICK, *supra* note 18, at 36.

²⁴ In Kant's colorful language: "Woe unto him who crawls through the

The common thread to international crimes of the type adjudicated by the international criminal tribunals – namely genocide, crimes against humanity, and war crimes – is the inhumane treatment of the victims by the perpetrators. Whether the goals of the perpetrators are complete annihilation of a culture, or the physical abuse of innocents, the shared aspect of these crimes is the violation of the victims' most basic rights and their treatment as means to an end. Punishing the perpetrators by treating them in the same manner therefore, as means to achieve social ends, is contradictory to the higher moral ground that criminal trials represent. The position adhered to in this article will thus be that deontological retribution, rather than consequentialist justifications to punishment, should guide international criminal tribunals when they determine the fate of the defendants they try.

C. THE SEVERITY OF THE THREATS THAT CREATE DURESS AND THE SCOPE OF CRIMES THAT ARE COVERED BY THE DEFENSE

Having briefly recounted the difference between the consequentialist and deontological approaches to criminal law, we can formulate the defense of duress as a consequentialist or a deontologist would. And once we have formulated the defense according to each of these approaches, we will be able to examine the judges' decisions and identify whether they are consequentialist or a deontological.

i. Statutory definitions of Duress

William Blackstone defined duress as a type of compulsion caused by “threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors, at least before the human tribunal.”²⁵ On one hand, at the core of this definition is the acknowledgment that some crimes are excusable when the defendant is subject to threats of death or bodily harm. On the other hand, Blackstone's definition leaves many questions un-

windings of eudaimonism in order to discover something that releases the criminal from punishment.” KANT, *supra* note 21, at 473.

²⁵ William Blackstone, *Commentaries on the Laws of England*, Book IV, 2197 (William Jones ed., Bancroft-Whitney Company 1916) (1765-69).

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answered, the most important of which is: “what is the rationale behind this defense?” Answering this question and understanding the rationale of the defense would enable one to answer the more practical questions courts have to contend with: the severity, immediacy, and credibility of the threats that create the defense – the “Severity of the Threats”; and the gravity of the crimes which duress can excuse – the “Scope of the Defense.”²⁶ This is one of the elements that make duress a difficult defense to categorize. The other excuses apply notwithstanding the gravity of the crimes that were committed. Insanity, for example, is always available as an excuse, no matter how grave the acts the defendant has been charged with.²⁷ The argument is made, however, that duress does not cover extremely grave crimes such as murder and genocide.²⁸

The criminal codes of various states provide varying models of the defense of duress, some providing better clues to the rationale for the defense than others. According to the French Code, “A person is not criminally liable who acted under the influence of a force or constraint which he could not resist.”²⁹ Constraint is interpreted to mean both physical and moral.³⁰ Thus “moral compulsion” created by the threat to bodily integrity is a complete defense.³¹ This definition focuses on the force constraining the defendant’s choice, rather than the harm that the defendant caused.³² In other words, the focus of the French definition of the defense is on the question of Severity of the Threats rather than of Scope of the Defense. The German Code states that

“If someone commits a wrongful act in order to avoid an immi-

²⁶ See, e.g., 18 U.S.C. § 17. The argument is made, however, that duress does not cover extremely grave crimes such as murder and genocide. See *infra* note 148 and accompanying text.

²⁷ See, e.g., 18 U.S.C. § 17.

²⁸ See *infra* note 138.

²⁹ The language of the original French Criminal Code states : « N'est pas pénalement responsable la personne qui a agi sous l'empire d'une force ou d'une contrainte à laquelle elle n'a pu résister. » C. PÉN. 122-2.

³⁰ See FREDERIC DESPORTES & FRANCIS LE GUNEHÉC, *DROIT PENAL GENERAL* ¶ 668 (10th ed. 2003).

³¹ *Id.*

³² See, e.g., KEVIN JON HELLER & MARKUS D. DUBBER, *THE HANDBOOK OF COMPARATIVE CRIMINAL LAW*, 227 (2011)(discussing constraint as the central feature of the defense in the French Code).

ment, otherwise unavoidable danger to life, limb, or liberty, either to himself or to a dependent or someone closely connected with him, the actor commits the act without culpability. This shall not apply if and to the extent that the offender could be expected under the circumstances to accept the danger, in particular, because he himself had caused the danger, or was under a special legal obligation to do so..."³³

The German Code, unlike the French Code, does not directly mention the question of choice, rather, it focuses on the level of the harm that the perpetrator needs to be threatened with to justify the application of the defense, in other words, it focuses on the Scope of the Defense.

The Rome Statute, however, seems to include both elements of choice and the element of harm. Article 31(1)(d) of the treaty states that

"duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided."³⁴

None of these three, give a definite answer, however, as to what ought to guide the court when it determines the Severity of the Threats that trigger the defense and the Scope of the Defense.³⁵

³³ Bundesgesetzblatt [STGB] [Criminal Code] §35 (Ger.), available at http://bundesrecht.juris.de/englisch_stgb/englisch_stgb.html#StGB_000P35 [hereinafter Bundesgesetzblatt].

³⁴ Rome Statute of the International Criminal Court art. 31(1)(d), July 17, 1998, 2187 U.N.T.S. 3.

³⁵ The American Law Institute's Model Penal Code definition of duress does not provide an answer either.

See MODEL PENAL CODE §2.09 (Proposed OFFICIAL DRAFT 1962):

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

(2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

(3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense un-

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One crucial key to the question of Scope of the Defense and Severity of Threats is the determination whether duress is a justification or an excuse. If duress is viewed as a justification, a balance of evils analysis of sorts needs to be conducted in order to identify the Severity of the Threats and the Scope of the Defense.³⁶ As a justification, the Scope of the Defense will be directly tied to the Severity of the Threat. Because of this nexus between the two factors, if duress is applied as a justification, its scope can be *a priori* capped because certain behaviors can be considered so wrongful that no matter how severe the harm these behaviors may prevent, they can never come within the Scope of the Defense. However, if duress is an excuse, then the question of the Severity of the Threats would most probably take precedence over the question of the Scope of the Defense, inasmuch if the Severity of the Threat is dire enough, then all crimes would fit under the Scope of the Defense. To decide whether duress should be applied as a justification or an excuse, however, the differences between these two groups of defenses should be more thoroughly explored. The subsections below survey the different theories of excuse and duress from a deontological and from a consequentialist perspective.

II. THE DIFFERENCE BETWEEN JUSTIFICATIONS AND EXCUSES

The difference between excuses and justifications is that excuses focus on the actor while justifications focus on the actor's conduct.³⁷ Exactly what this difference means is a matter for debate, and depends on the approach to criminal law (deontological or consequentialist) adopted by the interpreter. When scholars state that justifications focus on the act, they mean that an act is excluded from criminal responsibility not because of some attribute of the actor, but rather because the act is generally justifiable and would always be so.³⁸ Excuses, on the other hand, exclude criminal responsibility because some char-

der this Section. [The presumption that a woman acting in the presence of her husband is coerced is abolished.]

(4) When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense.

³⁶ MICHAEL S. MOORE, *PLACING BLAME* 42-3 (1997).

³⁷ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW*, 759 (1978).

³⁸ *Id.* at 760.

acteristic of the actor herself warrants refraining from holding her criminally responsible.³⁹

The sections below survey and critique theories of excuses and theories of justifications from consequentialist and retributive perspectives. Once the application of excuses and justifications has been explained, the next section provides the measures of the Severity of the Threats and Scope of the Defense of duress under each theory. Schematically, the four possibilities for application of duress would look like this:

Table 1

	Justification	Excuse
Consequentialist	(i) Duress as a consequential justification	(ii) Duress as a consequential excuse
Deontologist	(iii) Duress as a deontological justification	(iv) Duress as a deontological excuse

a. Theories of Excuses

(i) Consequentialist Theory of Excuse

Convincing consequentialist accounts of excuses are difficult to form, because consequentialism, as a paradigm, is less concerned with the guilt and agency of the individual, and more concerned with the aggregate benefits of his punishment.⁴⁰ Bentham justified excuses on the inefficacy of punishing defendants who are not morally blameworthy.⁴¹ His claim was that in cases where, due to a flaw in the mental element, the defendant is not morally culpable, there is no sense in punishing the offender because this will not prevent him or others like him from committing the crime again.⁴² Because the of-

³⁹ *Id.*

⁴⁰ David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 6-9 (2013).

⁴¹ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 173 (Oxford 1907) (1789).

⁴² *Id.*

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fender did not intend to commit the crime in the first place, she cannot be deterred from committing it again.⁴³ Bentham further developed this argument regarding insanity to state that because an insane individual, being irrational, cannot be deterred, punishing her is pointless.⁴⁴

Hart criticized this explanation by reminding us that personal deterrence is but one of the numerous utilities that consequentialists derive from punishment. While personal deterrence might be ineffective when the mental state of the culprit is incompatible with the mental element required for the commission of a criminal act, why punishing her would fail to deter others from committing the offense is unclear.⁴⁵ Fletcher also criticizes Bentham's assertion, arguing that deterrence is not aimed only at the specific members of society who are exactly similar to the culprit. That is, punishing for murder, if insanity is not an issue, is punishment for murder and would deter all would-be murders, not just insane ones.⁴⁶ One could claim that for a true consequentialist, punishing a culprit who is only partially guilty of the offense because of a potentially justifiable excuse would actually increase the deterrent effect on society by demonstrating the high likelihood of receiving punishment for the commission of the crime notwithstanding possible error.

A shared and more nuanced approach to a consequentialist theory of excuses was presented in the late 1960's by H.L.A. Hart and Richard Brandt. Brandt argued (and Hart made a similar argument)⁴⁷ that a utilitarian rationale for excuses stems from the utility created by the general tendency of members of society to adhere to and believe in the legal system.⁴⁸ Brandt's began his argument by describing a legal (and moral) system as a structure that includes both prohibitions and exceptions to these prohibitions.⁴⁹ Brandt further argued that excuses ought to embody the exceptions to the prohibitions that

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY, 19 (Oxford 1968). Hart famously called Bentham's argument a "spectacular non sequitur."

⁴⁶ FLETCHER, *supra* note 37, at 816.

⁴⁷ HART, *supra* note 45, at 39-40.

⁴⁸ Richard B. Brandt, *A Utilitarian Theory of Excuses*, 78 THE PHILOSOPHICAL REVIEW 337, 350 (1969).

⁴⁹ *Id.* at 347-348.

would weaken the adherence of members of the society to the legal structure, were they not provided, because they would make the prohibitions unjust.⁵⁰ According to this explanation, if members of society will be punished for acts they did not intend to commit, they will feel that they have been ill-treated, and be less likely to adhere to the law. In other words, pointless punishment would create ill will towards the law and would therefore create disutility.

The problem with Brandt's theory is that it assumes away the moral ground on which it rests. Brandt's utilitarianism states that punishment that is just is punishment that minimizes the harms caused by crimes. Thus, a moral person, according to Brandt, should support punishment that minimizes crimes. If this moral person is consistent, then he would not be put-off by purely consequentialist justifications for punishment and his sensibilities will not be injured if the punishments will indeed minimize crime. In other words, if the punishment is effective it is not unjust. If, as utilitarian consequentialists, we ought to believe that punishment that deters future crime is moral, then punishing culprits, whether they intended or not to commit the crime, is moral by the way of deterring potential evil-doers. Furthermore, if as Fletcher argues, punishing an individual who is not in control of his faculties is not pointless and may promote positive consequences, then the public would not be dissatisfied when such an individual would be punished because the punishment serves a utilitarian purpose. This means that Brandt's underlying assumption, that punishing those who act without intent would create consternation, is unfounded if the members of his society are the moral utilitarian agents that Brandt argues we ought to be. Inconsistencies notwithstanding, Brandt and Hart's explanations form a basis for consequentialist theory of excuse.

(ii) Deontological Theory of Excuse

Deontological accounts of excuses are easier to formulate than consequentialist accounts because the focal point of the theory is on the agency and free will of the defendant.⁵¹ Accord-

⁵⁰ *Id.* at 353.

⁵¹ Michael Moore, *Torture and the Balance of Evils*, 21 ISRAEL L. REV.

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ing to a deontological account, excuses are a set of conditions that make the actions of the individual inculpable because the actions were not the result of a choice to commit the *actus reus*.⁵² Automatism is a simple example of an excuse. When a person has no control over his bodily functions, she cannot be blamed for their consequences.⁵³ Similarly, mistake of fact is considered an excuse, because the mistaken person did not have the capacity to make a choice not to commit the crime.⁵⁴ Immaturity, involuntary intoxication and insanity, likewise, excuse the offender because she is considered not to have the capacity to make choices that incur criminal responsibility.⁵⁵

Peter Westen mounts an interesting critique to this deontological description of excuses. Westen argues that excuses should not be predicated on choice or capacity to choose,⁵⁶ but rather on the attitude of the agent.⁵⁷ The brunt of his criticism against choice theories is that when a person claims that he knew what he was doing was wrong, but was driven by an “uncontrollable urge,” the court has no way of giving the “uncontrollable urge” legal meaning.⁵⁸

Westen provides an example of cases in which an individual who committed a criminal act knew that an act is wrong and yet committed the act nonetheless, later claiming that he was insane and lacked the ability to stop.⁵⁹ Westen argues that the classic M’Naghten rule for determining insanity requires that the perpetrator not be aware of the wrongness of his actions.⁶⁰ Thus, a perpetrator who is aware of the wrongful nature of his deeds, but is unable to stop, cannot successfully argue insanity. Judges have, according to Westen, replaced the original requirement of lack of awareness in the M’Naghten test with lack

280, 284 (1989).

⁵² FLETCHER, *supra* note 37, at 831.

⁵³ *Fulcher v. State*, 633 P.2d 142, 145 (Wyo. 1981).

⁵⁴ *See, e.g.*, N.Y. PENAL LAW § 15.20(1)(a).

⁵⁵ Vera Bergelson, *A Fair Punishment for Humbert Humbert: Strict Liability and Affirmative Defenses*, 14 NEW CRIM. L. REV. 55, 66-67 (2011).

⁵⁶ For brevity’s sake these will be called ‘choice theories’.

⁵⁷ Westen, *supra* note 3, at 353.

⁵⁸ *Id.* at 342.

⁵⁹ *Id.*

⁶⁰ *Id.*

of control.⁶¹ Thus, the excuse of insanity is applied whether the perpetrator had awareness or not of the wrongful nature of her actions as long as she had no control. Westen contends that in situations of this sort, the act should be excused, but that choice theory cannot provide the justification because science, and jurists following science, are incapable of knowing when a person has or does not have control of his actions. Thus, because triers of fact are not capable of determining when somebody who is capable of understanding his actions is incapable of controlling himself, the attempt to ground excuses on that individual's ability to control is impractical.⁶²

According to Westen's analysis, using lack of control as a legal benchmark may be both too inclusive and too exclusive. Choice theory might be too inclusive because it might allow someone like the protagonist of Poe's *Tell Tale Heart* get away with his crime because he was obsessed with the murder, though he was in complete control of his faculties, and knew that he was in the wrong.⁶³ Choice theory might also be under inclusive because in a case like one described by Westen, where a defendant attacked and murdered helpless nuns when a voice in his head commanded him to do so, but stopped immediately when he was ordered by a police officer, it would be difficult to argue lack of control.⁶⁴ Westen's solution to this problem is an "attitudinal" approach to excuses. According to this approach, the core of criminal punishment is the condemnation of the culprit for his conduct.⁶⁵ Thus, whenever the conduct is not such that society finds blameworthy, for example because it was not rationally perpetrated, it should be excused.⁶⁶ Poe's murderer knows what he is doing is wrong, he acts in a completely rational, albeit somewhat obsessed, manner and murders the old man. Bechard, the nun murderer, does not rationally process his actions, but acts out of impulse, and is therefore not blameworthy. Westen's reasoning is that because Bechard's attitude does not deserve condemnation, because his

⁶¹ *Id.*

⁶² *Id.* at 342-43.

⁶³ EDGAR ALLAN POE, *THE TELL TALE HEART AND OTHER WRITINGS* 3 (Bantam Classic ed. 1982) (1902).

⁶⁴ Westen, *supra* note 3, at 370.

⁶⁵ *Id.* at 357.

⁶⁶ *Id.* at 371.

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conduct does not create indignation but pity, he should not be punished.⁶⁷ According to this theory, Poe's murderer should hang.

The problem with Westen's theory is that "blameworthiness" ought not be treated as an abstract intuition. While defining control and choice might be difficult, defining the "rationality" of the culprit is not easier. Westen's attitudinal standard is no more definite than any other yardstick by which blameworthiness can be measured. Choice, the capacity to choose, and the capacity to control one's actions are a better criterion than "rationality" because they focus on the element that makes the action culpable – the choice to violate the law.⁶⁸ While one might commit a crime with a "positive" attitude, motive, or rationale, the choice to commit the crime is at the essence of the mental element of the crime (thus, for example, the law does not excuse political crimes even if they are motivated by some wish to do good).⁶⁹ Hence, the lack of the mental element, i.e. the lack of choice or the ability to make a choice (and lack of control means one cannot make a choice) best explains excuses.⁷⁰

Although it may be difficult to prove, whether an individual chooses to violate the law or not is a factual question.⁷¹ On the other hand, determining whether an individual is rational or not is a value judgment rather than a factual judgment.⁷²

⁶⁷ *Id.* at 371.

⁶⁸ See R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 154 (1994).

⁶⁹ "[H]ardly any part of the penal law is more definitely settled than that motive is irrelevant;" JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 88 (2nd ed. 2005) (1960).

⁷⁰ Applying choice theory to Bechard, a judge or jury, would have to hear his testimony, listen to expert opinion, and then decide if they are convinced whether he was in control of his faculties or acted in a world in which fact and fiction (the voices in his head ordering him to kill) were so intermixed that he was not capable of making a choice which would render him culpable.

⁷¹ Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations, An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1458 (2004).

⁷² See BARBARA TOWNSEND, *REASON'S NEGLECT: RATIONALITY AND ORGANIZING*, 3-6 (2008) (tracing the etymology of rationality and reasonableness. Both culture and context specific terms that vary greatly depending on the eyes of the beholder); See generally Foucault's critique in MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* 77 (1988) (1965).

Thus, Westen's critique fails to address a flaw in the recognition of choice as the determinant factor for the effect of the excuse, and to provide an alternative that enables a better determination of the culpability of the individual asking to excuse her actions.

b. Theories of Justifications

(i) Consequentialist Theory of Justification

Unlike excuses, justifications lend themselves to consequentialist analysis. Westen and Mangiafico distinguish between justifications and excuses by claiming that justifications are a "choice of evil" type of defense.⁷³ Eugene Milhizer describes the common thread of justification defenses as that of "superior interest" or "lesser harm."⁷⁴ Thus, justifications require some sort of balancing between competing interests. For consequentialists, this means calculating the harm caused by committing the crime and the harm caused by not committing the crime, and if the harm caused by committing the crime is the lesser harm, the action is justified.⁷⁵

For consequentialists, therefore, the difference between excuses and justifications focuses purely on whether punishing the actor is non-beneficial (excuse) or whether punishing for the act is non-beneficial (justification). While both types of defenses turn on maximizing utility, the focus on the agent as opposed to the action is what distinguishes between the two.

(ii) Deontological Theory of Justifications

A deontological theory of excuses focuses on the capacity of the defendant to make choices. A deontological theory of justifications, on the other hand, must appraise the choices the defendant (who is deemed capable of making choices) made and determine whether these choices are justifiable.⁷⁶ But while a

⁷³ Westen and Mangiafico, *supra* note 4, at 934.

⁷⁴ Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 844 (2004).

⁷⁵ Paul H. Robinson, *Criminal Law Defense: A Systematic Analysis*, 82 COLUMBIA L. REV. 199, 213 (1982).

⁷⁶ Ken Greenawalt, *The Perplexing Borders of Justification and Excuse*,

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consequentialist theory of justifications will determine the justifiability of an act based on its consequences, because deontological ethics value actions based on their own merit,⁷⁷ a deontological theory of justifications cannot be based on the good consequences of the choice to violate the law. Thus, a deontological theory of justifications must show why a moral duty exists to act in a certain way even though the action violates a criminal prohibition.⁷⁸

Because justifying a criminal act means preferring not to act upon one ground for a duty (to obey the law) in order to act upon another ground for duty (the justified action), a deontological theory of justifications must contend with the dilemma of conflicting grounds for duties. A hypothetical will be useful to demonstrate the problem and the solution: In a two-apartment building, a person is trapped in one of the apartments (apartment 1) and his life is at immediate risk. Because of the construction of the house, this person can only be reached by breaking into the second apartment in the building (apartment 2). Because of the immediacy of the situation, the owner of apartment 2 cannot be reached in time to save the trapped individual.

At first blush, one might believe that adherence to a deontological categorical imperative would doom the trapped man. Clearly, breaking into private property is not a rule that ought to be universalized.⁷⁹ Because to Kantian deontology “an action from duty has its moral worth not in the purpose to be attained by it but in the maxim in accordance with which it is decided upon,”⁸⁰ a first impression would lead one to believe that breaking into an apartment *in order* to accomplish something else

84 COLUM. L. REV. 1897, 1899-1900 (1984).

⁷⁷ IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS, IN PRACTICAL PHILOSOPHY (THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT) (Mary J. Gregor trans.) (2005) (1785) 50.

⁷⁸ As demonstrated below, this statement is the fusion of a deontological method for resolving conflict of interests, and its application to the situations which justifications are applied to such as necessity, justification, and self-defense.

⁷⁹ To summarize very briefly, because the idea of private property is such that one cannot enter another's property without permission, it is a logical fallacy to make a universal rule by which it is permissible to enter another's property without permission.

⁸⁰ KANT, *supra* note 15, at 55 [Kant 4:400].

(saving a life for example) is unjustified. The mere fact that the benefits of saving a life exceed the costs of breaking into an apartment cannot be a justification for action according to deontological ethics. But not breaking into the apartment also constitutes a breach of an obligation – namely the obligation not to stand by and watch another person die.⁸¹

In this hypothetical therefore, one might surmise that there is a duty both to act and not to act. Naturally, a moral theory that would consider both of these courses of actions “duties,” in the sense that a moral agent is obliged to act according to both, would be impracticable because it would tell us nothing about how to solve moral dilemmas. It is not impracticable, however, to consider both of these courses of actions as grounds for duties rather than complete duties.⁸² The difference is crucial. When we use the term “duty” we refer to something that must be acted upon.⁸³ When we refer to “ground for duty,” we refer to something that creates an obligation, but only insofar as it can be acted upon.⁸⁴ In other words, if a duty cannot be acted upon, it cannot possibly be the case that it must be acted upon. This does not mean that there is not a good reason (grounds for duty/obligation) for a person to act upon these grounds, but because acting upon them is impossible, there cannot possibly be a duty to do so.

A second hypothetical will be useful to demonstrate this point before returning to the two-apartment building. Consider person X, who cannot swim, is stranded on a sand bar after the tide came in. Consider further person that Y, who cannot swim, is looking on from the shore at person X. Y certainly has grounds for a duty to do save X, but she cannot. The grounds for Y's duty to save X are the requirement not to stand by while another is in trouble, but because Y cannot save X, to say that Y has a duty, in the sense that the duty necessitates action, would be an empty statement. In other words, there are situations when a general duty exists, but when that duty does not necessitate action because taking that action is not possible. Y

⁸¹ KANT, *supra* note 21, at 572 [Kant 6:453].

⁸² *Id.* at 388-390 [Kant 6:232-233].

⁸³ Onora Nell, *Acting on Principle, an Essay on Kantian Ethics*, 132-33 (1975).

⁸⁴ BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT*, 218 (1993).

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ought to will to help X, but because she cannot do so, she has no duty to attempt the impossible.⁸⁵ Were a boat to float down the current enabling Y to reach X and save his life, the duty would become actionable and Y would not only have grounds for a duty to save X, but would be duty bound to do so.

In the hypothetical of the apartment building, there are two separate grounds for duties involved. There are grounds for a duty not to enter apartment 2 without permission. There are also grounds for the duty to save the life of the person in the apartment 1. As Kant posits, an agent in this situation might have two grounds of duties, but if these grounds conflict so that he can only act on one ground, then the other does not necessitate action and does not create a duty.⁸⁶ This treatment of conflicting grounds of duties, which recognizes that obligations we cannot act upon do not create absolute duties, is the key to expounding a deontological theory of justifications. In the apartment building scenario, the decision to act is not difficult to make. The values underlying protection of property are not as inimical to the preservation of agency and free-will as the values underlying the protection of life. Thus, while one ought not to break into apartment 2, doing so is justified because of the duty to save the life of the person in apartment 1.

Obedying the law out of duty rather than inclination is the basis of Kantian philosophy.⁸⁷ Respecting the criminal prohibitions is part and parcel of this duty. Therefore, for any member of society, grounds for a duty not to act in violation of criminal law always exist. However, in a given situation, other grounds for duty might also exist. Following a weighing of these grounds for duties, an agent may determine that the grounds for a given duty are stronger than the grounds for the duty to obey the law. The important difference between a deontological theory of justifications and a consequentialist theory of justifications is that deontologists weigh the grounds for the duty to act, not the results of each action.

When societies enact justificatory defenses into the criminal codes, they effectively spell out a limited number of grounds for duties that create a stronger obligation than the

⁸⁵ *Id.* 164.

⁸⁶ KANT, *supra* 82, at 378-379 [Kant 6:224].

⁸⁷ KANT, *supra* 80, at 50 [Kant 4:294].

obligation to obey a criminal prohibition.⁸⁸ How societies make the determination which grounds for duty create a stronger obligation than obeying the law is beyond the scope of this article,⁸⁹ but understanding that justifications make this determination, aids us to correctly assess the meaning of justificatory defenses.

The justification of obedience to military orders, as it is set out by numerous criminal codes, presents a convenient example. Article 122-7 of the French Criminal Code States “A person is not criminally liable who performs an action commanded by a lawful authority, unless the action is manifestly unlawful.”⁹⁰ Similarly, the general part of the Israeli criminal code states that “a person shall not be criminally liable for conduct committed... according to an order handed down by an authority that he is obliged to obey according to the law, unless the order is manifestly unlawful.”⁹¹ Using the deontological rationale for justifications, we can surmise that the Israeli and French legislators considered that soldiers’ obedience to superior commands (an authority that a soldier is obliged to obey according to the law) is a stronger ground of duty than the ground of the duty to refrain from violating the law. Thus, a soldier who obeys an order by her superior officer is excluded from criminal liability. The legislators, however, did not believe that the grounds of the duty to obey orders are always the strongest grounds for action, and therefore conditioned this justification by stipulating that when an order is manifestly illegal, it no longer creates

⁸⁸ Thus, for example, the defense of justification permits agents of the state to encroach upon the ground for a duty not to use physical force against their fellow beings when they act upon the stronger ground for duty to maintain public safety. *See, e.g.*, N.Y. PENAL LAW § 35.10(2) (McKinney).

⁸⁹ Thus, different jurisdictions will include different justifications in their penal systems. For example, in Florida the right to use deadly force against a perceived assault, even when retreat is possible, is considered a stronger ground for a duty to act than the grounds for a duty to refrain from taking another’s life; FLA. STAT. ANN. §776.032(1) (West). In New York, on the other hand, the duty to refrain from taking another’s life is considered stronger; N.Y. Penal Law §31.15(2)(a) (McKinney).

⁹⁰ “N’est pas pénalement responsable la personne qui accomplit un acte commandé par l’autorité légitime, sauf si cet acte est manifestement illégal.” C. PEN. 122-4 (Fr).

⁹¹ Criminal Law (General Part), 5754 1993-94, SH No. 357, § 34(13). In the original: “לא יישא אדם באחריות פלילית למעשה ... על פי צו של רשות מוסמכת שהיה . . . חייב לפי דין לציית לה, וזולת אם הצו הוא בעליל שלא כדין. The translation is mine.

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grounds of duty to obey, and that the ground of the duty to refrain from violating the law prevail when the violation is manifest. Notably, the result is not the guiding principle, but rather the duties to obey the law and to obey commands.

A deontological adjudicator who needs to make a decision on any justification defense therefore, will examine the grounds of the duty that the justification raises above the grounds of the duty to obey the law. If the adjudicator finds that the grounds of the duty that the justification protects exist, then that adjudicator will find that there is no criminal responsibility.

D. DESCRIPTIONS OF DURESS

Having described the difference between justifications and excuses according to the different criminal law paradigms (consequentialist and deontological), we can now proceed to see how duress is defined under the different theories of justification and excuse. This determination is important because substantive differences are found between the different applications of duress according to the different theories of excuse and justifications. This determination will therefore enable us to establish which theory of punishment the tribunal has adopted in a given case. Judges usually apply legal doctrines to the specific cases without declaring that they are doing so in accordance with a given criminal law paradigm or another.⁹² Demonstrating the different manners in which duress can be applied as a justification or an excuse under the two paradigms of criminal law will provide us with four arch-types of the duress defense. By examining tribunal decisions and determining which of the four arch-types the tribunal used, we are able to state which criminal law paradigm is used by the judges.⁹³

⁹² See, e.g., *United States v. Sanchez*, 659 F.3d 1252, 1259 n.1 (9th Cir. 2011) (rejecting the prosecution's attempt to apply duress as a consequentialist justification without using the terms "excuse," "justification," "deontological," or "consequentialist.").

⁹³ Thus, if a tribunal applies duress in a manner similar to the consequentialist justification arch-type, we will be able to determine that, at least regarding duress, the tribunal is thinking about criminal law in a consequentialist manner.

i. Duress from a Consequentialist Perspective

a. Duress as a Consequentialist Justification

A consequentialist applying duress as a justification (rubric (i) in Table 1) would ask if the damage caused by the person under duress is greater than the damage he would have incurred had he not acted (*i.e.* if his action is beneficial or harmful and should therefore be encouraged as justified or discouraged as unjustified and therefore criminal). Thus, if a tribunal: (1) determines the costs and benefits of the defendant's criminal act (*i.e.* the cost of the damage created by the commission of the crime against the benefit of the harm that was averted). Then, (2) the tribunal decides, based upon step (1), whether it wants to promote the defendant's behavior in society. And finally, (3) the tribunal decides whether to punish, and how severely, in a manner that will best induce the behavior it saw fit based on steps (1) and (2). Then, we can surmise that the tribunal is applying duress as a justification and acting under a consequentialist paradigm.

The Severity of the Threats and the Scope of the Defense when duress is applied as a consequentialist justification are codependent. The more severe the threats the perpetrator is faced with, the broader the scope of the crimes that can be committed to avoid those threats.⁹⁴ However, some crimes may be considered so costly that they may be outside the Scope of the Defense, even if the risk to the perpetrator is death.⁹⁵

b. Duress as a Consequentialist Excuse

A consequentialist applying duress as an excuse (square (ii) in Table 1) asks if punishing the individual under duress is likely to deter him or others like him in the future. For example, a consequentialist asks if punishing people in similar situations is likely to increase or decrease the likelihood of others committing the crime, or if it is likely to deter others in a different situation from trying to exploit the defense. Thus if, in a given case, the tribunal asks whether the punishment is likely

⁹⁴ Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1350-51 (1989).

⁹⁵ *Id.* at 1352.

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to cause the offender, or a similarly situated offender, not to commit the crime in the future, it can be surmised that the tribunal considers duress an excuse, and that as an excuse, it is judged in a consequentialist manner. Similarly to the consequentialist excuse, the Severity of the Threats and the Scope of the Defense would be codependent.

ii. Duress from a Deontological Perspective

a. Duress as a Deontological Justification

A deontologist applying duress as a justification needs to assume that the grounds of the duty of self-preservation are superior to the grounds of the duty to obey the law. As noted above, a criminal act can be a justification from a deontological perspective when the grounds for an obligation acted upon by committing a crime creates a stronger obligation to act than the obligation not to commit the crime. To conceive duress as a deontological justification means that the grounds for the duty to prevent harm to ourselves is stronger, and therefore overrides the grounds of the duty to prevent harm to others.

Formulated as a maxim for action, the individual applying duress as deontological justification says: "Because of a threat of bodily harm to me, I will violate the law, even to the degree of causing another person bodily harm, because the prohibition against causing another bodily harm is weaker grounds for acting on a duty than the prohibition against causing harm to me."⁹⁶ The problem with this maxim is that it makes self-preservation a higher ground of action than preservation of the other. In other words, it justifies using another person as a means to the end of one's self-preservation. While deontological thought, at least as formulated by Kant, does not require altruism, it does not permit an actor to use another merely for her own benefits.⁹⁷ Deontological thinking requires that all actions be of a kind that can be universalized; ordering obligations

⁹⁶ The method by which one ought to determine which elements of the contemplated action ought to be part of the formulation of the maxim (also known as the action description problem) is beyond the scope of this article; see G.E.M. ANSCOMBE, *INTENTION* 37-47 (1958); ERIC D'ARCY, *HUMAN ACTS AN ESSAY IN THEIR MORAL EVALUATION* 21 (1963); HERMAN, *supra* note 83, at 150.

⁹⁷ KANT, *supra* note 15, at 79.

should be applicable to all situations and based on the obligation itself, not on the actor who has that obligation.⁹⁸ However, ordering self-preservation above the preservation of the other cannot be universalized, as no rational individual would *a priori* wish to live in a society in which her wellbeing is secondary to that of her peers.

Because mere self-preference cannot be the ground which makes the duty to violate the law stronger than the duty to obey the law, the maxim formulated above must be reformulated without that element. In other words, treating duress as a justification under the deontological paradigm would require removing the element of duress that refers to violating the law, in order to specifically protect oneself from harm. The maxim for duress would then be: "When something is threatened with harm, I will violate the law, even to the degree of causing a different harm, when the prohibition against causing the second harm is weaker grounds for acting on a duty than the prohibition against causing the first harm." This iteration of duress, however, is exactly what necessity is – namely – the justification of a criminal act if it has prevented a greater harm.⁹⁹ Adopting this maxim makes the defense of duress redundant. In other words, duress cannot be formulated coherently as a deontological justification.

b. Duress as a Deontological Excuse

Arguing duress as an excuse under the deontological paradigm of criminal law (square (iv) in Table 1) means proposing that, because of the pressure placed on a defendant, she is not capable of expressing her will by making a choice to obey the law and is therefore excused from criminal liability.¹⁰⁰ The most important difference between this description of duress and the justification description of duress is that this description does not legitimate the action. Thus, were a tribunal to

⁹⁸ *Id.* at 73.

⁹⁹ See Kai Ambos, *Other Grounds for Excusing Criminal Responsibility*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1003, 1016 (Antonio Cassese et al., eds., 2002), available at http://www.department-ambos.unigoettingen.de/index.php/component?option=com_docman&Itemid,133/gid,131/task,cat_view/.

¹⁰⁰ FLETCHER, *supra* note 37, at 829.

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apply duress as a deontological excuse, this would not mean that the criminal action was legitimate, but rather that in the specific instance it was perpetrated, because of the circumstances under which the perpetrator was directly acting, she had no choice. Kant provides an example that distinguishes between the two. He argues that a man floating on a plank in the ocean cannot be tried for pushing off somebody else who tries to get on the plank.¹⁰¹ This, according to Kant, is not because the action is not culpable, but because it is unpunishable due to lack of choice.¹⁰² The Scope of the Defense, in this instant, would be infinite, so long as the Severity of the Threats is sufficient. In other words, the defense of duress takes on a binary nature as a deontological excuse. Either sufficient duress exists, and then choice is removed and all crimes are excused, or insufficient duress is applied, and then no excuse exists at all.

Applying duress as an excuse, however, is not without complications. The heftiest criticism against the application of duress as a deontological excuse is correctly aimed by scholars at what is essentially a fiction regarding the lack of choice by a person acting under duress.¹⁰³ Unlike the involuntary response of a person acting under automatism, and distinct from mistake of facts or insanity, an agent acting under duress understands the wrongful implications of her actions and yet proceeds with her conduct.¹⁰⁴ The very choice to act upon the threat, and therefore to refrain from harming oneself, suggests reflection and choice.

Indeed, although cases in which duress was taken seriously by courts are rare, extant examples demonstrate a measure of reflection by the culprits. The sailors in the famous *Regina v. Dudley and Stephens*¹⁰⁵ case deliberated between themselves

¹⁰¹ KANT, *supra* note 15, at 392.

¹⁰² *Id.*

¹⁰³ See, e.g., Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 270 (1995); see also Westen, *supra* note 4, at 902.

¹⁰⁴ *Id.*

¹⁰⁵ *R v. Dudley and Stephens*, [1884] Q.B. 273 (Eng.). That case was argued on necessity rather than duress, but adopting the distinction between duress and necessity described above, the choice of the defendant's was similar to a decision that would have been made under duress; see GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 132 (1998).

before eating their crewmate.¹⁰⁶ In another case, where sailors in a longboat threw passengers overboard lest the boat capsize, the court also suggests that the actions of the sailors on the longboat were not instinctual.¹⁰⁷ From the moment the sailors got into the longboat, they knew they might have to throw some of the survivors overboard, though their captain on another life boat preferred they not discuss this in the beginning.¹⁰⁸ Their choice to throw overboard only men whose wives were not also on the vessel shows further deliberation.¹⁰⁹ Similarly, in the ICTY case discussed at length below, the perpetrator, Drazen Erdemović, clearly knew his actions were wrong, asked to be dismissed and only upon the threat of death participated in the killing because of his concern for his wife and child.¹¹⁰

The answer to this potent criticism, that individuals under duress are not incapable of making choices, is that choices, to be morally significant, ought to be free. If the entire point of punishment is to cause responsible actors deserved pain in retribution for their choices, these choices must be made with free will. Claiming that the will of an agent under duress is free and that such agent can freely choose to die rather than commit the crime is possible of course. But this would be asking too much.¹¹¹ There is something about self-preservation, about extinguishing the very ability to make choices should the duress be ignored, that makes free choice an unacceptable term for the situation of a person under mortal threat. Societies give medals to individuals who risk their lives for the sake of others.¹¹² These individuals are hailed as heroes, exceptional beings whose actions are worthy of praise and are made into Homeric myths and Hollywood movies; surely demanding all people in society to be heroic is contrary to the idea of heroism so deeply in-

¹⁰⁶ See A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW: A VICTORIAN YACHTING TRAGEDY* 60-61 (1984).

¹⁰⁷ *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (also argued as a necessity defense).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Prosecutor v. Erdemović*, Case No. IT-96-22-T, ¶14 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 29, 1996).

¹¹¹ SANFORD KADISH, *BLAME AND PUNISHMENT* 144 (1987).

¹¹² See, e.g., 10 U.S.C. § 3741.

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grained in societies all over the world. In other words, the law considers the free choice to die or to suffer severe bodily harm, to be no choice at all. It thereby recognizes that not all men and women are heroes, and excuses those who are not heroes from criminal guilt when they act human.¹¹³

Having differentiated the different manners in which duress will be applied, depending on the way it is conceived by the judges (as a justification or excuse) and depending on the judges' approach to criminal law (consequentialist or deontologist), we can now see how the judges at the international criminal tribunals applied the defense, and then look back and categorize their decisions.

E. DURESS IN THE INTERNATIONAL CRIMINAL TRIBUNALS

The definition and application of the defense of duress by international criminal tribunals can be divided into two periods: Duress as it was applied by the International Military Tribunals (NMTs) following the Second World War, and duress as it was applied by the ICTY. As demonstrated below, in the NMTs duress was understood to be a deontological excuse. The situation at the ICTY is more complex.

i. The International Military Tribunals

The Nürnberg Military Tribunals applied duress as a deontological excuse in a number of the major trials. In the Krupp case, the tribunal tried the exploitation of slaves by the Krupp industrial conglomerate during the Second World War.¹¹⁴ In Krupp, the judges emphasized that criminal responsibility does not exist without will and intent.¹¹⁵ In the

¹¹³ Some sources, most notably the German Criminal Code, make an exception to the free choice theory of excuse by limiting it to professionals who take risk upon themselves; see Bundesgesetzblatt, *supra* note 32. This exception is only convincing if one thinks that men and women can contract away their right to self-preservation. There is a distinct difference between accepting great risk to one's life (like a soldier in a charge for example) and between positively agreeing to die (like a soldier jumping on a live grenade). Soldiers are expected to do the former, and are immortalized when they do the latter.

¹¹⁴ Krupp Case, *United States of America against Alfried Felix Alwyn Krupp Von Bohlen und Halbach*, Tribunal III, Case No. 10, VOL. X, TRIALS OF WAR CRIMINALS BEFORE THE NÜRNBERG MILITARY TRIBUNALS, 1 (1949).

¹¹⁵ *Id.* at 1439.

Einsatzgruppen case, the tribunal tried commanders and soldiers who were members of the mobile killing units employed by the German army after it had invaded Eastern Europe in 1941.¹¹⁶ Referring to the defense of duress, the judges stated:

...that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real, and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull lethal lever.¹¹⁷

In both cases, the duress defense was determined inadmissible because the defendants did not prove that they would have been harmed if they did not obey,¹¹⁸ and because the prosecution showed that the defendants were willingly and enthusiastically collaborating with their superiors.¹¹⁹ In the decision regarding the major war criminals, the International Military Tribunal for the Major War Criminals ruled out the defense of superior orders elaborating that responsibility is grounded in the possibility of making a moral choice.¹²⁰

These cases show that the Nürnberg tribunals were willing to consider applying duress to the field commanders and soldiers who perpetrated genocide (the Einsatzgruppen case), and to financiers who knowingly exploited the labor of slaves, they knew were worked to death, for financial gain. This willingness to consider applying the defense shows that the Scope of the Defense was not a central issue in considering whether the defense applied. On the other hand, the tribunal's statement that

¹¹⁶ Einsatzgruppen Case, *United States of American against Otto Ohlen-dorf*, Tribunal II, Case No. 9, VOL. IV, TRIALS OF WAR CRIMINALS BEFORE THE NÜRNBERG MILITARY TRIBUNALS, 3 (1949).

¹¹⁷ *Id.* at 480.

¹¹⁸ Krupp Case, *supra* note 113, at 1444-45; Einsatzgruppen Case, *supra* note 115, at 482-83.

¹¹⁹ *Id.* In the Flick case, on the other hand, a few of the defendants succeeded in convincing the tribunal that they were in severe and imminent danger and were consequently found not criminally responsible for their actions. See Flick Case, *United States of American against Friedrich Flick*, Tribunal IV, Case No. 5, VOL. VI, TRIALS OF WAR CRIMINALS BEFORE THE NÜRNBERG MILITARY TRIBUNALS, 1201-2 (1949). Friedrich Flick, like Krupp, headed an industrial complex that utilized slave labor for profit during the war.

¹²⁰ *Judicial Decisions Involving Questions of International Law--International Military Tribunal (Nuremburg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947).

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“a man, with a loaded pistol at his head, is *compelled*”,¹²¹ demonstrates that the tribunals considered the Severity of the Threats to directly affect the ability of the perpetrator to exercise free choice and to decide whether to commit the crime. The focus on the Severity of the Threats and the recognition of its existence to serve as a complete defense, demonstrates that the judges applied duress as a deontological excuse.

ii. The Erdemović Trial

a. Background and Trial Chamber I decision

Drazen Erdemović was born in Titoist Yugoslavia to a Croatian family in Bosnia and Herzegovina, and he conducted his mandatory military service with the Yugoslavian National Army until March 1992.¹²² According to his testimony before the ICTY Trial Chamber, following the breakup of the Republic of Yugoslavia, from May until November he served in the Army of Bosnia and Herzegovina but left it because he did not wish to participate in the war.¹²³ He was then mobilized into the Croatian Defence Council where he served until November of 1993.¹²⁴ In April of 1994, after five months of unemployment, he voluntarily joined a unit of mixed ethnicities in the Bosnian Serb army. His role in that capacity, according to his testimony, was to reconnoiter enemy positions and sabotage artillery equipment.¹²⁵

On July 16th, 1995, however, that role changed radically when he was ordered, along with a number of men from his unit, to report to the site of a farm in Pilica for an undisclosed mission.¹²⁶ Upon arrival at the farm, he and his colleagues were ordered to execute civilian men between the ages of seventeen and sixty, who were brought to the farm by buses.¹²⁷ When Erdemović told his direct superior he would not participate in the murder, his commander gave him the option of join-

¹²¹ Einsatzgruppen Case, *supra* note 116, at 480 (emphasis added).

¹²² Prosecutor v. Erdemović, Case No. IT-96-22-T, ¶79 (Nov. 29, 1996).

¹²³ *Id.* at ¶ 79.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at ¶ 80.

¹²⁷ *Id.* at ¶ 2.

ing the men about to be killed.¹²⁸ Erdemović participated in the killing of approximately 1,200 innocent men and boys that afternoon.¹²⁹ Following this initial event, he was again ordered to participate in the murder of another 500 civilians.¹³⁰ This time he refused, along with three other soldiers, and did not participate.¹³¹ A few days later, a member of his unit shot Erdemović for not participating in the second killing, causing him serious injury.¹³² Though this was not an officially sanctioned punishment, Erdemović testified that he suspected he was shot on the orders of a superior officer.¹³³ Shortly after being released from the hospital, Erdemović confided a journalist about what he had witnessed. He was then arrested and sent to the Hague to stand trial.¹³⁴

At the Trial Chamber of the ICTY, Erdemović plead guilty, but at the same time explained that he had committed the crime under duress.¹³⁵ It is very likely that Erdemović's lawyers expected the court to further investigate the duress argument, relying on the civil law trial procedure, according to which the judges will not be satisfied with the defendant's submissions, but will investigate further themselves.¹³⁶ The Trial Chamber, however, operating as a common law court does when presented with a guilty plea, rendered its sentencing decision based on the evidence before it, and ruled it had not been

¹²⁸ *Id.* at ¶ 80. According to Erdemović's testimony, the threat carried weight because a man had already been executed by this commander for insubordination before.

¹²⁹ *Id.* at ¶ 85.

¹³⁰ *Id.* at ¶ 81.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at ¶ 10. The ICTY Trial Chamber did not address this discrepancy in Erdemović's plea, who essentially argued both guilt and an affirmative defense. The Trial Chamber's omission eventually led the Appeals Chamber to return the case to the Trial Chamber. At least one other guilty plea before an international tribunal, was then followed by a statement, during the sentencing hearing, that duress was applied to the accused. See *Prosecutor v. Joao Franca da Silva Alias Jhoni Franca*, Dili District Court, Special Panel for Serious Crimes, Case No. 04a/2001, Judgment (5/12/2002). Other than quoting the defendant's proclamation, the Panel did not investigate this claim and because no appeal was brought the defendant's claim was not ruled upon.

¹³⁶ Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 865 (2005).

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presented with sufficient evidence that Erdemović was indeed acting under duress.¹³⁷ Erdemović was found guilty of the crime of humanity of murder.¹³⁸ He then appealed the Trial Chamber's decision.

b. The Appeals Chamber

The Appeals Chamber's decision focused on two issues: (i) whether Erdemović's actions should be excused because he was under duress, and (ii) whether the Trial Chamber should have accepted his guilty plea.¹³⁹ Because of the two distinct questions, and because of the divergent views of the judges, the tribunal's judgment was divided into four separate opinions. Judge Li wrote a separate opinion in which he ruled (i) that the guilty plea was properly made, and (ii) that the defense of duress cannot afford Erdemović an excuse because of the crimes he committed.¹⁴⁰ Judges McDonald and Vohrah wrote a joint separate opinion in which (i) they ruled that Erdemović's guilty plea was not properly made and that the case should therefore be remanded to the Trial Chamber, and (ii) ruled that duress cannot excuse the crimes perpetrated by Erdemović.¹⁴¹ Judges Stephen and Cassese each wrote a separate opinion in which they ruled (i) that the guilty plea was equivocal and that the case should be remanded to the Trial Chamber and (ii) that the defense of duress, if its elements can be proved by Erdemović in the Trial Chamber, can excuse him from criminal liability.¹⁴²

¹³⁷ Erdemović, *supra* note 122, at ¶20.

¹³⁸ *Id.* at ¶¶ 20, 25.

¹³⁹ *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment on Appeal, ¶ 16 (Oct. 7, 1997). Because of the multiplicity of the opinions, the tribunal published five different documents that constitute the Appeals Chamber decision. The Judgment provides the background and the disposition of the case and four separate opinions of the judges provide the ruling of each judge on the two issues that were discussed by the Appeals Chamber.

¹⁴⁰ *Prosecutor v. Erdemović*, Case No. IT-96-22-A, ¶ 27, Separate and Dissenting Opinion of Judge Li (Oct. 7, 1997) available at <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojli971007e.pdf>.

¹⁴¹ *Prosecutor v. Erdemović*, Case No. IT-96-22-A, ¶¶ 89-91, Joint Separate Opinion of Judges McDonald and Vohrah (Oct. 7, 1997) available at <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>.

¹⁴² *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, ¶¶ 68-69 (Oct. 7, 1997) *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 50 (Oct. 7, 1997) available at <http://www.icty.org/x/cases/>

Thus, the court unanimously ruled that Erdemović should not be acquitted;¹⁴³ ruled by a majority of four against one that the appeal was improperly made;¹⁴⁴ and ruled by a majority of three to two that duress cannot excuse Erdemović's responsibility even if all the facts claimed by him were proved to be true.¹⁴⁵

The analysis that follows will focus only on the question of the applicability of duress to Erdemović's case. Thus, the Joint Separate Opinion of Judges McDonald and Vohrah and the Separate Opinion of Judge Li, will be examined together, while the Separate Opinions of Judge Stephen and of Judge Cassese will each be examined separately as they apply different reasoning to arrive at their respective conclusions.

(1) The Majority Opinion on Duress: Judges McDonald and Vohrah and Judge Li

The majority judges on the question of duress, Judges McDonald, Vohrah, and Li, analyzed post-Second World War international tribunals and various current jurisdictions, and came to the conclusion that though duress is generally recognized as a defense, there is no consensus as to whether there is a consensus as to exceptions to its application.¹⁴⁶ Judges McDonald and Vohrah examined the common law stance against the applicability of duress as a defense to murder,¹⁴⁷ and came to the conclusion that this exception to the defense is the result of a cultural moral absolute on the subject of murder that has developed in the English courts,¹⁴⁸ and does not reflect common state practice.¹⁴⁹ They therefore turned to policy rather than state practice to justify their decision.¹⁵⁰

Judges McDonald, Vohrah, and Li posed the question:

erdemovic/acjug/en/erd-adojcas971007e.pdf.

¹⁴³ Erdemović Appeals Judgment, *supra* note 139, at 17.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Joint Separate Opinion of Judges McDonald and Vohrah, *supra* note 141, at ¶¶ 58-65.

¹⁴⁷ See, e.g., *United States v. LaFleur*, 971 F.2d 200, 206 (9th Cir. 1991).

¹⁴⁸ Joint Separate Opinion of Judges McDonald and Vohrah, *supra* note 138, at ¶ 71.

¹⁴⁹ *Id.* at ¶ 72.

¹⁵⁰ *Id.* at ¶ 75.

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“what ruling on the scope of duress is likely to bring about the least number of deaths?”¹⁵¹ Determining that the defense of duress can be too easily exploited, the majority judges ruled that, from a policy perspective,¹⁵² duress should not be a complete defense to the murder of innocents.¹⁵³ Judges McDonald and Vohrah also criticized, as overly utilitarian, the analysis of Judges Stephen and Cassese, who ruled (each for a different reason) that because Erdemović would have died had he refused to participate in the murder, but would not have stopped the murder, he should not be convicted.¹⁵⁴

As will shortly be demonstrated below, Judges McDonald and Vohrah erred in their description of Judge Stephen’s and Judge Cassese’s opinion, neither of which is utilitarian.¹⁵⁵ This error is somewhat ironic, considering the very utilitarian nature of their decision. The majority decision essentially decides whether the defendant before the tribunal is guilty, not based on whether he was personally responsible for his actions, but rather based on whether recognition of his lack of culpability might be exploited by other wrongdoers. As Aaron Fichtelberg put it, “the reasons put forward by the court to justify the denial of duress as a complete defense were... matters of policy, not principle – concerns wholly foreign to a legal regime such as international criminal law.”¹⁵⁶

In utilitarian terms, the majority’s opinion can be explained thus: the harm caused by punishing the defendant, even if he had no choice but to participate in the murder, is lesser than the harm that will be caused by others who will be able to exploit this defense (if it is recognized) and therefore policy requires that we find him guilty. The majority’s decision is consequentialist in subjecting the basic notions of guilt and

¹⁵¹ *Id.* at ¶¶ 77-78.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at ¶¶ 79-80.

¹⁵⁵ Had Cassese’s and Stephan’s conclusions been based on the uselessness of Erdemović’s death had he refused, thereby “increasing” the disutility, the majority judges would have been correct. That is not the rationale of either of the minority judges’ separate opinions.

¹⁵⁶ Aaron Fichtelberg, *Liberal Values in International Criminal Law: A Critique of Erdemovic*, 6 *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* 3, 14 (2008).

responsibility to the consequences of the decision, making the concepts of innocence or culpability dependent on the manner their application will increase or decrease future crime. Both Judges McDonald and Vohrah and Judge Li claimed that their determination of the Scope of the Defense is the only sound manner of interpreting what duress ought to be in light of the purposes of international humanitarian law – the mitigation of harm to innocent civilians.¹⁵⁷ This is only the case, however, if humanitarian law is analyzed from a consequentialist point of view. From a deontological perspective of humanitarian law, a teleological interpretation of duress would still be subject to the categorical imperative, necessitating that protection of human lives not be an end that justifies all means. In other words, the possible preservation of innocents cannot be a justification for inherently unjust action (such as finding a guiltless man guilty of mass murder).

Judges McDonald, Vohrah, and Li's opinions apply duress as a consequentialist excuse. To determine the Scope of the Defense, they (i) compared the harm that will be caused in the future by individuals who may use the defense to the harm caused by the crimes perpetrated, and (ii) came to the conclusion that this harm is greater than the benefit in excusing Erdemović due to his lack of choice.

(2) *Judge Cassese's Separate Opinion*

Judge Cassese disagreed with the majority both in methodology and in result, because after surveying municipal laws he found no generally accepted exception to the rule that duress applies in cases of murder, deducing that no such exception exists as a matter of state practice.¹⁵⁸ Judge Cassese then analyzed past decisions made by international tribunals, and came to the conclusion that four criteria are required for the defense of duress to apply: (i) the criminal conduct was perpetrated under immediate threat of harm to life or limb; (ii) there was no adequate means of averting the evil; (iii) the crime committed was not disproportionate to the evil threatened; and

¹⁵⁷ Joint Separate Opinion of Judges McDonald and Vohrah, *supra* note 141, at ¶75; Separate Opinion of Judge Li, *supra* note 140, at ¶8.

¹⁵⁸ Separate Opinion of Judge Cassese, *supra* note 142, at ¶41.

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(iv) the situation leading to duress must not have been voluntarily brought about by the coerced person.¹⁵⁹

Two interesting facts should be noted before analyzing the rest of Judge Cassese's ruling on duress. First, in only one of the international cases, which Cassese cited in his decision, is criteria (iii) mentioned.¹⁶⁰ According to Judge Cassese's opinion, only the International Military Tribunal, which tried the major war criminals and the NMTs in Nürnberg can truly be described as international trials.¹⁶¹ But in neither the trial of the major war criminals, nor the Einsatzgruppen judgment, nor the Flick case, is the proposition that proportionality is required for duress to apply raised. Additionally, in the Krupp case, the notion of proportionality is raised, but not in connection with duress, but with necessity.¹⁶² Second, these four criteria match the Italian (Judge Cassese's nationality) provision on the defense of duress exactly.¹⁶³ The similarity between the Italian law and Judge Cassese's determination of the criteria required to apply duress in international law, despite the weak international precedence supporting this determination, raises the suspicion that Judge Cassese's analysis might have been strongly affected by his acquaintance with the Italian interpretation of duress.

In all fairness to Judge Cassese's opinion, a report by the International Law Commission cites the digest compiled by the United Nations War Crimes Commission conducted after the Second World War, which concluded that duress required

¹⁵⁹ *Id.* at ¶¶ 16, 41.

¹⁶⁰ See Krupp Case, *supra* note 113, at 1443-1444.

¹⁶¹ Separate opinion of Judge Cassese, *supra* note 142, at ¶ 21. This is as opposed to some of the trial decisions taken by courts constituted by the victorious powers individually in their respective zones and cited by Judges McDonald and Vohrah in their decision.

¹⁶² See Krupp Case, *supra* note 113, at 1443-1444. The NMTs were not particular about distinguishing between necessity and duress, and used the terms interchangeably. However, based on the discussion at the relevant part of the opinion, it is possible to deduce that the defense in question was necessity as understood today and not duress. Judge Cassese quoted from other post-Second World War cases in his opinion; Separate opinion of Judge Cassese, *supra* note 142, at ¶¶ 23-27; but in none of these cases is there any mention of proportionality or 'the lesser of two evils.'

¹⁶³ McDonald and Vohrah, *supra* note 141, at ¶59 (quoting the French c.p. 54 (1) from the translation provided in the Separate opinion of Judges).

“three essential elements” including proportionality.¹⁶⁴ To prove its case, the International Law Commission cited the *Einsatzgruppen* case, which does not raise the question of proportionality in duress,¹⁶⁵ and the arguments of one British advocate at one of the later trials held in the British held zones.¹⁶⁶ This last source is particularly weak for three reasons. First, as Judge Cassese noted in his opinion, these later trials were not international trials but rather trials held under the *lex forum* of the trying state.¹⁶⁷ Second, this was not the judgment of the tribunal, only the argument of prosecutor.¹⁶⁸ And third, despite the attempt of the International Law Commission to discern, from the prosecuting attorney’s remarks, that proportionality is a relevant factor, the direct quotation from that case relates to murder being inexcusable by duress, not to proportionality as an element of the defense.¹⁶⁹ Why the United Nations War Crimes Commission chose to read proportionality into these decisions is not clear. One of two reasons may have guided its analysis. First, it may not have been willing to adopt the common law position that duress simply does not apply to murder, but had to contend with this practice of the common law war tribunals nonetheless. Or second, as mentioned earlier, the NMTs lack of a proper demarcation between duress and necessity, may have lead the International Law Commission to confuse the two.¹⁷⁰

Regardless of the method by which Judge Cassese decided that proportionality is a relevant criterion for the determination of duress, he applied duress as a justification rather than an excuse.¹⁷¹ That is because, as explained above, proportionality, or the weighing of different grounds for duty, is the hallmark of justifications. Excuses focus on the will of the pepe-

¹⁶⁴ Rep. of the Int’l Law Comm’n on the work of its forty-eighth session, May 6—July 26, 1996, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10, at 40, (1996).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 41.

¹⁶⁷ Separate Opinion of Judge Cassese, *supra* note 142, at ¶ 21.

¹⁶⁸ THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF THE TRIALS OF WAR CRIMINALS, Vol. XV, 173 (1949).

¹⁶⁹ *Id.*

¹⁷⁰ See *supra* note 162; see also Ambos, *supra* note 99, at 1036.

¹⁷¹ Luis E. Chiesa, Duress, Demanding Heroism and Proportionality: The Erdemovic Case and Beyond, 41 VAND. J. TRANSNAT’L L. 741, 749 (2008).

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trator, and are therefore binary – either the perpetrator had the capacity to intend to commit the crime or not. Certain crimes might require a lower level of intent than others, but where, because of some defect in the defendant, the ability to apply free will does not exist, there can be no partial intent attributed.

When Judge Cassese stated that he requires that the act committed under duress be the lesser of two evils, he is requiring that even under threat of death, the coerced individual choose the lesser evil. In other words, the threat of death, according to Judge Cassese's definition of duress, does not have the effect of removing the coerced person's ability to freely choose whether to commit the crime. Subsequently, this is the reason that when determining whether duress should apply in Erdemović's case, Judge Cassese considered the question, whether the victims of the massacre would have been murdered or not had Erdemović refused to shoot, as pertinent. If the death of the victims was inevitable, then the commission of the crime is the lesser of the two evils because Erdemović survived. Had Erdemović not committed the crime, he would have also been killed – a greater evil.¹⁷²

Judge Cassese's opinion therefore analyzes duress as a justification, but is it deontological or consequentialist? On the one hand, the language generally associated with consequentialist analysis of justifications (*i.e.* examining whether punishing the culprit in this situation would motivate or deter behavior of this sort in the future and whether this would increase or decrease the general welfare of society) is missing and therefore one may be led to believe that Judge Cassese does not approach the issue from a consequentialist perspective. Moreover, Judge Cassese gives great weight to the coerced individual's decision when she is acting under duress, focusing on the choices of the perpetrator. On the other hand, the main determining factor in Judge Cassese's decision is the consequence of the decision, not the grounds according to which it was made, *i.e.* a consequentialist determination. The Scope of the Defense, according to Judge Cassese, is directly linked to the Severity of

¹⁷² One could argue that this point of view is incorrect and that there are strong grounds not to kill even when the victim of the killing will die anyway. This issue, however, will need to be addressed elsewhere.

the Threats. The conclusion is that his analysis is most likely consequentialist rather than deontological. To recount - the majority views duress as a consequentialist excuse, Judge Cassese applies it as a consequentialist justification. Judge Stephen presents yet a third alternative.

(3) *Judge Stephen's Separate Opinion*

Judge Stephen's entire opinion revolved around the inconsistency between common law's murder exclusion to the defense of duress,¹⁷³ and his common sense intuition (backed by the law in most civil law jurisdictions) that this exception is incoherent with a coherent and justifiable doctrine of duress.¹⁷⁴ Judge Stephen's disagreement with the majority opinion was therefore grounded on two pillars. First, Judge Stephen had a strong intuition that murder ought not to be excluded from the defense of duress.¹⁷⁵ This is referred to as an intuition because Judge Stephen did not explain anywhere in his opinion why he believes this exclusion to be inapposite. Second, Judge Stephen disagreed with Judges McDonald, Vohrah and Li that common state practice and the jurisprudence of post-Second World War tribunals favors the murder exception to duress.¹⁷⁶

Judge Stephen's separate opinion is therefore difficult to analyze because his decision proceeds concurrently along two parallel rationales. On the one hand, the opinion follows an implicit notion that duress ought to be a complete defense from a substantive point of view. This notion is best exemplified by the rhetorical question he posed:

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

¹⁷³ Separate Opinion of Judge Stephen, *supra* note 142, at ¶25.

¹⁷⁴ *Id.* at ¶26.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at ¶¶ 23-24.

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only defence, is no defence?¹⁷⁷

On the other hand, most of Judge Stephen's opinion is dedicated to explaining how applying the defense of duress in the Erdemović case is correct, not from a substantive standpoint, but rather based on the laws of most civil law states and on the development of common law.¹⁷⁸

Demonstrating that in Erdemović's case, duress ought to be applicable to murder according to British law (the branch of common law Stephen focused on) is very difficult in light of two hundred years of precedents pointing in the other direction.¹⁷⁹ It is unnecessary to follow Stephen's entire reading of British precedent on duress in the case of murder; suffice it to say that he concluded that Erdemović's case can be distinguished from prior British rulings because unlike previous defendants, whose claims for duress have been denied, Erdemović's choice was not 'who should die?', but rather whether he should die along with the other victims.¹⁸⁰ According to Judge Stephen's reading, the strong common law aversion to accepting duress as a defense to murder is a moral repulsion to allowing a man to choose that one man shall live while another dies. This moral repulsion does not exist, according to Judge Stephen, when either one man or both shall die.¹⁸¹

The very long path that Judge Stephen took as he attempted to distinguish the Erdemović case from former British precedence makes gauging the paradigm according to which he made his final ruling difficult. More so than the other judges, Judge Stephen attempted to demonstrate the existence of common state practice regarding duress and to base his determination of the Scope of the Defense on this common practice. If we look beyond this attempt at the core argument that Stephen made (and essentially at the application that he found to be common state practice), we will find that he viewed duress as a deontological excuse. According to this view, similarly to

¹⁷⁷ *Id.* at ¶26.

¹⁷⁸ See, e.g., *Id.* at ¶ 25.

¹⁷⁹ Though not always as conclusively as one would think. In the case of the Mignonette mentioned above, the crown pardoned the defendants immediately after the verdict was pronounced. See Simpson, *supra* note 105, at 248.

¹⁸⁰ Separate Opinion of Judge Stephen, *supra* note 142, at ¶53.

¹⁸¹ *Id.* at ¶62.

the ruling of the Nürnberg tribunal in the Einsatzgruppen trial, a person under duress is incapable of exercising free choice and therefore cannot have a *mens rea*, notwithstanding how dire the offense with which he is charged. Thus, the Severity of the Threats alone determines the applicability of the defense. Judge Stephen, alone, applied duress as a deontological excuse.

F. ERDEMOVIĆ'S DURESS AS A LITMUS TEST FOR THE ICTY
APPEALS CHAMBER'S ATTITUDE TOWARDS PUNISHMENT

The logic that claims that exceptions to a rule can very often help clarify the content of the rule itself is as sound today as it was more than 2,000 years ago when it was argued in front of the Roman tribunal by Cicero.¹⁸² By following the rationale the tribunal provided when it discussed the situations that exclude criminal responsibility, one can get a sense of what the tribunal considers to be the basic components of this liability.

In the Erdemović case, the Appeals Chamber was split three ways in its presentation of the Scope of duress and its application. This split will create great difficulty in arguing duress before future tribunals. The manner in which the tribunal is split also makes determining what criminal law paradigm guided it when it made its ruling difficult. However, based on the tests the majority of the tribunal applied to decide if Erdemović is not guilty by reason of the duress he was under, the Appeals Chamber appears to have a consequentialist outlook on the criminal law process.¹⁸³

This consequentialist approach is manifested by the Appeals Chamber's focus on how its decision will affect future actors in similar situations and prevent them from participating in mass murder, rather than on the culpability and responsibility of the defendant. Judges McDonald and Vohrah in their joint separate opinion and Judge Li in his separate opinion essentially sacrificed Erdemović, notwithstanding his personal

¹⁸² M. Tullius Cicero, *The Speech of M.T. Cicero in Defence of Lucius Cornelius Balbus*, 14:32 (C.D. Yonge Trans.) available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.02.0020:text=Balb.:chapter=14&highlight=exception>.

¹⁸³ Judges McDonald, Vohrah and Li, and perhaps, but probably not Cassese.

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guilt or his ability to comply with the prohibition, for the sake of preventing future combatants from abusing the duress defense. From this perspective, the majority judges' opinion exemplifies the instrumentalizing of the defendant inherent in the consequentialist paradigm. The majority judges did not linger on the question of Erdemović's culpability - they did not ask whether he was capable of making a free choice. They did not ask a less formal question such as one Westen suggests, whether Erdemović's attitude is blameworthy.¹⁸⁴ Instead, the majority judges asked what the consequences of either a guilty or innocent sentence will have on future potential perpetrators. Erdemović's role in actual genocide, and in the judgment, became incidental to the policy the judges decided to advance. Incidentally, Erdemović was the defendant before the tribunal, but whether he personally had the capacity not to commit the crime was irrelevant, in the majority judges' opinion, when compared with the need to deter future genocidaires who might try to get away with genocide by claiming duress.

Thus, the majority opinion demonstrates utilitarian consequentialist justice at its worst - when it decided to acquit or convict without regard to the guilt or innocence of the defendant the tribunal essentially conducted a show trial. It is noteworthy that even according to non-deontological mixed or side-constraint theories of the kind presented by H.L.A Hart,¹⁸⁵ the majority opinion is unjust. The mixed retributivist-consequentialist theories emphasize that once guilt is established punishment needs to be also justified by its good consequences. But the side-constraint of these theories is the requirement that these good consequences only be gained by punishing the guilty.¹⁸⁶

Had the tribunal applied duress with a deontological criminal justice paradigm in mind, its analysis would have been similar to Judge Stephen's opinion. The judges would have sent the case back to the Trial Chamber where the evidence would have been examined so that the circumstances surrounding Erdemović's actions would have been ascertained. Had the Trial Chamber indeed found that Erdemović's depiction of the

¹⁸⁴ Westen, *supra* note 3, at 371.

¹⁸⁵ H.L.A. Hart, *Punishment and Responsibility*, 11-12 (1968).

¹⁸⁶ *Id.* at 12.

facts to be true; his actions would have been excused because his decision to perpetrate the crime was not freely made.

How this precedent will affect future rulings of the ICC requires looking at the definition of Duress in the Rome Statute of the ICC again. Because the ICC has not issued, to date, any decisions analyzing the defense, one can only speculate as to the manner in which it will be applied by the court, and yet the wording of Article 31(1)(d) of the Rome Statute foreshadows a problematic application of the defense. As it were, the drafters of the Statute seemed to conflate duress and necessity by including a “lesser evil” element to the defense.¹⁸⁷ Or else they have adopted a consequentialist approach to duress, which as demonstrated above, sacrifices the perpetrator by overlooking his culpability to achieve extrinsic ends.

Article 31(1)(d) defines duress an action as something resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.¹⁸⁸

The article permits acting in order to protect not only the defendant’s life, but also the life of another person. By removing the requirement that the person acting under duress is himself threatened, the central element that creates the lack of free will is removed from the definition of the defense. Because the central element of the defense is no longer the inability of the defendant to freely exercise his free will due to grave personal risk, the defense is no longer an excuse, but rather a justification. In a manner similar to Cassese’s opinion in Erdemović, once duress is treated as a justification, inserting a proportionality requirement is necessary. This state of affairs leaves one wondering why the drafters of the Rome Statute decided to omit creating a duress defense, but created, essentially, two necessity defenses.¹⁸⁹

¹⁸⁷ Ambos, *supra* note 99, at 1040.

¹⁸⁸ Rome Statute, *supra* note 34, at Art. 31(1)(d).

¹⁸⁹ For further critique, see Ambos, *supra* note 99, at 1035-1047. As Ambos notes, the defense portion of the Rome Statute is further hampered by a conflation of self-defense and necessity within the same section 31(1)(b); *Id.*, at 1040.

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As noted above, international precedent on the application of duress is split. While the NMTs defined the defense as a deontological excuse, the majority at the ICTY defined it as a consequentialist excuse. If the judges at the ICC wish to bolster the legitimacy of the organization by acting towards the perpetrators as ends rather than as means, thereby claiming the moral high-ground and refusing to treat them as they treated their victims, they will follow in the footsteps of the NMTs and refuse to hold responsible individuals who are inculpable because they had no choice but to commit the crimes because of duress. Time will tell.