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EXCUSE AND MITIGATION UNDER INTERNATIONAL CRIMINAL LAW: REDRAWING CONCEPTUAL BOUNDARIES

Olaoluwa Olusanya*

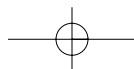
Since the Nuremberg trials of 1945, the classification of men and women who commit atrocities in time of war has been a subject of bafflement. Attempts to explain this phenomenon have largely relied on various abnormality theories. However, none of these theories hold sway. Instead, the dominant view today is that men and women who commit atrocities are normal. This conclusion has confounded many because it is even harder to rationalize how people who in fact closely resemble us could perpetrate such violent crimes. How had they become evil criminals? The focus on this article is on excuse theory and its value in resolving this issue.

“There is no evidence in the case, we submit, that prior to the war this defendant ever showed a single racist attitude, said anything with a racist connotation, did anything to anybody which had a racist connotation to it. You may think that he was, in fact, entirely lacking in such thoughts. It is at that point that the Prosecution have a difficulty because they have not even begun to try and explain how it is that suddenly, for a period of perhaps only 18 days, in May 24 1992, Goran Jelusic suddenly changed and became a blood-thirsty killer, glorying in his trade, and then suddenly, when he ceases to be occupied in that business, he reverts to having his Muslim friends whom he helps, in some cases, by ferrying them across the river at considerable personal risk to himself. They have not explained that. They have not demonstrated any reason why that should be so.”¹

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1. Statement made by Mr. Michael Greaves, Co-Counsel on behalf of Goran Jelusic, see trial transcript in the proceedings in Prosecutor v. Goran Jelusic, Case No. IT-95-10-T,

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INTRODUCTION

Since the Nuremberg trials of 1945, the classification of men and women who commit atrocities in time of war has been a subject of bafflement.² Criminologists,³ sociologist,⁴ and psychologists⁵ have devoted their efforts to making sense of how individuals can arrive at the point of cruelly perpetrating atrocities against erstwhile neighbors and friends. Various abnormality theories have been advanced.⁶ One theory is that perpetrators of genocide, war crimes, and crimes against humanity have a peculiar personality trait.⁷

paras. 3141–3142, International Criminal Tribunal for the former Yugoslavia, available at <http://www.icty.org/x/cases/jelusic/trans/en/991125it.htm> (last visited Dec. 2, 2009). See also Thomas Blass, *Obedience to Authority*, 206 (2000) (“Human nature can be transformed within certain powerful social settings in ways as dramatic as the chemical transformation in the captivating fable of Dr. Jekyll and Mr. Hyde.”).

2. See, e.g., Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 *Eur. J. Int'l L.* 571 (2002) (“What kind of a person is likely to get involved in a serious, large-scale crime, such as those listed in the ICC Statute? How is it possible to explain ‘die relative Leichtigkeit, mit der das Regime—und auch die Regime vor und nach der NS-Zeit—ihre Henker fanden und finden?’”).

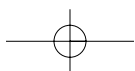
3. Most notably, Stanley Milgram, *Obedience to Authority* (1963).

4. See Zygmunt Bauman, *Modernity and the Holocaust* (1989); Thomas Carnahan & Sam McFarland, *Revisiting the Stanford Prison Experiment*, 33 *Pers. Soc. Psychol. Bull.* 603–15 (2007) (revisiting Philip Zimbardo’s Stanford Prison Experiment). On the dynamics of collective violence, see Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (1993).

5. See Gerald L. Borofsky & Don J. Brand, *Personality Organisation and Psychological Functioning of the Nuremberg War Criminals*, in *Survivors, Victims, and Perpetrators: Essays on the Nazi Holocaust* (Joel E. Dimsdale ed., 1980).

6. See W. Charny Israel, *Genocide and Mass Destruction: Doing Harm to Others as a Missing Dimension in Psychopathology*, 49 *Psychiatry* 144–57, at 144 & 146 (1986) (“According to accepted psychiatric definitions, it was largely normal people—both leaders and followers—who executed the most systematic evil in the history of mankind. . . . Yet it is inconceivable that we reconcile ourselves to mental health concepts that do not define, in some intelligent way, the leaders and followers who execute mass murder as disturbed and abnormal. . . . If making other people’s lives miserable—persecuting, tormenting, and even killing them—cannot be linked with existing definitions of abnormality, the profession of psychology has a serious problem of credibility.”).

7. The following authors have argued that the Holocaust was caused by the propensity of Germans to idolize authority and their personality predispositions toward an authoritarian personality: Theodor W. Adorno et al., *The Authoritarian Personality* (1950); Norbert Elias, *The Germans: Power Struggles and the Development of Habitus in the Nineteenth and Twentieth Centuries* (1996); Erich Fromm, *The Anatomy of Human Destructiveness* (1997).



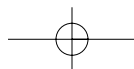
A second theory is that people who commit such crimes are driven by intense hate or prejudice,⁸ whilst a third theory is that perpetrators of international crimes are mentally insane.⁹ However, none of these theories holds sway. Instead, the dominant view today is that men and women who commit atrocities are normal.¹⁰ For example, Kelley, the psychologist to the Nuremberg Trial during the initial few months of its establishment, concluded “not only that such personalities are not unique or insane but also that they could be duplicated in any country of the world today.”¹¹ This conclusion has confounded many because it is even harder to rationalize how people who in fact closely resemble us could perpetrate

8. See Daniel J. Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (1996) (Goldhagen's controversial study emphasized free will in the form of “eliminationist anti-Semitism” over compatibilism, that is, the theory that an individual's choices are the result of his or her own desires and preferences, and are not overridden by some external or internal force.) For a compatibilist perspective, see Z. Bauman, *supra* note 4, at 19 (arguing that complicity in the holocaust was not a product of an evil predisposition but of state coercion and manipulation). Goldhagen's thesis has since been discredited by many. See, e.g., Fritz Stern, *The Goldhagen Controversy*, *Foreign Aff.* 128–38 (Nov./Dec. 1996); Reinhard Rürup, *Viel Lärm über Nichts? D. J. Goldhagens “Radikale Revision” der Holocaustforschung*, 3 *Neue Politische Literatur*, 357–63 (1996); Ruth Bettina Birn, *Revising the Holocaust*, 40 *Hist. J.* 195–215 (1997) (accusing the author of selectively using primary sources); Dieter Pohl, *Die Holocaustforschung und Goldhagens Thesen*, 45 *Vierteljahrshefte für Zeitgeschichte*, 1–48 (Jan. 1997).

9. See Thomas Blass, *Psychological Perspectives on the Perpetrators of the Holocaust: The Role of Situational Pressures, Personal Dispositions, and Their Interactions*, 7(1) *Holocaust & Genocide Stud.* 30–50, 38 (Spring 1993) (“While the major Nazi leaders were awaiting trial at the International Tribunal in Nuremberg in 1945, the prison psychologist, Gustave Gilbert, a German-speaking American, administered the Rorschach ink-blot test to them. Together with Miale, Selzer analyzed those Rorschach protocols and concluded that . . . ‘the Nazis were not psychologically normal or healthy individuals.’” However, Blass goes on to point out weaknesses in Gilbert and Selzer's conclusion.).

10. See George M. Kren & Leon Rappoport, *The Holocaust and the Crisis of Human Behavior*, 70 (1980) (“Our judgment is that the overwhelming majority of SS men, leaders as well as rank and file, would have easily passed all the psychiatric tests ordinarily given to US recruits or Kansas City policemen.”); see Z. Bauman, *supra* note 4, at 19 (agreeing with Kren and Leon Rappoport). Similar conclusions have been drawn in relation to the perpetrators of the My-Lai massacre by the U.S. Army's Commission of Inquiry. According to the Commission, the soldiers at My-Lai were “generally representative of American youth assigned to combat units throughout the Army.” See Donald G. Dutton, *The Psychology of Genocide, Massacres and Extreme Violence*, 135 (2007).

11. See Douglas M. Kelley, *Preliminary Studies of the Rorschach Records of the Nazi War Criminals*, 10 *Rorschach Exchange* 45–48, 47 (1946).



such violent crimes.¹² In this respect, Sonnenfeldt, a former Chief Interpreter and Interrogator for the American Prosecutor at the Nuremberg trials, wrote: “The indicted had no blood on their hands, no evil stares, no murderous animal fangs, no signs of insanity. The apparent normality of these men was very frightening; I wondered, would there ever be another gang like them? Anywhere? Any time? How had they become criminals?”¹³

The inability to answer these fundamental questions evidences the “limits of the taxonomies used in our current analytical framework.”¹⁴ It is here that excuse theory has value.¹⁵ From the point of view of excuse theory, the findings of the Nuremberg psychiatrist and psychologist that “such personalities are not unique or insane, but also that they could be duplicated in any country of the world today” constitute a recognition of human weaknesses.¹⁶

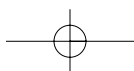
12. See Michael Mann, *Were the Perpetrators of Genocide “Ordinary Men” or “Real Nazis”?*, 14(3) *Holocaust & Genocide Stud.* 331–66 (2001). See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, 25 (1994) (“Half a dozen psychiatrists had certified [E]ichmann as normal.”); Bernard J. Bergen, *The Banality of Evil* (1999); Tsvetan Todorov, *Facing the Extreme* 124 (Arthur Denner & Abigail Pollak trans., 2000) (expressing incredulity that Eichmann, the man responsible for such evil acts, “stood before the court a profoundly mediocre, indeed common, human being”).

13. See Richard W. Sonnenfeldt, *Remarks, Symposium, The Nuremberg Trials: A Reappraisal and Their Legacy*, 27 *Cardozo L. Rev.* 1609, 1611 (2006).

14. See O. Sara Lwiwerant, *Mass Murder*, 5(4) *J. Int’l Crim. Just.* 917–39, 928 (2007) (“[T]he impossibility of defining a new pathology of mass murder shows the limits of the taxonomies used in our current analytical frameworks. The perplexity engendered by these conclusions does not close the issue. On the contrary, this assessment, because it does not fit the usual taxonomies, catches a glimpse of ‘ordinary men’ that necessitates a new way of framing the original issue. . . .”).

15. There is an abundance of research dealing with major rationales for the theory of excuse in criminal law. For a sample see the following authors: Glanville Williams, *The Theory of Excuses*, *Crim. L. Rev.* 732 (1982); H.L.A. Hart, *Legal Responsibility and Excuses*, in *Punishment and Responsibility*, ch. 2 (1968); George P. Fletcher, *Rethinking Criminal Law*, 798–817 (1978); Michael S. Moore, *Choice, Character, and Excuse*, in vol. 548 *Placing Blame* (1997) (“Excuses are the royal road to theories of responsibility generally.”); George Vuoso, *Background, Responsibility, and Excuse*, 96 *Yale L.J.* 1661 (1987); Sanford H. Kadish, *Excusing Crime*, 75 *Cal. L. Rev.* 257 (1987); Robert Sullivan, *Making Excuses*, in *Harm and Culpability*, vol. 131 (Andrew Simester et al. eds., 1996); Paul H. Robinson, *Excuses*, in *Structure and Function in Criminal Law* 81–94 (1997); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought To Be*, 78 *Saint John’s L. Rev.* 725, 864–54 (2004).

16. For example, excuses such as duress and provocation have been described as concessions to human frailty. For provocation, see, e.g., John Gardner & Timothy Macklem,

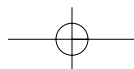


Thus the law recognizes that even though people may have ordinary levels of courage, they may nevertheless be coerced into agreeing to break the law. Similarly, the law accepts that despite the fact that people have ordinary levels of self-control, there are situations where they may get angry and lose their self-control.¹⁷ The recognition of human weaknesses has led to the excuse theory playing a neutral role in the assessment of criminal responsibility¹⁸ vis-à-vis all types of crimes regardless of their

Compassion Without Respect? Nine Fallacies, in *R v. Smith*, *Crim. L. Rev.* 623, 624 (2001) (“[T]he whole idea of the defence of provocation was to make concessions to human frailty.”); see also, e.g., *Holmes v. DPP* [1946] A.C. 588 (“The law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation on human frailty.”); Joshua Dressler, *Why Keep the Provocation Defense?*, 86 *Minn. L. Rev.* 959, 978–79 (2002) (“The provocation defense is about human imperfection and, more specifically, impaired capacity for self control.” For duress, see, e.g., *Regina v. Howe* [1987] 1 A.C. 417 (H.L.) (Lord Hailsham stated vis-à-vis duress that “the ‘concession to human frailty’ is no more than to say that in such circumstances a reasonable man of average courage is entitled to embrace as a matter of choice the alternative which a reasonable man could regard as the lesser of two evils.”).

17. Imagine, for instance, a scenario in which A, a soldier assigned to guarding prisoners of war (POWs), learns that X, one of the POWs, was responsible for the murder and rape of a relative of A’s. Boiling with anger, A kills X. Here we may say that owing to a perceived sense of injustice perpetrated by agent X, A’s immediate response was to eliminate the source of the wrong—in Hegelian terminology it was a disposition to annul or cancel the wrong. See Georg W.F. Hegel, *Hegel’s Philosophy of Right*, secs. 101–03 (Thomas M. Knox, trans., 1967). (However, note that Hegel did not support private revenge, see *id.*, secs. 102, 220.) “As Alcibiades argued in *Timon of Athens* and *Revenge in A Fig for Fortune*, bearing is for asses. A Man who is truly a man cannot be patient. If he has ‘nature’ in him, he will strike where wrong is offered,” see Eleanor Prosser, *Hamlet and Revenge* 158 (1971). Raz refers to the above scenario as “expressive action”: “In the case of purely expressive actions we . . . allow the emotion to express itself, the will acting as a non interfering gate keeper,” see Joseph Raz, *Engaging Reason: On the Theory of Value and Action*, 43–44 (1999); see also Willard Gaylin, *Rage Within: Anger in Modern Life* (1984) (pointing out that human beings instinctively respond when we are hurt or insulted and that a state of anger creates a high level of physiological arousal; it is deeply embedded in the human psyche, something inherited from primitive ancestors).

18. On the meaning of responsibility, see Hart’s taxonomy of five senses of moral responsibility: role, capacity, causal, legal, and liability responsibility. Of primary interest to this article is capacity responsibility, under which an agent is presumed to possess the minimum requirements for normative competence and to be capable of fulfilling moral obligations, and thus imposing responsibility on him or her would not be considered unfair. See H.L.A. Hart, *supra* note 15, 211–30; John Locke, *An Essay Concerning Human Understanding*, Book 2, ch. 27, §§ 8, 15, 17–21, 23, 26 (1979, 1690) (explaining that only persons can be held accountable in law and morality because only persons are responsible

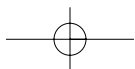


heinousness and magnitude.¹⁹ In cases concerning the excuse theory,²⁰ the critical issue is not the heinousness of the crime nor is it the role of the

for their actions). For a philosophical discussion of capacity responsibility, see also John Martin Fischer & Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (1998). For a jurisprudential analysis of capacity responsibility, see Stephen J. Morse, *Culpability and Control*, 142 U. Pa. L. Rev. 1587, 1587–1637 (1994). For a partial critique of Hart’s treatise, see Peter Cane, *Responsibility in Law and Morality*, (2002). On the issue of at what point an agent can be deemed normatively competent, Kohlberg in his study on cognitive development concluded that from thirteen years of age onward, an individual is capable of fulfilling moral obligations. See Lawrence Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in *Handbook of Socialization Theory and Research* 347 (David A. Goslin ed., 1969).

19. See Wayne R. Lafave & Austin W. Scott Jr., *Criminal Law* 212 (2nd ed. 1986) (“The basic premise that for criminal liability some mens rea is required is expressed by the Latin maxim *actus non facit reum nisi mens sit rea*.”). The dictum dates to Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (1644), 107 (1797).

20. Cassese notes that international criminal law has yet to make any practical distinction between the concept of excuse and that of justification. See Antonio Cassese, *Justifications and Excuses in International Criminal Law*, in *The Rome Statute of the International Criminal Court: A Commentary* 952–54 (Antonio Cassese et al. eds., 2002). On the other hand, in the context of domestic criminal law, Fletcher is arguably most responsible for generating scholarly interest in the distinction between justification and excuse, and today his is the predominant view: “A justification negates an assertion of wrongful conduct. An excuse negates a charge that the particular defendant is personally to blame for the wrongful conduct,” see George P. Fletcher, *The Right and the Reasonable*, 98 Harv. L. Rev. 949, 958 (1985). This is consistent with the following distinction by Hart: “In the case of ‘justification’ what is done is regarded as something which the law does not condemn, or even welcomes”; in contrast, excuse defenses are triggered when “the psychological state of the agent . . . exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals,” see H.L.A. Hart, *supra* note 15, 13–14. A number of other prominent scholars have commented on this distinction in a similar fashion, and there is substantial scholarship on this issue. See, e.g.: Paul Robinson, *Criminal Law Defenses* 100–101 (1984) (“Justified conduct is correct behaviour that is encouraged or at least tolerated. In determining whether conduct is justified, the focus is on the act, not the actor. An excuse represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic of the actor vitiates society’s desire to punish him. . . . The focus in excuses is on the actor.”); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 318–19 (1996) (“[J]ustifications are said to identify acts that produce morally preferred states of affairs. . . . Excuses, in contrast, are said to identify circumstances in which an act is wrongful but the actor blameless.”); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 1897 (1984) (“If A’s claim is that what he did was fully warranted . . . A offers a justification; if



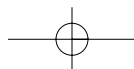
victims²¹; instead it is whether, based on a unique set of facts, a reasonable person would have responded in the same way as the accused.²² It follows that, in principle, nothing prevents a fact finder from applying the excuse theory in relation to war crimes, genocide, and crimes against humanity,²³

A acknowledges he acted wrongfully but claims he was not to blame . . . he offers an excuse.”); Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, 154 (1993) (“[A]s a justification . . . no wrong act has been done. . . . As an excuse . . . the focus moves from the question of the value of the act to the position, condition or circumstances of the actor and their effect on his culpability.”); M. Moore, *supra* note 15, 483, (1997) (“[J]ustifications answer a different moral question than do excuses. . . . When an action is justified, any prima facie wrongfulness is eliminated by the other (and good) attributes of the action; when an action is excused, it is still wrongful but the actor cannot be held responsible for it because she is not culpable.”).

21. See, e.g., Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 *Mod. L. Rev.* 467 (1988) (emphasizing in relation to provocation that the trend today is to focus on the perpetrator’s self-control rather than the conduct of the decedent, and therefore to treat the defense as a form of excuse).

22. See G. P. Fletcher, *supra* note 20, 955 (“Claims of justification direct our attention to the propriety of the act in the abstract; claims of excuse, to the blameworthiness of the actor in the concrete situation.”).

23. After all, as stated by John C. Smith, “to allow a defence to crime is not to express approval of the action of the accused but only to declare that it does not merit condemnation and punishment,” see *Justification and Excuse in the Criminal Law*, 13 (Hamlyn Lectures, 1989). There has been a great deal of debate amongst philosophers on the notion of an absolute moral prohibition of intentional homicide of innocent noncombatants. See, e.g., Thomas Nagel, *War and Massacre*, 1(2) *Phil. & Pub. Aff.* 123–44 (1972) (Maintaining as absolute the moral prohibition of intentional homicide of innocent noncombatants, he contends that there are strong consequentialist reasons for “adhering to any limitation which seems natural to most people—particularly if the limitation is widely accepted already. An exceptional measure which seems to be justified by its results in a particular conflict may create a precedent with disastrous long-term effects.” (*ibid.*, 125)); Richard Brandt, *Utilitarianism and the Rules of War*, 1(2) *Phil. & Pub. Aff.* 145–65 (1972) (expressing a similar view as Nagel); Philip E. Divine, *The Principle of Double Effect*, 19 *Am. J. Juris.* 44–60 (1975) (sharing the same opinion as Nagel and Brandt). It is difficult to see how the moral prohibition of intentional homicide against innocent persons can be made absolute given the complexities of the legal field. This would amount to an imbalance between offense and defense or between *actus reus* and *mens rea*—it would mean both the annulment of all defenses and the imposition of strict liability offenses—effectively ensuring a return to the Aristotelian approach (*arête*) at the expense of Kantian deontological revolution. Thus the better view is that an absolute moral prohibition of intentional homicide against innocent persons is untenable; see *Calley v. Callaway*, 382 F. Supp. 650 (1974), in *The My Lai Massacre and Its Cover-up: Beyond the Reach of Law?*, 553 (Joseph Goldstein, Burke Marshall, & Jack Schwartz eds., 1976) (in which Judge Robert Elliott, upon releasing Lt. Calley on parole in 1974, is quoted as saying “war is war and it’s not unusual for innocent



since it offers a more principled perspective to the question of why people who previously had no inclination toward violence would go on to perpetrate such violent crimes.²⁴

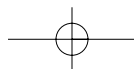
However, the area of excuse and mitigation in the context of international criminal law (ICL) remains in flux.²⁵ A catalogue of problems currently exists: there are no clear guidelines for presenting relevant evidence to support either of these concepts²⁶; there is no clear dichotomy between excuse and mitigation—the line between mitigation and excuse is known to mark the boundary of criminal responsibility. Yet, in the ICL context it is difficult to know where this boundary lies; owing to confusion and a lack of a clear picture of how a person's criminal responsibility may be affected

civilians such as the My Lai victims to be killed. It has been so throughout recorded history"). From this perspective, the defense of excuse should be applicable to international crimes regardless of their level of heinousness. See Paul H. Robinson, *Criminal Law Defenses*, 82 *Colum. L. Rev.* 203 (1982) (making the remark that an excused actor admits harm or evil but claims absence of personal culpability); see also Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 *Am. U. L. Rev.*, 11, 22–23 (1986) (“[E]xcuses will apply only when the wrongful conduct is substantially more attributable to coercive influences than to free will. Because the act was not voluntary, commission of the wrongful act is not determinative of the actor’s moral blameworthiness. Therefore, the excused actor cannot be punished solely on the basis of performing the act.”).

24. As stated by Card, “[H]arm is not evil unless aggravated, supported, or produced by culpable wrongdoing,” see Claudia Card, *The Atrocity Paradigm*, 5 (2002).

25. One explanation is that, prior to the establishment of contemporary international criminal tribunals such as the ICTY, ICTR, and ICC, voluntary impairment defenses were rarely asserted in war crimes prosecutions. Another explanation has been forwarded by Esser: there are “certain psychological reservations towards defences. By providing perpetrators of brutal crimes against humanity . . . with defences for their offences, we have effectively lent them a hand in finding grounds for excluding punishability”; see Albin Esser, *Defences in War Crimes Trials*, in *War Crimes in International Law*, 251 (Yoram Dinstein & Tabory Mala eds., 1996); see also Per Saland, *International Criminal Law Principles*, in *The International Criminal Court: The Making of the Rome Statute*, 189, 208–209 (Roy S. Lee ed., 1999) (maintaining that Article 31(2) of the ICC Statute gives the Court a residual power to refuse to apply a defense to an individual case even where text of the statute might require it).

26. For instance, although the Rules of Procedure of the International Criminal Tribunal for the Former Yugoslavia make reference to special defenses, aside from diminished responsibility, they do not mention what those special defenses are. See Peter Krug, *The Emerging Mental Incapacity Defence in International Criminal Law: Some Initial Questions of Implementation*, 94 *Am. J. Int’l L.* 317, 319 (2000).

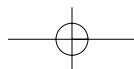


by contextual determinants, judges have vacillated between guilt and innocence, between exoneration and condemnation, and between heuristics²⁷ and normative reasoning. As a result the boundary of international criminal responsibility is simultaneously expanding and contracting, and thereby exposing fissures in the edifice of international criminal law. Thus inconsistency and a lack of uniformity exist in the treatment of defendants vis-à-vis excuse and mitigating circumstances. Furthermore, in exercising their discretion judges have narrowly focused on volition and reason²⁸ at the trial phase, thereby failing to take sufficient account of relevant contextual processes in attributing blame.²⁹ The employment of a bright lines

27. See, e.g., Amos Tversky and Daniel Kahneman, Judgment under Uncertainty: Heuristics and Biases, 185, no. 4157 *Science*, 1124–31, 1124 (1974) (“Many decisions are based on beliefs concerning the likelihood of uncertain events such as . . . the guilt of a defendant. . . . What determines such beliefs? How do people assess the probability of an uncertain event or the value of an uncertain quantity? This article shows that people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations. In general, these heuristics are quite useful, but sometimes they lead to severe and systematic errors.”); Keith E. Stanovich, The Fundamental Computational Biases of Human Cognition, in *The Psychology of Problem Solving*, 291–342 (Janet E. Davidson & Robert J. Sternberg eds., 2003).

28. Here we are able to contrast a Kantian approach with an Aristotelian approach. Kant for instance stated that “[t]he will is not only the precondition for carrying out given moral obligations; it is the origin of all concrete moral obligations which come into being through the moral will.” In other words, moral choice or moral freedom is central to individual criminal responsibility. See Heiner Bielefeldt, *Autonomy and Republicanism: Immanuel Kant’s Philosophy of Freedom*, 25 *Pol. Theory*, 528 (1997); see also Andrew J. Ashworth, *Belief, Intent and Criminal Liability*, in *Oxford Essays in Jurisprudence*, 3rd Series 1, (John Eekelaar & John Bell eds., 1987). Aristotle, on the other hand, would have stated that as long as a actor is sane then that actor is presumed to be fully capable despite the hard choices he or she faces: “For example, a tyrant who had a man’s parents or children in his power might order him to do something dishonourable on condition that, if the man did it, their lives would be spared; otherwise not. . . . Now in the imaginary cases we have stated the acts are voluntary. For the movement of the limbs instrumental to the action originates in the agent himself, and when this is so it is in a man’s own power to act or not to act. Such actions are therefore voluntary”; see Aristotle, *The Nicomachean Ethics*: Book III, 78 (James Alexander Kerr Thomson trans., 1976).

29. Current research in the field of social psychology evidences a shift from neo-Aristotelian virtue ethics and the idea of a stable and firm character trait to the notion of “fundamental attribution error”—in other words, the tendency to underestimate the influence of external factors and overestimate the influence of internal factors. See, e.g., Gilbert Harman, *Moral Philosophy Meets Social Psychology*, 99 *Proc. Aristotelian Soc’y* 315–31 (1999) (concluding that our ordinary attributions are “widely incorrect and, in fact,



approach³⁰ has arguably contributed to a distorted picture of international criminal conduct as originating largely as the result of personal preference and disposition instead being of the product of a combination of environmental, personal, and other influences not always within individual control.³¹

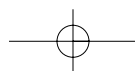
Finally, the purpose of this paper goes far beyond clarifying the relationship between excuse and mitigation to encompass the invention of tools by which to grade culpability in the ICL context as well as an investigation into the philosophical presumptions common to modern legal systems: agency, moral responsibility, and culpability,³² in the ICL

there is no evidence that people differ in their character traits” and that “despite appearances, there is no empirical support for the existence of character traits”); see also John M. Doris, *Persons, Situations, and Virtue Ethics*, 32:4 *Nous* 504–30 (1998) (arguing that a situationist causal explanation of the agent’s behaviour is better than the explanation of trait theorists).

30. See Jose E. Alvarez, *Rush to Closure*, 96 *Mich. L. Rev.* 2031, 2055–56 (1998) (“[T]he perpetrator-driven nature of the rules of evidence, the requirements of substantive law, and the respective roles, as traditionally conceived, of prosecutor, defence attorney, and judge, suggest the need to draw bright lines that are often—perhaps usually—inconsistent with the rendering of a nuanced history. . . . From the perspective of . . . judges, to emphasize . . . the personal culpability of Milosevic or the impact of certain cultural or religious institutions would be of questionable relevance to the narrow legal issues.”); see also Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith*, 43 *U. Pitt. L. Rev.* 307, 320–33 (1982) (pointing out the merits and demerits of “bright-line” rules). Critical scholars have demonstrated that power arrangement is just as significant as rational choice in the attribution of criminal responsibility; see, e.g., Marion Smiley, *Moral Responsibility and the Boundaries of Community, Power and Accountability from a Pragmatic Point of View*, (1993) (maintaining that the attribution of responsibility is a reflection of political power); Elizabeth L. Hillman, *Gentlemen Under Fire*, 26 *Law & Ineq.*, 1, 3 (2008) (“[T]he perception that high-ranking officers are rarely disciplined and almost never criminally prosecuted is so common partly because it is true.”).

31. The direct perpetrators of international crimes are just a “cog in the wheel” of a system. See Victoria F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 *U. Penn. L. Rev.* 1691, at 1729–30 (2003) (“[O]ur attention to individualized notions of voluntariness already assumes the state out of the picture. By focusing our attention on voluntariness as a feature of individual conduct (as opposed to the defendant’s relation to the state), we have chosen a particular level of analysis. We have chosen to ignore the institutional effects of the case.”).

32. See Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 *Harv. L. Rev.* 959, 961, (1992) (concluding, “The core of criminal law doctrine, centred around the concept of *mens rea* and the variety of criminal excuses, probably comes closer than any other set of social practices to . . . [a] conception of the responsible human subject . . . characterized exclusively by a rational free will unencumbered by character, temperament, and circumstances.”); Michael S. Moore, *Prima Facie Moral Culpability*, 76 *B.U. L. Rev.* 319 (1996) (“any being who is held responsible must be sufficiently rational and autonomous.”).



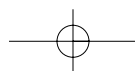
context.³³ To achieve the aforementioned aims, this paper will attempt to synthesize factual and theoretical knowledge—in other words, empirical facts from the social sciences and the doctrinal points of law.³⁴ Thus this paper recognizes that the social science field is able to supply the ICL field with relevant empirical data that address issues of volition and reason, and possibly with the relative weight to grant macro-level structural, situational, and cultural phenomena.³⁵ The main argument is that international crimes are committed in settings where individuals feel powerless, unduly constrained, and unfairly treated. Such crimes are therefore not a product of horizontal interactions between individual perpetrators at equidistance from each other; rather they are vertical interactions involving a chain of subordinates with the superior at the top—the powerful v. the powerless, the winners v. losers, the strong v. the weak.³⁶ The paper is divided into three main conceptual parts.

33. See Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 *Colum. L. Rev.* 1768 (2005) (observing that Fletcher and Drumbl “entertained the possibility that the first principle of domestic criminal law—personal culpability—may have to be modified or abandoned, if international law is ever to successfully ‘adapt . . . the paradigm of individual guilt to the cauldron of collective violence’ epitomized by mass atrocity,” quoting Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 *Mich. L. Rev.* 1295, 1309 (2005)). See also Claus Kreß, *Claus Roxin’s Lehre von der Organisationsherrschaft und das Völkerstrafrecht*, 153 *Goldammer’s Archiv für Strafrecht*, 304 (2006) (discussing the vertical dimension of system criminality, “Here the brains or mastermind behind the criminal act is treated as the principal perpetrator rather than an accomplice to the crime.”); Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 *J. Int’l Crim. Just.* 159, 179–83 (2007) (similarly discussing the concept of *Organisationsherrschaft*).

34. See, generally, Richard Lempert, *Between Cup and Lip: Social Science Influences on Law and Policy*, 10 *Law & Pol’y* 167 (1988).

35. See Deborah Woo, *Cultural “Anomalies” and Cultural Defenses: Towards an Integrated Theory of Homicide and Suicide*, 32 *Int’l J. Soc.* 279 (2004).

36. Essentially leaders have “dominated” followers on a macro level. According to Foucault, domination can be activated when the relations of power are organized in such a way that they are “perpetually asymmetrical and the margin of liberty is extremely limited.” See M. Foucault, *The Ethics of the Self as a Practice of Freedom*, in *The Final Foucault*, 1–21, 12 (James Bernauer & David Rasmussen eds., 1994). See R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 *Cath. U. L. Rev.*, 459 (1994) (pointing out the illogic of imputing moral responsibility to the most deprived individuals); Anthony Duff, *Punishment, Citizenship and Responsibility*, in *Punishment, Excuses and Moral Development*, 23 (Henry Tam ed., 1996) (pointing out that structural inequalities constitute the strongest moral basis for disadvantaged offenders to resist punishment, “not because their actions are justified, not



The first part identifies the roots of current defects in the framework for excuse and mitigation under international criminal law. Here the main arguments are that the conceptual misconstruction of perpetrators of wartime atrocities³⁷—that is, Mr. or Ms. Anybody—and the relegation of excuse from the guilt phase to the sentencing phase have largely combined to undermine the concepts of excuse and mitigation under international criminal law. The second part of the paper identifies overlaps, gaps, and ambiguities in the current framework for excuse and mitigation under international criminal law. The final part involves an attempt to modify the current system of excuse and mitigation.

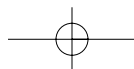
I. THE CONCEPTUAL FRAMEWORK FOR EXCUSE AND MITIGATION: UNDERLYING REASONS OF DEFECTS

In the discussion below, it will be demonstrated that substantive and procedural factors are responsible for current difficulties experienced with the implementation of the concepts of excuse and mitigation in the ICL context. Substantively, the main problem lies in the conceptual construction of a perpetrator of wartime atrocities. In other words, the following fundamental question is inadequately answered at present: What motivates a wartime offender to commit international crimes?³⁸ It is argued below that individuals who commit atrocities in the context of war do not fit neatly into the label of “crazy” or “sick,” because they act in response to external rather than internal stimuli. Finally, procedurally, the key issue pertains to

because they ought to be excused, but because we lack the moral standing to condemn them”). In feminist legal theory, Kathryn Abrams contends that liberalism concentrating on individual autonomy does not adequately capture the concept of agency because it “mutes . . . differences in power or social circumstances,” K. Abrams, *Sex Wars Redux*, 95 *Colum. L. Rev.* 304, 361 (1995).

37. The term “perpetrators of wartime atrocities” refers to the foot soldiers who are often the primary perpetrators of international crimes. See, e.g., Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond*, 5 *J. Int’l Crim. Just.* 638, 639 (2007) (observing that “a fundamental dilemma of legal responses to mass atrocity . . . is that the atrocities are usually carried out by foot soldiers but it is often the generals and presidents who bear a greater share of moral responsibility”).

38. See Herbert, C. Kelman, *Violence without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers*, 29 *J. Soc. Issues*, 26–61 (Posing the same question).



the logic of combining guilt with punishment exclusively at the sentencing phase. It will be contended below that such an approach arguably blurs the distinction between excuse and mitigation.

A. Conceptual Misconstruction of a Perpetrator of Wartime Atrocities

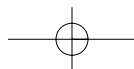
The general narrative of wartime violence depicts men and women who commit genocide, war crimes, and crimes against humanity as monsters.³⁹ ICL judges have been willing to accept only very specific and simplified characterizations of war criminals and the forces that drive them to commit atrocities, as reflected in the limited range of excuse defenses available to this category of offenders. Rather than devising a framework for assessing the reasonableness of the actions of those who commit atrocities in time of war, the judges have resorted to the “how do we feel about it”⁴⁰ heuristic and therefore have proceeded on the premise that those who commit atrocities fall into a category of psychological dysfunction. The current perspective arguably compromises a defendant’s right to a fair trial by wrongly inducing that defendant to assert inaccurate and harmful defenses such as insanity and diminished responsibility.⁴¹ Under this perspective, the defendant cannot simply assert as a defense that state propaganda⁴² caused him

39. See J.E. Alvarez, *supra* note 30, 2037–40 (arguing that the Nuremberg trials encouraged the public perception that “Nazi war criminals were merely an especially evil collection of gangsters bent solely on aggressive conquest”). See *Prosecutor v. Tadić*, Case No. IT-94-I-T, Sentencing Judgment, 59 (July 14, 1999) (“[F]or such a man to have committed these crimes requires an even greater evil will on his part than that of a lesser man.”); see also Alex Ross, *Television View: Watching for a Judgment of Real Evil*, *N.Y. Times*, Nov. 12, 1995, at B37 (drawing attention to the coverage of Dusko Tadić’s trial by Court TV).

40. See Norbert Schwarz, *Feelings as Information: Moods Influence Judgments and Processing*, in *Heuristics and Biases: The Psychology of Intuitive Judgment*, 539 (Thomas Gilovich, Dale Griffin, & Daniel Kahneman eds., 2002) (“[W]hen the judgment is overly complex and cumbersome to make . . . individuals are likely to resort to the ‘How-do-I-feel-about-it?’ heuristic.”).

41. See, e.g., Jennifer L. Larkin, *The Insanity Defense Founded on Ethnic Oppression: Defending the Accused in the International Criminal Tribunal for the former Yugoslavia*, 21 *N.Y.L. Sch. J. Int’l & Comp. L.* 91 (2001).

42. “Whether we like it or not, there is a ‘science’ of influencing others. The most successful by-products of this science are the minor arts of propagandizing, advertising and political manoeuvring”; see Ernst G. Beier & Evans G. Valens, *People-Reading: How We Control Others, How They Control Us*, 15, (1975).



or her to act; rather defendant must mold the truth into the framework of a diminished responsibility or insanity defense.⁴³

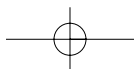
However, both insanity and diminished responsibility compromise the integrity of the international criminal justice system by masking the role of state propaganda in the commission of international crimes. A case in point is the Banović judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY).⁴⁴ The defense submitted that a number of factors should be taken into account in assessing the criminal liability of the accused. They included the following: the low rank of the accused; the state of mind of the accused who, it was submitted, never intended to kill anyone; and the effect of the aggressive wartime propaganda on the accused. Yet despite this, the Trial Chamber came to the conclusion that “the Defence has fallen short of raising a defence of diminished mental responsibility in mitigation.”⁴⁵ This was an unfortunate conclusion given the ample evidence of the role played by social elites in engineering mass atrocities in the context of the former Yugoslavia. In this respect, Cerović made the following statement in relation to the conflict in the former Yugoslavia: “[T]he war did not start spontaneously at all. On the contrary, it took years of careful preparation, fuelled by horrifying nationalistic propaganda. . . . Television and other powerful media smoothly switched from communist to nationalist rhetoric and propaganda inciting war. The media was under the strict control of government; many journalists, who never learned to be independent, readily accepted the new directions. . . . In the final phase nationalism can actually evolve beyond madness. . . .”⁴⁶

43. International criminal law (ICL) is not alone in this. Of interest here is V.F. Nourse, *supra* note 31, at 1733 (“Currently, our only option in a crudely descriptive, hyper individualistic world appears to be to pathologize defendants, to render them sick, insane, or somehow subject to special rules for special classes. The poor town drunk, poor battered woman, and the poor ill-educated Native American: they are sick and all good liberals should have compassion. But this kind of condescension, however wrapped up in kindness, risks blindness to oppressive relations.”).

44. See *Prosecutor v. Banović*, Case No. It-02-65/1-S Trial Chamber (Oct. 28, 2003).

45. See *ibid.*, para. 79.

46. See Stojan Cerovic, *The Rise of Serbian Nationalism*, 26 *N.Y.U. J. Int’l L. & Pol.* 527, 528–30 (1994); see also F. Gopalani Ameer, *The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute*, 32 *Cal. W. Int’l L.J.* 87, 110 (2001) (making a similar observation).



It is clear from the above that, by seeking to describe mass atrocities as originating from mental illness, international criminal law is in effect providing a distorted picture of both the psychological makeup of the accused—that is, the actual source and content of an accused’s goal, desires, values, and emotions—as well as the bearing of each of these factors on the moral agency of that accused.⁴⁷ In this respect, the following statement by Oberschall confirms that atrocities were perpetrated by ordinary men and women in the former Yugoslavia out of normality processes instead of out of abnormality processes:

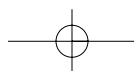
For explaining ethnic manipulation one needs the concept of a cognitive frame. A cognitive frame is a mental structure which situates and connects events, people and groups into a meaningful narrative in which the social world that one inhabits makes sense and can be communicated and shared with others. Yugoslavs experienced ethnic relations through two frames: a normal frame and a crisis frame. People possessed both frames in their minds: in peaceful times the crisis frame was dormant, and in crisis and war the normal frame was suppressed. . . .

The crisis frame was grounded in the experiences and memories of the Balkan wars. In these crises, civilians were not distinguished from combatants. . . . Everyone was held collectively responsible for their nationality and religion, and became a target for of revenge and reprisals. . . .

If the normal frame prevailed in the 1980s . . . how did the nationalists activate and amplify the crisis frame after decades of dormancy? The emotion that poisons ethnic relations is fear . . . : fear of extinction as a group, fear of assimilation, fear of domination by another group, fear of one’s life and property, fear of being a victim once more. After fear comes hate. The threatening others are demonized and dehumanized. The means of awakening such fears were through the news media, politics, education, popular culture, literature, history and the arts.⁴⁸

47. On subliminal conditioning of attitudes, see Jon A. Krosnick, Andrew L. Betz, Lee J. Jussim, & Ann R. Lynn, *Subliminal Conditioning of Attitudes*, 18(2) *Personality & Soc. Psychol. Bull.* 152–62, 158–59 (1992) (“An entire childhood spent hearing a group of people referred to with negative affect or seeing them, either in the media or in reality, associated with situations that arouse negative affect may generate a fairly strong negative attitude. This attitude may lead an individual to generate consonant beliefs about the group’s characteristics.”). See I. Tallgren, *The Sensibility and Sense of International Criminal Law*, *supra* note 2, 571 (“The commission of crimes may be encouraged . . . by various techniques affecting the offender’s judgment as to what constitutes prohibited conduct. That way the actor may be manipulated, lured or indoctrinated to commit crimes. . . .”).

48. See Anthony Oberschall, *The Manipulation of Ethnicity: From Ethnic Cooperation to Violence and War in Yugoslavia*, 23:6 *Ethnic & Racial Stud.* 982–1001, at



It follows from the above that, far from being crazy, those who killed possibly acted out of fear induced by manipulation to which almost anybody in any country could have succumbed.⁴⁹ What is needed, therefore, is to review the specific and simplified characterizations of the forces that drive ordinary people to commit wartime atrocities, which currently permeates available legal excuses.

B. Fusion of Guilt and Punishment Determinations

A perusal of ICL cases reveals a tendency to combine guilt with punishment exclusively at the sentencing phase.⁵⁰ The *Cesić* case⁵¹ shall be employed to illustrate preliminary concerns about this practice. In the *Cesić* case, the accused plea of an acute stress reaction to the war was discussed in the sentencing phase, where it was placed under personal circumstances and dealt with alongside issues such as his family life and his childhood,⁵² as is evident below:

Personal Circumstances

(a) Argument of the Parties

The Defence alleges a number of personal circumstances to mitigate punishment. These include the following.

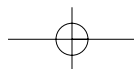
989–90 (2000); see also *The International Spread of Ethnic Conflict: Fear, Diffusion and Escalation* (David A. Lake & Donald Rothchild eds., 1998). It has been pointed out by psychologists that the intensity of emotions alters perceptual cognitive, expressive, and physiological systems; see, e.g., Nico H. Frijda, *The Emotions* (1986); Richard S. Lazarus, *Emotion and Adaptation* (1991).

49. For seminal work on fear appeals, see Irving L. Janis & Seymour Feshbach, *Effects of Fear-Arousing Communications*, *J. Abnormal & Soc. Psychol.* 48, 78–92 (1953). For the persuasive effects of fear appeals, see Franklin J. Boster & Paul Mongeau, *Fear-Arousing Persuasive Messages*, in *Communication Yearbook* 8, 330–75 (Robert N. Bostrom ed., 1984); Paul A. Mongeau, *Another Look at Fear-Arousing Persuasive Appeals*, in *Persuasion: Advances Through Meta-Analysis*, 53–68 (Michael Allen & Raymond W. Preiss eds., 2000).

50. See *California v. Ramos*, 463 U.S. 992, 1007–1008 (1993) (noting that there is a “fundamental difference between the nature of the guilt/innocence determination at issue . . . and the nature of the life/death choice at the penalty phase.” In the latter phase it states that “the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. . .”).

51. See *Prosecutor v. Cesić*, Sentencing Judgment, IT-95-10/1-S (Mar. 11, 2004).

52. See Krug, *supra* note 26, at 329 (suggesting that the placement of issues that affect guilt with those that affect punishment at the sentencing phase arises from procedural differences between continental law and common law. Continental systems adhere to this approach whilst common law systems reject such an approach.).



- (i) Ranko Cestic was brought up by his mother after his parents divorced;
- (ii) He is married with no children;
- (iii) The fact that Ranko Cesić and his partner's incomes were low proves that he did not personally gain during the conflict, which the Defence presents as a rare phenomenon;
- (iv) At the time of commission of the crimes he was 27 years old; and
- (v) The crimes were committed during the first weeks of the war at a time of chaos, confusion and in a context of widespread propaganda, when Ranko Cesić's behaviour was affected by an acute stress reaction to the war.⁵³

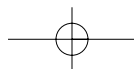
In general there are three main problems with the approach of mixing relatively minor issues—such as the accused's age, his marital status, the fact that he was brought up by his mother after his parents divorced, and the fact that he and his partner's incomes were low—with a fundamental issue such as post-traumatic stress disorder. First, it has the effect of blurring the distinction between excuse and mitigation. In this respect, Hill noted that “prior good deeds, support of family, lack of previous misbehaviour—do not have the same intrinsic connection to moral blame as do the emotions and motivations underlying the criminal act itself. These characteristics of the actor are temporally and causally separate from the act the criminal law seeks to punish.”⁵⁴ It follows that, under the current perspective, there is a danger that defendants who attribute their conduct to unusual exogenous pressures and not to moral deficiency are unfairly equated with those seeking the right to commit crimes at a reduced cost.

Second, such an approach undermines crucial culpability determinations. In relation to this, Morse lists a catalogue of problems arising from allowing judges to assess culpability issues at the purely discretionary sentencing stage:

Although partial responsibility can in principle be fully considered at sentencing, this method suffers from substantial defects. First and most important, sentencing is a matter of discretion. Judges may refuse to give reduced rationality its just mitigating force, and there may be wide disparities among judges sentencing similarly situated defendants. Judges, like all members of a society, have some implicit or explicit “theory” of responsibility and how

53. See *Prosecutor v. Cesić*, supra note 51, at paras. 88–89.

54. See Rachael A. Hill, Character, Choice, and “Aberrant Behavior,” 65 U. Chi. L. Rev. 975, 985 (1998).



it should guide punishment. Judges' responsibility theories will also differ substantially. There is no guarantee that any individual judge's theory will be consonant with what the legislature or other more representative groups would agree is fair, and thus, the judge's mitigation decision may not comport with community norms. Moreover, mitigating primarily at sentencing removes this important culpability determination from the highly visible trial stage, at which the community's representative—the jury—makes the decision, and relegates it to the comparatively low visibility sentencing proceeding. Our criminal justice system has a preference for making crucial culpability determinations that affect punishment at trial. Partial responsibility is an explicitly normative judgment that should be made, therefore, by the community's representatives at the guilt phase, and not by judges at sentencing.⁵⁵

Finally, the approach of combining factors that are causally remote from the criminal act with those that are causally proximate “defeats the purpose of individualized sentencing in a bifurcated proceeding.”⁵⁶ Crocker has argued that “[t]he punishment-phase determination is not a recapitulation of the guilt-phase decision, but both a reconceptualization of the defendant's guilt-phase culpability and the consideration of new factors relevant only to punishment.”⁵⁷ It follows that the main concern here is that combining issues relevant to guilt with those pertaining to punishment together at the sentencing phase introduces the danger that punishment decision will reflect only the blameworthiness of the defendant and not both the defendant's blameworthiness and culpability for the crime.

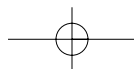
II. EXCUSE AND MITIGATION: OVERLAPS, GAPS, AND AMBIGUITIES

Having laid the groundwork for understanding why the framework for excuse and mitigation under international criminal law is defective in section II, this section will attempt to identify and analyze overlaps, gaps, and ambiguities arising from the substantive and procedural defects identified above.

55. See Stephen Morse, *Diminished Rationality, Diminished Responsibility*, 1 *Ohio St. J. Crim. L.* 289–308, 298–99 (2003).

56. See Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness*, 66 *Fordham L. Rev.* 21, 26 (1997).

57. See *ibid.*



A. Excuse Defenses and Mitigating Circumstances

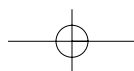
Under international criminal law, the equation of guilt with punishment has arguably led to the collapsing of the distinction between excuse and mitigating circumstance. This viewpoint is supported by the fact that presently a wide range of factors are often miscategorized as mitigating. As stated by Harmon and Gaynor: “ICTY jurisprudence has identified a considerable number of mitigating circumstances, but does not clearly distinguish between those circumstances which mitigate guilt (such as duress and diminished mental responsibility) and those which have no effect on criminal responsibility, but mitigate the appropriate punishment (such as a guilty plea, voluntary surrender, co-operation with the Prosecution, remorse, post-crime efforts at reconciliation or ill-health).”⁵⁸

Furthermore, in support of the opinion that excuse defenses overlap with mitigating circumstances is a systematic analysis of the following selected cases. In the *Plavšić* case, the meaning of the term of “mitigating” is evident in the following statement: “A Trial Chamber has the discretion to consider any other factors which it considers to be of a mitigating nature. These factors will vary with the circumstances of each case. In addition to substantial co-operation with the Prosecutor, Chambers of the International Tribunal have found the following factors relevant to this case to be mitigating: voluntary surrender; a guilty plea; expression of remorse; good character with no prior criminal conviction; and the post-conflict conduct of the accused.”⁵⁹ It is submitted that these above constitute mitigating circumstances because they do not have the same intrinsic connection to moral blame as excuse defenses. In other words, they are characteristics of the actor that are temporally and causally separate from the act that an ICL tribunal or court seeks to punish. They are therefore only relevant to penalties.

However, other cases have distorted the meaning of “mitigating” or “mitigation” in the ICL context by including excuse defenses in the *Plavšić* list and by treating both in an identical manner. For instance, in relation to duress, the Trial Chamber in the *Erdemović* case noted that

58. See Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. Int'l Crim. Just. 683, 690 (2007).

59. See *Prosecutor v. Plavšić*, IT-00-39-6k 40/1-S, Sentencing Judgement, Trial Chamber, para. 65 (Feb. 27, 2003).



duress “may be taken into account only by way of mitigation.”⁶⁰ The Erdemović case itself draws attention to the problematic status of duress under international criminal law.⁶¹ It should be recalled that the ICTY Trial Chamber in its sentencing judgment of November 29, 1996,⁶² held that duress can be a complete defense to international crimes; specifically, “while the complete defence based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application are particularly strict.”⁶³ Also at the Appellate level, the Appeals Chamber rejected by a very narrow majority of 3–2 the Trial Chamber’s finding on duress as a complete defense.⁶⁴ On the one hand, Judge Li⁶⁵ concurred with the opinions of Judges McDonald and Vohrah that duress is not a complete defense but merely a mitigating factor.⁶⁶ On the other hand, both Judge Cassese and Judge Stephen were of the opinion that duress should constitute a complete defense. Judge Cassese in his dissenting opinion wrote: “after finding that *no specific international rule* has evolved on the question of whether duress affords a complete defence to the killing of innocent persons, the majority should have drawn the only conclusion imposed by law and logic, namely that the *general* rule on duress should apply.”⁶⁷ Judge Stephen in his dissenting opinion stated that “[i]t is for the foregoing reasons that I conclude that, despite the exception which the common law makes to the availability of duress in cases of murder where the choice is truly between one life or another, the defence of duress can be adopted into international law as deriving from a general principle of law recognized by the world’s major legal systems, at least

60. See Prosecutor v. Drazen Erdemović, Case No. IT-96-22-T bis, Sentencing Judgement, para. 17 (March 5, 1998).

61. See, e.g., Peter Rowe, Duress as a Defence to War Crimes after Erdemovic, 1 Y.B. Int’l Humanitarian L., 210 (1998); David Turns, The International Criminal Tribunal for the Former Yugoslavia: The Erdemovic Case, 47 Int’l & Comp. L.Q. 461 (1998); Robert Cryer, One Appeal, Four Opinions, Two Philosophies and a Remittal, 2 J. Armed Conflict L. 193 (1998).

62. See Prosecutor v. Drazen Erdemović, Case No. IT-96-22-T, T.Ch. I, Sentencing Judgement (Nov. 29, 1996).

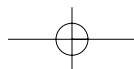
63. See *ibid.*, para. 19.

64. See Prosecutor v. Erdemović, Case No. IT-96- 22-A, Oct. 7, 1997 (ICTY Appeals Chamber).

65. See *ibid.*, Separate and Dissenting Opinion of Judge Li.

66. See *ibid.*, Joint Separate Opinion of Judge McDonald and Judge Vohrah.

67. See *ibid.*, Separate and Dissenting Opinion of Judge Cassese, para. 11.



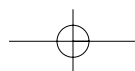
where that exception does not apply.”⁶⁸ In addition, disagreements in the Erdemović case were fuelled by inconsistencies under post-Nuremberg trials and under domestic law. All of this has led to a general state of uncertainty as to whether duress constitutes an excuse or a mitigating circumstance in the ICL context.

A second problematic situation involves the plea of diminished responsibility. In relation to diminished responsibility, the Appeals Chamber in the Celebici case gave the following explanations of its status: “the relevant general principle of law . . . is that the defendant’s diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. . . . Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is to be raised by the defendant as a matter in mitigation of sentence. As a defendant bears the onus of establishing matters in mitigation of sentence, where he relies upon diminished mental responsibility in mitigation, he must establish that condition on the balance of probabilities—that more probably than not such a condition existed at the relevant time.”⁶⁹ Sparr, for instance, criticized the confusion surrounding the status of diminished responsibility under international criminal law, as is evident in the following statement: “By not accepting the diminished-responsibility contention of defense, and therefore not demonstrating how their particular reduced-mental-capacity interpretation was applicable to future ICTY judgments, the Chamber in effect remained silent and left the matter in doubt. A key question is whether diminished responsibility is better considered as an affirmative defense or a sentencing mitigation factor. This is an important issue that can have significant substantive and procedural consequences.”⁷⁰

68. See *ibid.*, Separate and Dissenting Opinion of Judge Stephen, para. 66.

69. See *Prosecutor v. Delalić et al*, Judgement, Case No. IT-96-21-A, para. 590 (Feb. 20, 2001).

70. See Landy F. Sparr, *Mental Incapacity Defences at War Crimes Tribunals: Question and Controversy*, 33 *J. Am. Acad. Psychiatry & L.* 59–70, 64 (2005); Albin Eser, *Article 31: Grounds for Excluding Criminal Responsibility*, in *Commentary of the Rome Statute of the International Criminal Court*, 863–93, 875 (Otto Triffterer ed., 2nd ed. 2008) (pointing out that the Rome Statute treats diminished criminal responsibility as only a mitigating factor). See also Antonio Cassese, *Int’l Crim. L.* 224–28 (2003) (explaining that the post-World War II trials similarly treated diminished criminal responsibility as only a mitigating factor).



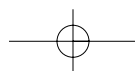
It follows from the above that excuse defenses now significantly overlap with mitigating circumstances under international criminal law. These overlaps are unfortunate because excuse defenses are primarily meant to relieve the accused of criminal responsibility and are taken into account by a fact finder before the verdict. Not only do they affect the final penalty, they also result in a change in the category of crime or offense with which the accused is ultimately convicted.⁷¹ They are therefore fundamentally different from mitigating circumstances, which come into the picture at the sentencing stage as a key criterion of punishment once a defendant is convicted and which, as a result, have no bearing on the assessment of guilt or innocence.⁷² In this respect, it is worth devoting attention to the viewpoint that both categories of defendants are similar—one argument is that it is questionable whether, in moral terms, murder is necessarily less culpable when performed in anger as a result of provocation, by a defendant whose conduct resulted from unusual exogenous pressures, than when performed out of cool deliberation by one who is merely seeking to receive moral credit for previously leading an exemplary life. Indeed it is possible to make the argument that it is morally unsustainable for anger and sudden loss of self-control to constitute the basis of a defense to crimes such as genocide, war crimes and crimes against humanity.⁷³ A second argument is that, from the perspective of sentencing, there is no difference between a provoked killer and a cold-blooded killer who subsequently shows remorse. This argument can be sustained to some extent because both types of offenders, when compared to a killer who shows no remorse, share one main characteristic: they are both reformable. In the Blaskić case, the Trial Chamber⁷⁴ made the following relevant statement vis-à-vis the relevance of

71. See P. Krug, *supra* note 26, at 329 (“[R]educed capacity [the English variant] does not serve as a justification for mitigating sentences. Instead, this variant reduces the level of criminal responsibility by finding an accused guilty of a lesser included offence instead of the higher crime for which he or she would have been liable but for reduced capacity.”).

72. See generally R. Hill, *supra* note 54, 975.

73. For critical literature in this area, see, e.g., Brad J. Bushman & Craig A. Anderson, *Is It Time to Pull the Plug on the Hostile versus Instrumental Aggression Dichotomy?*, 108 *Psychol. Rev.* 273, 273–79 (2001). For criminal law literature in support of the abolition of all partial excuses, including the defense of provocation, see Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 *J. Crim. L. & Criminology* 1, 30 (1984).

74. See *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14-T, Judgment (Mar. 3, 2000).



an accused's character traits to sentencing: "The character traits are not so much examined in order to understand the reasons for the crime but more to assess the possibility of rehabilitating the accused. High moral standards are also indicative of the accused's character."⁷⁵

Both arguments are however problematic. In relation to the first argument pertaining to the unsustainability of anger as a defense to international crimes, conceptually, it is illogical to equate hot-blooded actors⁷⁶ with cold-blooded killers. The reason is that the former commit crimes because they failed to exercise the requisite degree of self control.⁷⁷ Whilst they deserved to be punished for this failure, the law nevertheless should deem them to be less culpable and deserving of a lesser punishment than someone who kills with full mental capacity, whether or not that person subsequently voluntarily surrenders, pleads guilty, shows remorse, or had a previous good character with no prior criminal conviction.⁷⁸ Also, it is not certain that war criminals generally act out of anger; many may have acted out of fear, which is viewed as a less problematic alternative basis for a plea of provocation.⁷⁹ On the other hand, in terms of the second argument involving the equation of a provoked killer with a defiant killer who subsequently shows remorse,⁸⁰

75. See *ibid.*, para. 78o.

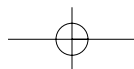
76. See William Sargant, *Battle for the Mind: A Physiology of Conversion and Brainwashing*, 79, 84, 99 (1985) (inter alia explaining that, in programming for political conversion, the speaker deliberately provokes nervous tension in the form of anger or anxiety to ensure undivided attention, increased suggestibility, and impaired judgment). For criminal law literature in support of retaining all partial excuses, including the provocation defense, see Joshua Dressler, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 *J. Crim. L. & Criminology* 953 (1984).

77. See Julius Kühn, *Emotion, Cognition and Motivation: II. The Functional Significance of Emotions in Perception, Memory, Problem-Solving, and Overt Action*, 2(4) *Sprache Kognit* 228–53 (1983) (Angry people are "prone to impulsive judgment and action."). See also Galen V. Bodenhausen et al., *Negative Affect and Social Judgment: The Differential Impact of Anger and Sadness*, 24(1) *Eur. J. Soc. Psychol.* 48 (1994).

78. See Coke, *supra* note 19, 47 ("Murder is when a man of sound memory [kills another] . . . with malice fore-thought, either expressed by the party, or implied by law."); 1 Matthew Hale, *The History of the Pleas of the Crown* 455 (1778) ("When one voluntarily kills another without any provocation, it is murder, for the law presumes it to be malicious.").

79. See Alex Reilly, *Loss of Self-Control in Provocation*, 21 *Crim. L. F.* 320, 330 (1997) (noting that fear is mixed with anger in situations involving the provocation defense).

80. For example, see *United States v. Lewis*, 111 F. 630, 634 (W.D. Tex. 1901) ("[The defendant's act] . . . was not the result of a cool, deliberate judgment, and previous malignity of heart, but solely imputable to human infirmity.").

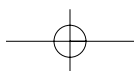


the following hypothetical shall be employed to demonstrate why such an equation is unwise: An accused kills his own neighbor. He admits to the crime. Here a sentencing judge will see the admission as a sign of culpability and sentence the defendant by appropriately calibrating the culpability punishment to the level of blameworthiness surrounding killings resulting from a calculated decision. Now change the hypothetical, so that the sentencing judge knows this additional fact: the accused has no previous criminal record, is married and has two children, is nineteen years of age, has demonstrated remorse for the act committed and has shown a strong sense of compassion toward the victim, and finally, the accused is in poor health.

The sentencing judge might well consider these facts as relevant to whether the accused has a reduced need for rehabilitation. But for the purpose of retribution, is the accused's previously clean record, together with the other positive personal circumstances, relevant to his desert? My suspicion is that most of us would probably be against the idea of a sentencing discount for the accused. However, it appears from the jurisprudence of the ICTY that the accused who kills his neighbor would have his desert calculated on the basis of both the gravity of the offense and the mitigating factors mentioned above. Under this approach, once the murder is weighed against the quality of the accused's entire life, the commission of murder weighs less than it otherwise would weigh, and the impact of the cumulative weight of good conduct would thereby lessen his desert for the murder.⁸¹ In other words, in measuring the harm caused by the defendant, sentencers under international criminal law have decided to broaden the relevant temporal context to take into account the defendant's record of good deeds.⁸² Harmon and Gaynor have criticized this approach as constituting a dilution of the accused sentence: "The cumulative effect of a Trial Chamber recognizing multiple factors of mitigation may result in a significant sentence reduction. When combined with the consistent ICTY practice of approving the release of convicted persons after they have served two-thirds of their sentences, sentences are significantly diluted, and a participant in large-scale crimes will be freed after a relatively short

81. For a critical analysis of these issues, see Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 *Notre Dame J.L. Ethics & Pub. Pol'y*, 99, 99–100 (1996).

82. See, e.g., *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgement, para. 134 (Dec. 10, 2003) (Good character is an "important mitigating factor.").



prison term.”⁸³ It follows from the above that mitigation of punishment on the basis of good character could convey the message that an offender will be treated leniently as long as he or she has a previously clean record. Given that international criminal trials involve the prosecution of very serious crimes, such an approach could be perceived as a denial of justice for victims.⁸⁴ Finally, the foregoing discussion has demonstrated that the boundaries between excuse and mitigating circumstances need clarification.

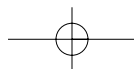
B. Mental Abnormality (diminished responsibility) and Mental Normality (provocation)

Under international criminal law as exemplified by the statutes and jurisprudence of the ICTY and ICTR (International Criminal Tribunal for Rwanda), there is a liberal policy toward the admissibility of evidence relevant to volitional impairment. As stated by Krug: “The normative structure of international criminal law does not pose any explicit prospective barriers to the admissibility of evidence: courts are authorized to admit all relevant evidence deemed to have probative value. For instance, the ICTY and ICTR definition of mental incapacity is broadly stated, without any prospectively applied categorical exclusion. In addition, it includes the concept of volitional impairment, which is expressed in terms of the inability to control one’s actions.”⁸⁵ It follows that the incorporation of the concept of volitional impairment into the legislative structures of the ICTY and ICTR considerably expands the range of potentially applicable causal factors. This opens the way for the admissibility of evidence on both internal and external causes of volitional impairment and, further, suggests that both provocation (psychological normality) and diminished

83. See Harmon & Gaynor, *supra* note 58, at 689.

84. See John Feinberg, *Doing and Deserving*, 98 (1970) (“Punishment is a conventional device for the expression of attitudes of resentment and indignation and of judgments of disapproval and reprobation on the part of the punishing authority himself or those ‘in whose name’ the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalty. . . .”) Following this line of reasoning, a failure to punish equates to a tacit approval of the conduct that has been perpetrated. See also Joseph Raz, *The Authority of Law: Essays on Law and Morality*, ch. 1 (1979) (emphasizing the importance of consistency in sentencing); John Finnis, *Natural Law and Natural Rights*, 26364 (1980).

85. See Krug, *supra* note 26, at 323–24.



responsibility⁸⁶ (psychological abnormality⁸⁷) are admissible to prove lack of capacity.

However, the degree to which either of the two defenses is redundant with or complementary to the other is as yet unclear. In this respect, the Banović and Celebici judgments demonstrate how the separation of the two defenses under international criminal law has created a gap in coverage into which a worthy defendant could land, finding no avail in either of the two defenses. As will now be demonstrated, the accused in both cases appeared to have fallen into such a gap. It is therefore worth discussing both cases in detail. In the Banović case, the accused criminal responsibility was linked to the ill-treatment of non-Serbs from Prijedor at Keraterm camp.⁸⁸ The indictment alleged that, between May 24, 1992, and August 30, 1992, the Keraterm camp, amongst others, was operated in a manner designed to ill-treat and persecute non-Serbs from Prijedor and other areas as a means to rid the territory of, or to subjugate, non-Serbs. The accused, who served as a camp guard during that period, admitted his participation in several persecutory acts including the murder of five prisoners; the beating of twenty-seven detainees; and the confinement in inhumane conditions, harassment, humiliation, and psychological abuse of Bosnian Muslims, Bosnia Croats, and other non-Serbs detained at the Keraterm camp. The defense put forward a number of factors, all related to the personal circumstances of the accused, which, it claimed, should mitigate the sentence.

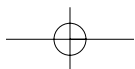
The most relevant of these factors was evidence introduced about the personality of the accused through a report prepared by Dr. Miklos Biro, a professor of clinical psychology at the University of Novi Sad, which was said to be based on “data of the case” as described in the indictment and obtained from the defense team, as well as interviews with the accused and his family.⁸⁹

86. See *R v. Byrne* [1960] 2 Q.B. 396, 403 (classifying diminished responsibility as an excusatory defense).

87. See *ibid.* (defining “abnormality of mind” as “a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal . . . wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment”).

88. See *Prosecutor v. Banović*, *supra* note 44.

89. See *ibid.*, para. 77.



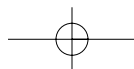
The summary of the “forensic psychological analysis” described the accused as a person of normal, below-average intelligence who shows signs of emotional immaturity, especially characterized by “bad impulse control.” The accused was said to have incorporated the authoritarian behavior model of his father, so that he was submissive to superiors and strict to subordinates. The report observed that with his low education and modest intellectual capabilities, the accused easily succumbed to the war propaganda that spread collective hatred and rumours about the enemy’s brutality. In Dr. Biro’s view, the combined effect of the war propaganda and authoritarian behavior help to explain why, psychologically, the accused did not understand the criminality of his behavior. The report nonetheless concluded that “the accused was able to understand general social and legal norms, as well as to anticipate the consequences of their disregard.”⁹⁰ Finally, Dr. Biro observed that the accused “is now fully aware of the social, moral, and legal context of his acts”⁹¹ as a result of the proceedings against him and his detention.

Basically the defense employed this report to establish that the accused’s low level of education and modest intellectual capabilities affected his culpability. In response, the Trial Chamber noted that, in advancing the evidence contained in Dr. Biro’s report, the defense had fallen short of raising a defense of diminished mental responsibility in mitigation.⁹² It rejected the assessment contained in Dr. Biro’s report to the effect that the accused may have been unable to appreciate the unlawfulness of his conduct. The Trial Chamber held *inter alia* that it did not accept the argument that the accused did not have the strength of character to resist the war propaganda, and that the gravity of the crimes suggests that the accused voluntarily participated in them. Thus the accused fell into a normative gap because, although the Trial Chamber found that his low level of education and modest intellectual capabilities did not rise to the level of diminished capacity, it failed to consider whether these two characteristics of the accused were relevant to an alternative defense of provocation stemming from “the war propaganda which spread collective hatred and rumours about the enemy’s brutality.” The Banović judgment therefore failed to recognize the synergistic interconnection between diminished capacity

90. See *ibid.*

91. See *ibid.*, para. 78.

92. See *ibid.*, para. 79.



and provocation⁹³ stemming from the external circumstance of war propaganda.

The Celebici judgment is a second case that highlights a gap in coverage between provocation and diminished responsibility under international criminal law.⁹⁴ In the Celebici judgment, one of the four accused, Esad Landzo, a guard at the Celebici camp from approximately May to December 1992, was charged with multiple offenses of murder and torture as war crimes and crimes against humanity. His defense raised the plea of diminished responsibility, which like insanity is founded on an abnormality of mind. The Trial Chamber distinguished between insanity and diminished responsibility: “In the case of the plea of insanity, the accused is, at the time of commission of the criminal act, unaware of what he is doing or incapable of forming a rational judgement as to whether such an act is right or wrong. By contrast, the plea of diminished responsibility is based on the premise that, despite recognising the wrongful nature of his actions, the accused, on account of his abnormality of mind, is unable to control his actions.”⁹⁵ The case resulted in countless evaluations of the accused and the testimonies of five psychiatrists on the diagnostic criteria of DSM-IV and ICD-9.⁹⁶ There was a unanimous agreement by the psychiatrists that Landzo had suffered from mental disorders at the time of the acts; the psychiatrist, however, disagreed on the specific identification of the accused’s psychiatric disorders. For instance, one of the psychiatrists, Dr. Laggazi, was of the opinion that Landzo suffered from a personality disorder that crossed well over the pathological threshold on the abnormality/behavior curve. He further stated that this disorder meant that Mr. Landzo displayed the additional traits of dependency and narcissism, with the result that his ability to exercise his free will in relation to the orders that he received was restricted.⁹⁷ In contrast, Dr. Sparr adopted the view that the abnormality of personality Landzo exhibited had no pathological component but merely reflected his personality traits.⁹⁸

93. Jeremy Horder, *Between Provocation and Diminished Responsibility*, 10 King’s C. L.J. 143, 143 (1999) (delineating ethical distinction but granting that “like any significant ethical distinction, the distinction’s boundaries are contested and difficult to draw”).

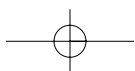
94. See *Prosecutor v. Delalić et al.*, Judgment, Case No. IT-96-21-T (Nov. 16, 1998).

95. See *ibid.*, para. 1156.

96. See *ibid.*, para. 36.

97. See *ibid.*, para. 1179.

98. See *ibid.*, para. 1180.



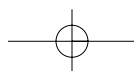
Ultimately, this division appeared to influence the Trial Chamber's opinion that, although Landzo suffered from a personality disorder, the evidence relating to his inability to control his physical acts on account of abnormality of mind was not at all satisfactory. It therefore found that, despite his personality disorder, Landzo was quite capable of controlling his actions.⁹⁹ Given that that Landzo's abnormality of mind was found not to have substantially impaired his mental responsibility, the diminished responsibility plea was rejected.¹⁰⁰ Thus Landzo, like Banović, fell into a normative gap: although the Trial Chamber found that his mental disorders did not rise to the level of diminished capacity, it failed to consider his characteristics vis-à-vis the following provocative issues:

His home town of Konjic was shelled over a continued period of time in 1992, resulting in an atmosphere of constant fear of injury or death for himself and his family, and it was also under a blockade such that living conditions became very difficult. Many displaced persons were arriving in the town, having been expelled from their own homes in other parts of Bosnia and Herzegovina, and the stories of their mistreatment, and that of the Bosnian Muslim population in general, at the hands of the Bosnian Serbs and Croats, were undoubtedly circulating. Additionally, among the casualties of the conflict were persons close to Mr. Landzo. Given that the detainees in the Celebici prison-camp were Bosnian Serbs who had been arrested upon the execution of military operations by Bosnian government forces to break up pockets of resistance against the lawful authorities in the municipality, along with Mr. Landzo's immature and impressionable state of mind, it is not surprising that he might identify these detainees with the enemy that had inflicted this suffering and hardship upon himself, his family and his fellow members of the population of Bosnia and Herzegovina.¹⁰¹

99. See *ibid.*, para. 1186.

100. Proof that international criminal law maintains a separate distinction between provocation and diminished responsibility is evident in the following statement by the Trial Chamber in *Prosecutor v. Delalić*, *ibid.*, at para. 1166: “[T]he accused must be suffering from an abnormality of mind which has substantially impaired his mental responsibility for his acts or omissions. The abnormality of mind must have arisen from a condition of arrested or retarded development of the mind, or inherent causes induced by disease or injury. These categories clearly demonstrate that the evidence is restricted to those which can be supported by medical evidence. Consequently, killings motivated by emotions, such as those of jealousy, rage or hate, appear to be excluded.”

101. See *ibid.*, para. 1284.



Finally, the Banović and Landzo decisions highlight the complete and inflexible distinction between diminished responsibility and provocation as well as normative gaps under international criminal law and the need for a reform of this area.

C. Duress and Coercion: Subjectivity v. Objectivity

ICL cases reveal a high degree of ambiguity in relation to situations involving duress and coercion.¹⁰² One of the key issues here is whether the relevant standard for evaluating duress¹⁰³ is an objective or a subjective standard. A second issue is whether psychological coercion can serve to underlie duress. An analysis of the case law reveals ambiguities in relation to both of these issues. A comparative analysis of the Erdemović case¹⁰⁴ with the Mrdja case¹⁰⁵ will be employed to illustrate current ambiguities. The relevant circumstances of the Erdemović case are as follows: The accused, Drazen Erdemović, whilst serving as a soldier in the 10th Sabotage Detachment of the Bosnian Serb Army, participated on July 16, 1995, in a firing squad that shot and killed hundreds of unarmed Bosnian Muslim men from Srebrenica. He was estimated to have personally killed seventy people and was charged with war crimes and crimes against humanity.¹⁰⁶ It was established during his trial that he initially refused to participate, and that only after his commanding officer informed him that he would be shot along with the victims did he reluctantly comply and take part in the killings. Without going into all the details of the case, it is clear that

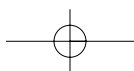
102. In this article, the terms “duress” and “coercion” are used interchangeably.

103. See Gerhard Werle, *Principles of International Criminal Law* 146 (2005): (“[T]he Rome Statute adopted the continental European criminal law tradition, under which killing a person out of duress or necessity as a last resort can go unpunished. In contrast, in common law, the killing of innocent civilians is always criminal; the presence of a situation of necessity or duress can at most lead to mitigation of punishment.”). World War II cases similarly adopted a continental approach to duress; see, e.g., *U.S. v. Ohlendorf*, 4 *Trials of War Criminals before the Nuernberg Military Tribunals* 471, 480 (1948) (the *Einsatzgruppen* case); Theodor Lenckner & Walter Perron, § 176, in *Strafgesetzbuch: Kommentar*, margin no. § 35, n.18 (Adolf Schönke & Horst Schröder eds., 2001) (noting that § 35 of the German Penal Code recognizes the availability of duress as a complete defense in form of an excuse).

104. See *Prosecutor v. Erdemović*, Judgment, IT-96-22-A (Oct. 7, 1997).

105. See *Prosecutor v. Darko Mrdja*, IT-02-59-S, (Mar. 31, 2004).

106. See *Prosecutor v. Erdemović*, *supra* note 104, at para. 8.



this case carried all the elements of duress. Here we have a coercer, Erdemović's commanding officer who threatened to kill the accused Erdemović, and the coerced party who chose to accede to the threat.¹⁰⁷

Let us now compare the Erdemović case with the Mrdja case.¹⁰⁸ Darko Mrdja was charged with acting in concert with others in the killing of over two hundred men as war crimes and crimes against humanity.¹⁰⁹ In response to these charges, the defense submitted that the accused acted under the duress of his superiors' orders and that, if he had not carried them out, he would have suffered "serious consequences."¹¹⁰ In addition, it emphasized that Mrdja was a "low-ranking member of the Intervention Platoon" who was subjected to the constant anti-Muslim brainwashing and hate propaganda of his superiors.¹¹¹ The defense accordingly submitted that, "[a]lthough, without any doubt, he had the legal and moral obligation to oppose the order given to him and the other members of the Platoon, [Mrdja] had neither the intellectual nor personal ability to do so." In support of its submissions, the defense referred to the Erdemović Sentencing Judgment and the case law of the German Supreme Court, which acknowledged that duress is in some circumstances a mitigating factor. The defense additionally relied upon Mrdja's oral statements. For instance, at the hearing, Mrdja said that he would have been killed if he had not carried out his superiors' orders. The defense also referred to Professor Gallwitz's Report, which concluded that "Darko Mrdja acted in a way of reduced self-control caused by acute stress or in a normal emotional reaction, with age, indoctrination, increased brutality, obedience, group-conforming conduct reducing the ability of independent thinking."¹¹² Finally, the defense argued that the fact that Mrdja acted pursuant to his superiors' orders was a reason, in addition to the duress he experienced, to mitigate punishment in accordance with Article 7(4) of the Statute.

107. For a discussion of duress in the context of the Erdemović case, see, e.g., P. Rowe, *supra* note 61, at 210. Duress has been described as an excuse best explained by the unfair opportunity branch of the choice theory of excuse; see, e.g., Joshua Dressler, *Reflections on Excusing Wrongdoers*, 19 Rutgers L.J. 671, 710 (1988) ("Duress is a no-fair-opportunity excuse.").

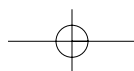
108. See *Prosecutor v. Darko Mrdja*, *supra* note 105.

109. See *ibid.*

110. See *ibid.*, para. 59.

111. See *ibid.*, para. 59.

112. See *ibid.*, para. 61.



The prosecution responded by drawing the Trial Chamber's attention to the facts of the Erdemović case, which in its words "were different from the present case because Erdemović expressly refused to comply with his superior's orders, was threatened with execution, and only then committed the crimes."¹¹³ Thus the issue was whether duress could emanate from subtler psychological coercion as opposed to physical coercion.¹¹⁴ The Trial Chamber seemed to have been of the opinion that the concept of duress is limited to only physical coercion and, therefore, that psychological coercion was insufficient to effectuate duress, as is evident in its statement: "The Trial Chamber is not persuaded on the basis of this evidence that Darko Mrdja indeed acted under threat. . . . The absence of any convincing evidence of any meaningful sign that Darko Mrdja wanted to dissociate himself from the massacre at the time of its commission prevents the Trial Chamber from accepting duress as a mitigating circumstance."¹¹⁵ This viewpoint draws attention to restrictions under classical duress on the types of coercive threats sufficient to excuse an actor of criminal responsibility. In this respect, unless the coercer uses deadly force or threatens the accused with death, the accused will be denied duress as a matter of law.¹¹⁶ Psychological coercion stemming from "indoctrination, increased brutality, obedience, group-conforming conduct" does not satisfy this legal threshold.¹¹⁷

Another traditional requirement of the duress defense raised in the prosecution's argument is that the coercer must either expressly or by implication order the commission of the offense committed by the accused. A generalized fear of harm of death unconnected with any specific and clear demand to commit a crime will not excuse.¹¹⁸ Thus the reality is that, although some wartime offenders may commit their crimes in the shadow

113. See *ibid.*, para. 63.

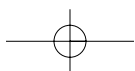
114. See G. Werle, *supra* note 103, at 145 ("States of psychological coercion are included only if they threaten imminent serious physical consequences to life or limb."); see also A. Esser, *supra* note 70, at marginal no. 29.

115. See *Prosecutor v. Darko Mrdja*, *supra* note 105, at para. 66.

116. See G. Werle, *supra* note 103, at 145.

117. Yet see, e.g., Philip G. Zimbardo, *The Human Choice*, in *Nebraska Symposium on Motivation*, 1969, 237–307 (William J. Arnold & David Levine eds., 1970) (on an experiment demonstrating that deindividuation is more influential when individuals are in uniform).

118. See Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope*, 56 *Ohio St. L.J.* 665 (1995) (for an interesting discussion on coercive threats).

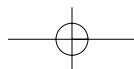


of indoctrination, increased brutality, obedience, and group conformity,¹¹⁹ unless they can connect their crimes to a clear demand, their claim of duress will likely fail. Yet Pavlov's groundbreaking research on conditional reflexes¹²⁰ informs us that human beings may respond in a desired manner if they are conditioned by verbal or other symbols used in propaganda—in other words, a form of duress by mental coercion or coercive persuasion.¹²¹

119. Although the defense of duress focuses on proximal cognitive antecedents, distal cognitive antecedents also influence the commission of atrocities. In the case of the latter, the My-Lai incident in the Vietnam war is a case in point. Distal risk factors emanating from years of military training and culture affected the cognitive ability of perpetrators to distinguish between right and wrong. For instance, it appears that Lieutenant Colonel Barker, who was the commanding officer for the task force of which the now-infamous Charlie Company was a part, did not issue any order for the killing of unarmed civilians; nevertheless, in the light of the factors such as the demand for more aggression on the part of American soldiers, the intelligence information portraying a community who were allied to the Viet Cong, the uncorroborated assumption that civilians would be “gone to market,” and the fact that the guerrillas commonly disguised themselves as Vietnamese peasants, to mention but a few, the overall conclusion was that a free-fire zone had in effect been created. Thus no one would be spared from attacks—everyone was lawful target—all should be eliminated. As stated in the Peers Commission Report on the massacre: “it seems reasonable to conclude that LTC Barker’s minimal or nonexistent instructions concerning the handling of noncombatants created the potential for grave misunderstandings as to his intentions and for the interpretation of his orders as authority to fire, without restriction, on all persons found in the target area.” See Michael Bilton & Kevin Sim, *Four Hours in My Lai*, 96 (1971); see also Randall Collins, *Violence: A Micro-Sociological Theory*, 29 (2008) (pointing out that “military organisation is the easiest place to trace the social techniques for overcoming our biological propensity not to be violent”). See Herbert C. Kelman, *Violence without Moral Restraints*, 29 *J. Soc. Issues*, 26–61, 39 (maintaining that “when acts of violence are explicitly ordered, implicitly encouraged, tacitly approved, or at least permitted by legitimate authorities, people’s readiness to commit or condone them is considerably enhanced”).

120. See Ivan P. Pavlov, *Conditioned Reflexes* (Gleb von Anrep trans., ed., 1927). Others who have been inspired by Pavlov in their research on brainwashing and propaganda include Serge Chakhotin, *The Rape of the Masses; The Psychology of Totalitarian Political Propaganda* (1940); and Joost A.M. Meerlo, *The Rape of the Mind* (1956).

121. See Decision on the Confirmation of Charges, Katanga and Ngudjolo Chui (ICC-01/04-01/07), Pre-Trial Chamber I, Sept. 30, 2008 (“An alternative means by which a leader secures automatic compliance via his control of the apparatus may be through intensive, strict and violent training regimes. For example, abducting minors and subjecting them to punishing training regimens in which they are taught to shoot, pillage, rape and kill, may be an effective means for automatic compliance with leaders’ orders to commit such acts.”).



These viewpoints also draw attention to the issue of inescapability in duress cases: that is, the traditional requirement that a defendant reasonably believe that committing the crime was the only way to avoid threatened danger.¹²² The accused cannot claim duress if he had any reasonable opportunity to extricate himself from the coercive situation without committing the crime, either by resisting the coercer or by escaping.¹²³ The following comments by Dienstag shed light on the notion of inescapability in the context of international criminal law:

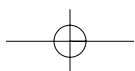
Unlike the criminal defendant, who can claim the operation of duress for the entire period of his action, a war crime participant will often have various opportunities to evade the threatened injury . . . he is likely to be armed and allowed periodic leave for off-camp visits. Even if the ordinary coerced actor will not be deterred by the knowledge that he will later be held accountable, deterrence may work on the war criminal as an impetus to escape efforts. To be sure, the soldier who deserts to avoid complicity in murder runs the substantial risk that he will be found and executed. But a substantial risk is not a certainty, and the percentage difference leaves theoretical room for the deterrence aspect of the law to operate. Of course, the law could allow a duress defense to be presented and let the trier of fact decide whether the probabilities were such that the defendant should have attempted escape. The likelihood that escape opportunities will exist, however, calls for a rule that will spur the actor to escape attempts rather than encourage him complacently to rely on an apparent excuse and commit the ordered crimes. A Hobbesian calculation here requires the stricter standard.¹²⁴

It is submitted, however, that Dienstag ignores the social, economic, and psychological barriers that prevent those who kill in time of war from resisting or escaping. Psychologically, when indoctrination and hate propaganda

122. See generally L. K. Dore, *supra* note 118, at 665.

123. Yet “[p]sychologists have known for some time that many cognitive processes are beyond conscious awareness or voluntary control”; see Nicholas Epley & Thomas Gilovich, *Just Going Along: Nonconscious Priming and Conformity to Social Pressure*, 35 *J. Experimental Soc. Psychol.* 578–89, 579 (1999). For a review of relevant literature, see generally Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition*, 102 *Psychol. Rev.* 4–27 (1995).

124. See Abbe L. Dienstag, *Fedorenko v. United States*, 82 *Colum. L. Rev.* 120, 148–49 (1982). See Aaron Fichtelberg, *Liberal Values in International Criminal Law*, 6(1) *J. Int’l Crim. Just.* 14 (2008) (making a similar point in relation to the Erdemović case).



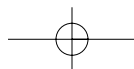
extend over an appreciable period of time, some wartime offenders may find themselves as virtual prisoners.¹²⁵

Equally from a social and economic context, the following statement by Brooks in relation to the Erdemović case gives us some insight into the obstacles faced by wartime offenders:

By all accounts, Drazen Erdemović was an accidental and unwilling soldier, not a mercenary. He came from a pacifist, cosmopolitan background, and grew up with friends of many different ethnicities. He opposed the war, and did not wish to fight; when he left the Croatian Defense Force, he sought work as a locksmith. He eventually married a Serbian woman he had known since childhood, and the young couple drifted around Serbia for a time, trying to find work and a place where a multi-ethnic family could live unmolested. They considered leaving the Balkans altogether, and tried to get visas to Switzerland, but papers were difficult to obtain. Finally, with his wife pregnant and his savings almost gone, Erdemović turned to one of the few remaining sources of steady employment in the region, and in 1994 he enlisted once more, this time in the Bosnian Serb Army of Radovan Karadžić's self-proclaimed "Republica Srpska," the Serb enclave within Bosnia.¹²⁶

125. See Penny Powers, *Persuasion and Coercion*, 19(2) HEC Forum 139 (June 2007) (citing Lerbinger, "coercion might occur unconsciously over long periods of time by the creation of a populace who lacks knowledge of persuasive strategies, exists in a media world of 'pseudo-events' and craves approval and pleasure instead of 'truth from reason' . . . Social science must be held accountable for its role in creating and exploiting dependent groups of people.").

126. See Rosa Ehrenreich Brooks, *Law in the Heart of Darkness: Atrocity & Duress*, 43 Va. J. Int'l L. 861, 863–64 (2003); see also Stephen C. Newman, *Duress as a Defense to War Crimes and Crimes against Humanity*, 166 Mil. L. Rev. 160 (2000) (agreeing with Ehrenreich's account). What these authors are in effect alluding to is the problem of moral luck—under this theory it is assumed that individuals commit criminal acts wholly or partly as a result of things outside of their control. "It is not that they were compelled to do them by overwhelming force, but that background factors came together so that they made a particular choice which if things had been different they would not have made"; see Phillip Cole, *The Myth of Evil: Demonizing the Enemy* 146 (2006); see also Tony Honoré, *Responsibility and Luck*, 104 L.Q. Rev. 530 (1988), (examining the problem of moral luck). Of relevance also is the following question posed by Solzhenitsyn: "So as to not clothe oneself too quickly in the immaculate tunic of the just, each of us must ask ourselves: and had my life taken a different turn, would not I, too, have become one of the executioners?"; cited by Pierre Moutin & Marc Schweitzer, *Les crimes contre l'humanité du silence à la parole* 30 (1994).



Brook's statement above demonstrates how people caught up in the maelstrom of war are subject to social pressures that induce them to join in criminal activity despite restrictions on their freedom that tangibly limit their ability to escape. It may therefore be the case that they did not wilfully place themselves in a position where the causal nexus pointed toward the likelihood of committing international crimes. Ultimately the above discussion on duress draws attention to the following issue: For the purpose of evaluating duress claims, should war crime defendants be treated as a category of person whom the fact finder might think less able to resist pressure than people not within that category? Or should they be treated in a similar fashion as ordinary defendants under domestic criminal law?

D. Mistake of Fact (full excuse) and Provocation (partial excuse)

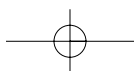
Mistake of fact and provocation have been dealt with differently under the Rome Statute of the International Criminal Court. In the case of a mistake of fact defense, Article 32 of the Rome Statute states *inter alia* that a "mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by law."¹²⁷ This stipulation suggests that if, for example, A fires at an unarmed civilian B, whilst mistakenly but reasonably believing that B was an armed enemy soldier, this would be deemed as negating the requisite *mens rea* for A's attack, thereby resulting in the possibility of an acquittal.¹²⁸ On the other hand, in relation to a provocation defense, Article 31(1)(a) of the Rome Statute (under "Grounds for excluding criminal responsibility") states that a person shall not be criminally responsible if, at the time of that person's conduct, he or she "suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law."¹²⁹

Clearly by requiring extreme abnormality in the form of the destruction of one's capacity as a basis for a loss of self-control, this provision

127. See The Rome Statute of the International Criminal Court, Art. 32, U.N. Doc. A/CONF. 183/9 (July 17, 1998) (hereinafter ICC Statute).

128. For other examples, see Albin Eser, *Mental Elements—Mistake of Fact and Mistake of Law*, in A. Cassese, *supra* note 20, at 938.

129. See ICC Statute, Art. 31(1)(a).



rules out any possibility of pleading provocation.¹³⁰ It therefore appears narrower¹³¹ than Rule 67(A)(ii)(b) of the ICTY Rules of Procedure and Rule 67(A)(ii)(b) of the ICTR Rules of Procedure, which state verbatim that:

As early as reasonably practicable and in any event prior to the commencement of the trial . . . the defence shall notify the Prosecutor of its intent to offer: . . . (b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.¹³²

In the light of this, one wonders how the Rome Statute intends to deal with an accused who acted honestly, although mistakenly, in the face of perceived provocation?¹³³ Would the accused be acquitted on the grounds of mistake of fact?¹³⁴ Or would the case be characterized as one involving provocation, and thereby resulting in a full conviction?¹³⁵ Any response at

130. See Peter Krug, *supra* note 26, at 332 (“The use of ‘destroys’ may, that is, be taken as signalling the rejection of the notion of reduced capacity. The answer to this question awaits the anticipated ICC’s construction of the Statute. In this author’s opinion, however, it is unlikely that the drafters of the Statute intended to bar the Court from using mental condition as a mitigating factor. There is a clear grant of discretion in the Statute’s sentencing provisions, and there is no explicit prohibition of mitigation in Article 31(1)(a).”); see also S. Janssen, *Mental Condition Defences in Supranational Criminal Law*, 4 *Int’l Crim. L. Rev.* 84 (2004).

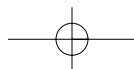
131. Albin Eser, *supra* note 70, 875 (“At any rate, however, the level of incapacity must still remain above mere diminished mental capacity; . . . the Statute does not provide a (partial) defence of ‘diminished criminal responsibility.’”).

132. See International Criminal Tribunal for the former Yugoslavia, *Rules of Procedure and Evidence*, U.N. Doc. IT/32, adopted on Feb. 11, 1994, 67 (A)(ii)(b); International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995, 67 (A)(ii)(b).

133. See the contrasting views of Fletcher and Yeo on this issue as detailed in *Partial Excuses to Murder 20–21* (Stanley M.H. Yeo ed., 1991) (Fletcher disagrees with the notion of mistaken provocation; Yeo in contrast supports the notion.).

134. See G. Werle, *supra* note 103, at 151 n.346 (“Under civil law doctrine e.g., German law, a mistake about the factual requirements of a ground for excluding criminal responsibility (*Erlaubnistatbestandsirrtum*) may also exclude criminal responsibility.”); see also Hans-Heinrich Jescheck & Thomas Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 490, 464–67 (5th ed. 1996).

135. It appears that this latter scenario is more likely to occur. See G. Werle, *supra* note 103, at 151 (“[I]f the perpetrator, for example erroneously assumes that a prisoner of war is reaching into his pocket to pull a weapon, and he therefore shoots him, no grounds for excluding



this stage would understandably be premature.¹³⁶ However, even under statutory regimes that recognize both categories of excuse defenses, the overlap between mistake of fact and provocation has led to inconsistencies in the treatment of defendants.

Two cases illustrate this problem, *Regina v. Finta*¹³⁷ and *Prosecutor v. Tadić*.¹³⁸ In the former case, the accused charges related to events during World War II when, as a Hungarian gendarmerie captain, he was alleged to have committed various offenses under the heading of war crimes and crimes against humanity (such as confinement, imprisonment, and robbery) against many Jewish people in the ghetto of Szeged, one of the largest provincial cities of Hungary.¹³⁹ In the *Tadić* case, allegations of war crimes and crimes against humanity pertained to the accused's involvement in attacks in the town of Kozarac, which is about ten kilometers further east of Prijedor, the second largest town in Republika Srpska after Banja Luka and the center of a massive propaganda campaign. In the course of the attack on Kozarac, much of the non-Serbian population of the city was led away to the camps of Omarska, Keraterm, and Trnopolje, where they were subjected to further suffering. *Tadić* was *inter alia* accused of partaking in ill-treatment in the camps, particularly the Omarska camp, the most notorious of all three.¹⁴⁰ *Finta* and *Tadić* both blamed their actions on the prevailing propaganda campaign, which portrayed Jewish people and non-Serbs, respectively, as enemies. Each claimed he genuinely acted to avert danger.

In the *Finta* judgment, the Canadian Supreme Court recognized the possibility that a wartime situation could cause the commission of honest but mistaken acts in the face of perceived provocation, as is evident in the following statements: “[T]he crime itself must be considered in context. Such crimes are usually committed during a time of war. Wars are concerned with death and destruction. Sweet reason is often among the first

responsibility due to mistake of fact under Article 32(1) of the ICC Statute are available. Here, however, it may be argued that this unsatisfying result should be corrected. . . .”)

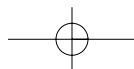
136. See *S. Yeo*, *supra* note 133, at 92 (“The common law experience of mistake about the provocation itself is slender and appears to be restricted to error induced by drunkenness.”).

137. See *Regina v. Imre Finta* [1994] 1 SCR 701, Supreme Court of Canada (Mar. 24, 1994).

138. See *Dusko Tadić*, Sentencing Judgement, Case No. IT-94-I-T (July 14, 1997).

139. See *Regina v. Imre Finta*, *supra* note 137.

140. See *Dusko Tadić*, *supra* note 138.



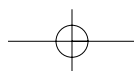
victims. The manipulation of emotions, often by the dissemination of false information and propaganda, is part and parcel of the terrible tapestry of war. False information and slanted reporting is so predominant that it cannot be automatically assumed that persons in units such as the Gendarmerie would really know that they were part of a plot to exterminate an entire race of people.¹⁴¹ Similarly in the Tadić case, a link between wartime propaganda and the commission of mistaken acts in the face of perceived provocation could be said to have been implicitly recognized by the Trial Chamber when it stated: “[T]he virulent propaganda that stoked the passions of the citizenry in Opstina Prijedor was endemic and contributed to the crimes committed in the conflict and, as such, has been taken into account in the sentences imposed on Dusko Tadic. As two writers have noted: When victims are dehumanized . . . the moral restraints against killing or harming them become less effective. Groups of people who are systematically demonized, assigned to inferior or dangerous categories, and identified by derogatory labels are readily excluded from the bonds of human empathy and the protection of moral and legal precepts.”¹⁴²

The impression given in these statements was that Finta and Tadić were both acting on a false view of events deliberately induced by the Nazis and by Serbian leaders, respectively. However, despite similar findings, the outcomes of both cases were fundamentally different. Finta’s defense was *inter alia* treated as falling under mistake of fact defense and resulted in an acquittal; whereas Tadić’s conduct appeared to have been grouped under a provocation defense, and Tadić was sentenced to twenty years imprisonment for his crimes. Two radical outcomes resulting out of essentially identical situations.¹⁴³ Why the discrepancy? Finally, a comparison of the Finta and Tadić cases reveals inconsistencies and a lack of uniformity *vis-à-vis* the relationship between provocation and mistake of fact under international criminal law.

141. See *Regina v. Imre Finta*, *supra* note 137, at para. 816; see also Jose E. Alvarez, *Crimes of States/Crimes of Hate*, 24 *Yale J. Int’l L.* 365, 427–28 (1999).

142. See *Dusko Tadić*, *supra* note 138, at para. 72.

143. See S. Yeo, *supra* note 133, at 93 (similarly expressing puzzlement with the state of affairs between mistaken self-defense and mistaken provocation albeit in the domestic context, he writes, “Juries might think it odd that the law’s measure of self-defence under mistaken belief (which may lead to a full acquittal) is less demanding of the accused than that which may result in a mere reduction, by provocation, of murder to manslaughter.”).



III. MINIMIZING OVERLAPS, CLOSING GAPS, AND RESOLVING AMBIGUITIES

Section I involved identifying the reasons for current defects in the concepts of excuse and mitigation under international criminal law. Section II analyzed these defects. The final section now attempts to address these problematic issues.

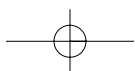
A. Excuse Defenses and Mitigating Circumstances: A Conceptual Separation

Previously it was demonstrated that overlaps currently exist between excuse and mitigating circumstances under international criminal law. The confusion of factors exclusively relating to the offender with those exclusively relating to the offense will ultimately erode the distinction between excuse and mitigation. Bearing this in mind, this section attempts to redraw both the boundaries between excuse and mitigating circumstances and the boundaries between different categories of mitigating circumstances. To facilitate this process, this section will establish a bifurcated framework for evaluating excuse and mitigating circumstances. Two conceptual parts can be distinguished: the first, “Culpability Reduction Factors,” are those related to the crime and which establish that the accused demonstrated less culpability vis-à-vis the crime; the second, “Positive and Verifiable Personal Circumstance Factors,” are mitigating circumstances unrelated to the crime but which portray the defendant in a good light and are verifiable.

Already divisions along similar lines exist under domestic law. For instance, the English Law Commission¹⁴⁴ has proposed a clear distinction between the two sets of characteristics. In its consultation paper, duress, indirect or forced participation, and diminished responsibility are characterized as “mitigating factors” that may be relevant to the offense of murder. The full list includes:

- (a) an intention to cause serious bodily harm rather than to kill,
- (b) lack of premeditation,

144. See Law Commission, *A New Homicide Act for England and Wales*, Consultation Paper No. 177, http://www.lawcom.gov.uk/docs/cp177_web.pdf (last visited Dec. 2, 2009).



- (c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957 (c. 11)), lowered his degree of culpability,
- (d) the fact that the offender was provoked (for example, by prolonged stress) in a way not amounting to a defence of provocation,
- (e) the fact that the offender acted to any extent in self-defence,
- (f) a belief by the offender that the murder was an act of mercy, and
- (g) the age of the offender.¹⁴⁵

On the other hand, expression of remorse, good character with no prior criminal conviction, and postconflict conduct are categorized under “personal mitigation,” that is, factors that reduce the severity of a sentence, and relate to the offender rather than to the offense.¹⁴⁶ Finally, the forthcoming subsections present a more in-depth discussion of the proposed bifurcated framework for evaluating excuse and mitigating circumstances.

1. Culpability Reduction Factors

Arguably, the biggest obstacle for culpability reduction is the set of peculiarities that may pertain to international crimes.¹⁴⁷ As stated in the Kupreskić case: “Unlike provisions of national criminal codes or, in common-law countries, rules of criminal law crystallised in the relevant case-law or found in statutory enactments, each Article of the Statute does not confine itself to indicating a single category of well-defined acts such as murder, voluntary or involuntary manslaughter, theft, etc. Instead the Articles embrace broad clusters of offences sharing certain general legal ingredients . . . some provisions have such a broad scope that they may overlap. . . . Other acts or transactions may only be defined as crimes against humanity (Article 5).”¹⁴⁸

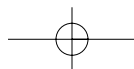
It follows that, since it is impossible to talk of specific and basic intent crimes under international criminal law for the purpose of extenuating

¹⁴⁵. See *ibid.*

¹⁴⁶. See *ibid.*

¹⁴⁷. See P. Krug, *supra* note 26, at 331 (arriving at a similar conclusion). See Andrew von Hirsch & Jareborg Nils, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 *Oxford J. Legal Stud.* 1, 19–21 (1991) (on developing principles by which the relative seriousness of different crimes under domestic law may be assessed).

¹⁴⁸. See *Prosecutor v. Kupreskić et al.*, IT-95-16-T, paras. 697–98 (Jan. 14, 2000).



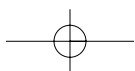
criminal responsibility, this section makes a proposal for special verdicts¹⁴⁹ of crimes against humanity by reason of provocation, or crimes against humanity by reason of diminished responsibility, or genocide by reason of duress, or war crimes by reason of provocation.¹⁵⁰ This proposal would not require amendments to ICL statutes; rather it would involve judges recognizing this aspect in their sentencing judgments. Thus although both a crime against humanity and a crime against humanity by reason of provocation will result in the same act, there is clearly a difference in the level of culpability between both crimes that should be reflected in different sentencing outcomes. A crime against humanity by reason of provocation carries with it a lesser degree of blameworthiness and condemnation than the term “crime against humanity” alone would imply. The current approach of merely imposing a lower sentence for a crime against humanity, absent of any explanation of culpability differences in the commission of such crimes, makes the international criminal justice system appear erratic. It also reduces global confidence in the international criminal justice system as a whole when, on the face of it, people who appear to be cold-blooded killers are giving lenient treatment. Finally, there is also the risk that a sentence for a defendant suffering from mental impairment at the time of his crime may increase if the defendant is sentenced for genocide, war crimes, or crimes against humanity instead of any of these by reason of a partial excuse.

2. Relevant Personal Circumstance Factors

Under this heading two categories of circumstances can be identified: the first is relevant personal circumstances, whilst the second can be described as irrelevant personal circumstances. Relevant personal circumstances include voluntary surrender, assistance in the apprehension and prosecution of another war criminal, and postconflict conduct of the accused. Furthermore, the value of being able to verify genuine instances of positive personal circumstances for the purpose of sentencing is, for example,

149. See P. Krug, *supra* note 26, at 331 (“If the international prosecution system is to function effectively under the English variant, lesser included offenses will have to be found within one or more of the core crimes. . .”).

150. This proposal draws inspiration from the following document: Sentencing Guidelines Council, *Manslaughter by Reason of Provocation* (Nov. 2005).



illustrated by the attempts of one of the accused in the *Kvočka et al.* judgment,¹⁵¹ Zigić, to mitigate his sentence on the basis of voluntarily surrendering. In the *Kvočka et al.* judgment, Zigić argued that his surrender to the Tribunal while in prison in Banja Luka should be considered as a mitigating factor¹⁵² because the authorities of the Republika Srpska would not have extradited him to the Tribunal had he not taken the initiative to surrender. In response, the Trial Chamber, although acknowledging that voluntary surrender may constitute a mitigating circumstance, nevertheless ruled out Zigić's act as constituting voluntary surrender.¹⁵³ Key to its finding was the fact that Zigić was already imprisoned in Banja Luka at the time of his surrender to the Tribunal, raising the issue of whether, in the light of Zigić's incarcerated state, his surrender really could be described as voluntary. Zigić's main argument in this respect was that, without his consent, the authorities of Republika Srpska would not have extradited him to the Tribunal, and therefore that the general lack of cooperation between the authorities of Republika Srpska and the Tribunal around the time of his incarceration had the effect of transforming his incarceration and subsequent extradition into a voluntary surrender.

The Appeals Chamber sided with the accused¹⁵⁴ and was heavily influenced in this respect by the approach taken by the Trial Chamber in the *Simić* case.¹⁵⁵ In that case poor relations between the ICTY and the Republika Srpska were crucial to the accused's successful plea of voluntary surrender as a mitigating factor. In the *Zigić* case, the Appeals Chamber noted that Zigić's surrender to the Tribunal took place only some two months later than Milan Simić's surrender. Therefore, the Appeals Chamber found that the Trial Chamber committed an error when it declined to consider Zigić's voluntary surrender to the Tribunal as a mitigating factor.¹⁵⁶

Further illustrating issues of relevance and verifiability in relation to voluntary surrender is the contrasting decision in the *Deronjić* case.¹⁵⁷ In attempting to reduce the sentence, part of the defense strategy was to rely

151. See *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/I-A (July 8, 2002).

152. See *ibid.*, paras. 709–13.

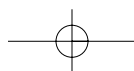
153. See *ibid.*

154. See *ibid.*

155. See *ibid.*

156. See *ibid.*

157. See *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, paras. 265–67 (Mar. 30, 2004).



on a plea of voluntary surrender. Its rationale for relying on this plea was that voluntary surrender is a mitigating factor that “may inspire other indictees to similarly surrender themselves, thus enhancing the effectiveness of the work of the Tribunal.”¹⁵⁸ It argued that because the accused was arrested in front of his home less than seventy-two hours from the moment the indictment against him had been issued, and before he was even aware that the indictment against him existed, he was deprived of the opportunity to surrender voluntarily and thereby receive credit for it.¹⁵⁹ The defense further contended that, in his interview with the prosecution given as a suspect, the accused had expressed his willingness and readiness to come voluntarily to the Hague and face charges against him. As evidence of his genuine intention to voluntary surrender, the defense asserted that Deronjić not only complied with the summons of the prosecution to be interviewed by the investigators but also expressed his willingness to appear voluntarily whenever so requested.¹⁶⁰

All of the above was meant to establish that the accused had been willing to surrender voluntarily and therefore that his intention to surrender should be considered as a mitigating factor. However, the Trial Chamber in response rejected this plea, stating that it was impossible to ascertain whether or not the accused genuinely intended to surrender voluntarily.¹⁶¹ It cited the conclusions reached by the Trial Chamber in *Obrenović*: “[S]ince the Trial Chamber would have to speculate in order to determine whether Dragan Obrenović would in fact have voluntarily surrendered if given the opportunity, the Trial Chamber attached little weight to this factor.”¹⁶²

Both cases highlight the value of relevant and verifiable evidence at the penalty phase of war crime trials. On the other hand, in terms of irrelevant personal circumstances, they include most notably character and youth.¹⁶³ For instance, in terms of character evidence under international criminal law, two types of character evidence can be identified: the accused’s character before the war and the accused’s character during the

158. See *ibid.*

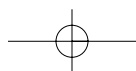
159. See *ibid.*

160. See *ibid.*

161. See *ibid.*

162. See *Ibid.*

163. See Jennifer J. Clark, *Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 96 *Geo. L.J.* 1685, 1694 (2008) (commenting on the unreliability of youth as a sentencing factor).



war. It is unfortunate that both are sometimes given the same weight. The Cesić case¹⁶⁴ shall be used to illustrate this point. In the Cesić judgment, the defense referred to statements from ten non-Serb character witnesses who gave the following examples about the character of the accused that related to his conduct during the war:

- (i) Stopping soldiers maltreating some Muslims;
- (ii) Supplying food;
- (iii) Saving men from being killed at Luka Camp by taking them to their homes;
- . . .
- (vi) Protecting neighbours by placing a piece of paper at the entrance door certifying, under his name, that their building had been “cleared” and did not need to be searched again; . . .¹⁶⁵

On the other hand, the prosecution presented evidence unrelated to the war “to prove that Ranko Cesić has been previously convicted for a criminal offence.”¹⁶⁶ Fortunately the Trial Chamber found that the evidence submitted by the prosecution did not successfully rebut the evidence adduced by the defense in support of its claim of good character.

Nevertheless it should be emphasized that the consideration of character evidence unrelated to the war alongside character evidence directly related to the war is inappropriate¹⁶⁷ since the former type of evidence has no intrinsic connection to the crimes committed.¹⁶⁸ The following hypothetical emphasizes the perverse consequences of treating both types of character evidence in the same fashion. Imagine that two soldiers W and Y

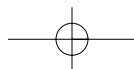
164. See *Prosecutor v. Cesić*, supra note 51.

165. See *ibid.*, paras. 67–87.

166. See *ibid.*, paras. 67–87.

167. See J.J. Clark, supra note 163 (“[D]efendants frequently argue that evidence of good character prior to the conflict should mitigate their sentences. The Trial Chamber’s responses to this evidence vary widely. Sometimes they view prior good character as a mitigating factor, but sometimes they give it only limited weight. Still other times they refuse to consider good character altogether, and on occasion they find that prior good character aggravates, rather than mitigates, the appropriate punishment.”).

168. See G. Fletcher, supra note 15, at 491 (“[G]uilt, culpability and blameworthiness . . . do not raise questions of the actor’s general moral worth or even of his moral wickedness in a particular situation. They pinpoint the specific inquiry into whether it is fair to hold the actor accountable for an act of legal wrongdoing.”).



are alleged to have committed crimes in the context of an armed conflict. W is able to point to instances of merciful conduct vis-à-vis enemy detainees, but Y was thoroughly merciless at all times during the war. However, there is evidence to suggest that prior to the war, W was a racist individual but Y was very tolerant. To what extent should this past evidence be deemed as relevant to the appropriate amount of blame that should be attached to the present crimes of W and Y?

The answer is that such evidence is irrelevant to the attribution of blame vis-à-vis the current crimes committed by both of the accused.¹⁶⁹ In fact a similar position was adopted in the Kupreskić case¹⁷⁰ where the Trial Chamber held that, in general, evidence of the good character of the accused prior to the commission of the alleged crimes rarely has probative value since, by their very nature, the alleged crimes may be committed by persons without a criminal record or a history of violence.¹⁷¹ Furthermore, it noted that, as a general principle of criminal law, such evidence is generally inadmissible as a demonstration of the accused's propensity to act accordingly.¹⁷² It follows that the decision of whether or not to use character evidence in mitigation should be limited to only what the accused did during the war. The accused's life before the war is of no relevance to any decision to attribute blame. Finally, when evaluating mitigation for mass atrocities, no one should care whether an accused is married with children or single; or whether an accused has a good employment history or a history of unemployment; or whether the accused converted to religion or was an atheist; or whether the accused had a deprived childhood or was born with a silver spoon in his mouth. All of these factors should be excluded from any decision to mitigate sentence.¹⁷³

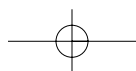
169. See Susan M. Davies, Evidence of Character to Prove Conduct, 27 *Crim. L. Bull.* 504, 523 ("The primary justification for the exclusion of most character evidence is the fear that the prejudicial effect of such evidence outweighs its probative value."). See also Fed. R. Evid. 404(a)(1) (stipulating inter alia that evidence of a person's character or of a character trait is not admissible to prove that the person acted in conformity with such character or trait); Victor Tadros, The Characters of Excuse, 21(3) *Oxford J. Legal Stud.*, 495–519, 502.

170. See Prosecutor v. Kupreskić et al., Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque (Feb. 17, 1999).

171. See *ibid.*

172. See *ibid.*

173. The consideration of unlimited mitigating evidence about the defendant shifts focus away from the impact of genocide, war crimes, and crimes against humanity on victims.



B. Individualized Justice

The concept of individual criminal responsibility constitutes a bedrock of the international criminal justice system. Individual criminal responsibility is essentially “the concept that a person is only culpable to the extent of his own freewill or guilty mind.”¹⁷⁴ Notably it was recognized and applied by the World War II tribunals and has been adopted by contemporary ICL enforcement agencies.¹⁷⁵ However, despite the above, attempts to inject subjectivity into the guilt phase of ICL proceedings has so far been unsuccessful, as evident in the analysis in section II. Almost all of the cases examined above reveal that the reasonableness of the accused’s conduct was viewed hyper-objectively¹⁷⁶ and therefore that limited attention was giving to the peculiar situation or the peculiar characteristics of each of the accused.¹⁷⁷ Rather than asking how a defendant faced with the same situation and sharing the same characteristics as Banović, Lanzo, or Mrdja¹⁷⁸ would have reacted, there was a tendency to ask how a reasonable person would have reacted in this situation.¹⁷⁹ Therefore, one problem with

174. See Lafave & Scott, *supra* note 19.

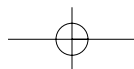
175. See Henry T. King Jr., Robert Jackson’s Vision for the Justice and Other Reflections of a Nüremberg Prosecutor, 88 *Geo. L.J.* 2421 (Aug. 2000) (emphasizing the centrality of individual criminal responsibility as part of Robert Jackson’s vision).

176. Employing an objective test is, however, problematic and creates a misunderstanding of the situation in that a reasonable person does not commit genocide or crimes against humanity; see Morse, *supra* note 73, at 33 (“Reasonable people do not kill no matter how much they are provoked, and even enraged people generally retain the capacity to control homicidal or any other kind of aggressive or antisocial desires.” (footnote omitted).); see also Model Penal Code § 210.3 cmt. at 56 (1980) (A reasonable person does not kill.).

177. See, e.g., Stephanie M. Wildman & Dolores A. Donovan, Is the Reasonable Man Obsolete? A Critical Perspective on Self Defence and Provocation, 14 *Loy. L.A. L. Rev.* 465–68 (1981) (maintaining that an objective test fails to reflect accurately the circumstances of a defendant and instead advocates reliance on a subjective test).

178. See *ibid.*, 459 (“[T]he question of attribution is to be viewed in light of all relevant facts and circumstances of the individual case.”).

179. In the context of domestic law, support for an objective test is evident in the following: Note, The Cultural Defense in the Criminal Law, 99 *Harv. L. Rev.* 1293, 1302 (1986) (“To maintain [social] order, it has been argued, societies must lay down a body of positive law that compels the obedience of all regardless of individual notions of morality: if each person were required to adhere to the law only to the extent that it was consistent with her own values, societies would tend toward anarchy.”). Kevin J. Heller, Beyond the Reasonable Man?, 26 *Am. J. Crim. L.* 1, 9 (1998) (“Subjective standards of reasonableness are irreconcilable with the Rule of Law, in this view, because such standards necessarily take



applying a universal standard of reasonableness to the context of international criminal law is that, unlike ordinary criminals who violate social norms by committing crimes, individuals who are swept up in mass violence do not step outside the prevailing moral framework.¹⁸⁰ It follows that this is not merely a case of people living in a bad neighborhood who have succumbed to strong and malignant peer group influence.¹⁸¹ Rather it is one of whole or entire societies operating according to their own system of morality at a particular time.¹⁸² It may be that in such societies, a number of people were genuinely made to believe that they were acting in self-defense to protect their families and homes from injury, death, or destruction. In this respect Tallgren made the following relevant statement:

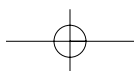
Contrary to most national criminality which is understood to constitute social deviation, acts addressed as international crimes can, in some circumstances, be constituted in terms of conforming to a norm. As a result, the refusal to commit such acts could be considered as socially deviating behaviour. Examples are not too difficult to find: the same chain of events can be described and evaluated from different points of view, as justified civil disobedience/internal disturbance, followed by more human rights activism/rebellion, followed by promotion of national liberation/terrorism,

into account 'the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men',” quoting Oliver Wendell Holmes Jr., *The Common Law*, 108 (1938).

180. See Miriam J. Auerman, *Extraordinary Evil Ordinary Crime*, 15 *Harv. Hum. Rts. J.* 39, 59.

181. For relevant literature, see Richard Delgado, *Rotten Social Background*, 3 *Law and Inequality* 9 (arguing for a recognition of the relationship between socioeconomic status and criminal behavior). See also David L. Bazelon, *The Morality of the Criminal Law*, 49 *S. Cal. L. Rev.* 385 (1976); Peter Arenella, *Convicting the Morally Blameless*, 39 *UCLA L. Rev.* 1511 (1992); Peter Arenella, *Character, Choice and Moral Agency*, 7 *Soc. Phil. & Pol'y* 59 (Spring 1990). For contrasting opinions, see Fletcher, *supra* note 15, at 810 (“It may be the case that all human conduct is compelled by circumstances, but if it is, we should abandon the whole process of blame and punishment and turn to other forms of social protection.”); Stephen J. Morse, *Deprivation and Desert*, in *From Social Justice to Criminal Justice*, 2 (William C. Heffernan & John Kleinig eds., 2000) (concluding, “No convincing theory suggests that deprived offenders are less morally responsible simply because they are deprived and therefore deserve excuse or mitigation on that basis alone.”); Michael S. Moore, *Causation and the Excuses*, 73 *Cal. L. Rev.* 1146–47 (1985).

182. When whole societies operate according to their own system of morality at a particular time, applying an objective test would be counterproductive since it has the effect of legitimizing or justifying rather than excusing the conduct of that defendant.



followed by retaliation/counter-terrorist action, followed by strengthened oppression by the majority/self-defence, and so on.¹⁸³

In addition, a case that illustrates the need for the doctrine of individualized justice at the trial phase in the ICL context is the German border guards' trial. The trial commenced on September 2, 1991, in Berlin, when prosecutors tried four former border guards who were responsible for shooting the last group that tried to escape by climbing the Berlin Wall in February 1989.¹⁸⁴ The border guards' defense was that they were following orders. But at the first border guard trial in June 1991, the judge had asserted that, regardless of orders, the defendants had an obligation not to shoot based on "basic human rights and a higher moral law."¹⁸⁵ The judge had also asserted that, although the guards had been "at the end of a long chain of responsibility," they had transgressed "a basic human right" by firing at someone whose only crime was attempting to leave the country.¹⁸⁶ Kamali made the following relevant comments in relation to the case:

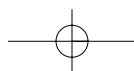
Yet, as Tina Rosenberg writes in her account of the trials, one of the objectives of border guard training was to create unreflective obedience and a "siege mentality." The East German public viewing the trials was troubled, as Martha Minow notes, by the court's failure to acknowledge or understand the context of the guards' conduct, such as issues of indoctrination and military control, as well as its automatic application of West German moral and ethical standards to the East German border guards. A further problem with these trials was that the judges who tried the first cases were all from West Germany. On a practical level, the West German judges often did not know

183. See I. Tallgren, *supra* note 2, at 575; H. Arendt, *supra* note 12, at 291–92 ("Can we apply the same principle that is applied to a governmental apparatus in which crime and violence are exceptions and borderline cases to a political order in which crime is legal and the rule?"); Mark Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War*, (2001) (pointing out that factors such as culture, propaganda, and "common knowledge" may have bearing on the extent to which unlawfulness is manifest). See also M. Osiel, *supra* note 33, at 1755 & 1769 nn.13–15 (2005); Mark A. Drumbl, *Collective Violence and Individual Punishment*, 99 *Nw. U. L. Rev.* 549–50 (2005); Martha Minow, *Between Vengeance and Forgiveness* 46 (1998).

184. See Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 *Colum. J. Transnat'l L.* 107–10 (2001).

185. See *ibid.*

186. See *ibid.*



enough about the East German system to understand the subtle psychological context of the border guards' attack on their fellow citizens.¹⁸⁷

Each of the above opinions points to the fact that the uniqueness of the ICL context necessitates greater particularity when determining criminal responsibility. The forthcoming subsections employ a particularizing standard for evaluating the criminal conduct of war criminals. They lay the foundation for employing a context-dependent notion of reasonableness vis-à-vis defendants under international criminal law. This might on occasion replace the reasonable person with the reasonable Hutu, or the reasonable Serb, or the reasonable hate-propaganda-exposed defendant.¹⁸⁸ The aim in each of the forthcoming sections is to achieve individualized justice for defendants who commit crimes in time of war through a more particularized personal analysis of their conduct.

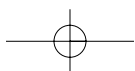
1. Mistake of Fact (full excuse) and Provocation (partial excuse)

In the corresponding section above (II.D.), the *Finta* and *Tadić* cases were used to illustrate how rigidity between mistake of fact and provocation under international criminal law has led to inconsistencies in the attribution of criminal liability. The proposal in this section is to employ the mistake of fact defense to protect those who acted honestly, although mistakenly, in the face of perceived provocation. Of relevance to this discussion is the U.S. Model Penal Code's (MPC) extreme mental or emotional disturbance (EMED) defense, which combines provocation with mistake of fact.¹⁸⁹ According to the MPC, for a plea of EMED to succeed, the defendant must experience "intense feelings" sufficient to cause the loss of control at

187. See *ibid.*, at 109.

188. Particularized standards are recognized under domestic law. See, e.g., *Regina v. Muddarubba* (Austl., 1956) (unpublished decision), reprinted in Joseph Goldstein, Alan M. Dershowitz, Richard D. Schwartz, & Richard C. Donnelly, *Criminal Law: Theory and Process* 989 (1974) (The defendant's tribal community was found to be relevant to his plea of provocation.); see also *R v. Dincer* (1983) 1 V.R. 460, 461, 467 (Austl.) (Both the nationality and culture of the defendant were found to be useful in assessing the defendant's plea of provocation.).

189. See Model Penal Code and Commentaries (Official Draft and Revised Comments), Part II, vol. 1, art. 210.3(1)(b), p. 1 (1980). For relevant literature on the mens rea aspect of the Code, see Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability*, 35 *Stan. L. Rev.* 681–83 (1983).



the time of the killing. It further requires that the defendant's emotional disturbance be based on a "reasonable explanation or excuse" but qualifies this requirement with the addendum that reasonableness must be determined from the defendant's situation under circumstances as he or she believes them to be.¹⁹⁰ According to Dressler, "the Commentary states that the phrase 'under the circumstances as he believes them to be' is meant to clarify the role of mistake in provocation law."¹⁹¹

It is therefore worth considering EMED vis-à-vis the World War II case of *Regina v. Finta*,¹⁹² which brought to the fore the role of mistake in provocation under international criminal law. In that case, as should be recalled, the accused was a Hungarian who had been a police officer during World War II and immigrated to Canada in 1948. He was accused of committing manslaughter, kidnapping, unlawful confinement, and robbery by assisting the Nazis in the forced deportation of Jewish people from Budapest during the Holocaust. In its deliberations, the Canadian Supreme Court opined that the requisite test for the mental element of crimes against humanity was a subjective test. Employing this test, the majority arrived at the conclusion that the accused mistakenly relied on the "general, publicly stated belief in newspapers in Hungary that the Jews were subversive and disloyal to the war efforts of Hungary" and on "the universal public expression in the newspapers cited by one of the witnesses of approval of the deportation of Hungarian Jews."¹⁹³ On the basis of this line of reasoning, the accused was acquitted.

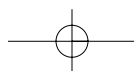
Several issues are raised by the acquittal. One issue is that, by considering the reasonableness of Finta's conduct from the viewpoint of a person in Finta's situation under the circumstances as he believed them to be, the Canadian Supreme Court may have inadvertently legitimized racist conduct. In this respect, Alvarez along with "Irwin Cotler and other critics of

190. See Model Penal Code, *ibid.* (The MPC provides that the "reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."). See, e.g., Joshua Dressler, *Understanding Criminal Law* § 31.07, [B][2][b][ii], at 531 (3rd ed. 2001) (The MPC formulation is more subjective insofar as it requires that the reasonableness of the explanation or excuse for the actor's disturbance be assessed from the viewpoint of a person "in the actor's situation.").

191. See Dressler, *supra* note 16, at 990.

192. See *Regina v. Imre Finta*, *supra* note 137.

193. See *ibid.*



the controversial Finta decision have argued that the above portions of the Canadian Supreme Court's opinion threaten to turn evidence of anti-Semitism or racism from an element of an international crime into a defense.¹⁹⁴ As stated by Alvarez, "Pursued to its logical end, the result could be that any 'lynch mob' atmosphere could arguably be pleaded as a defense."¹⁹⁵ In his comment on the MPC commentary, Dressler noted that the word "situation" in the phrase "from the viewpoint of a person in the actor's situation" is "designedly ambiguous."¹⁹⁶ Furthermore, according to him, "the term situation as employed in the commentary is meant to allow a jury to consider a defendant's 'personal handicaps and some external circumstances,' but there are limits to subjectivization. . . . It is 'equally plain that idiosyncratic moral values'—the Commentary gives an example of an assassin who kills a political leader because he believes it is right to do so—'are not part of the actor's situation. An assassin . . . cannot ask that he be judged by the standard of a reasonable extremist. Any other result would undermine the normative message of the criminal law."¹⁹⁷ Dressler further wrote: "The Commentary concedes that there are many cases between these extremes—'matters . . . [not] as integral a part of moral depravity as a belief in the rightness of killing'—that are better left to common law resolution."¹⁹⁸

In the light of the above, the question is, Was Finta a racist, or did he genuinely mistakenly believe that Jewish people posed a threat? There are two possible answers: on the one hand, his subjective beliefs could be dismissed as a false attempt to avoid liability or willful blindness. In this respect, Cotler et al. argued that the Supreme Court erroneously concluded that Hungarian newspapers spread hate propaganda. They made the following relevant statement:

[T]he Court was misled in its reliance on Finta's characterization of these Hungarian newspapers. In particular, the newspapers do not contain one

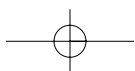
194. See Alvarez, *supra* note 141, at 427.

195. See *ibid.*

196. See Dressler, *supra* note 16, at 991.

197. See Dressler, *ibid.*

198. See Dressler, *ibid.* The concerns raised by these scholars pertain to a hypersubjectivism of the reasonable man standard. For criticism of this approach, see, e.g., Cynthia Kwei Yung Lee, *Race and Self-Defense*, 81 *Minn. L. Rev.* 367, 386 (1996) ("A subjective standard of reasonableness might also be criticized for allowing people to set their own standards governing the permissible use of force.").

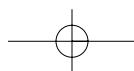


word about the “subversiveness” and “disloyalty” of the Jews; indeed, some do not even mention the war and only one piece makes any reference to any alleged military danger from the Jews. This article, while published in a newspaper on April 9, 1944, is not a newspaper “report” but a memorandum written on February 18, 1944 (i.e., one month before the German invasion), by thirty-four right-wing Hungarian Members of Parliament from the Hungarian Life Party. Rather than purporting to be “an indication of the feelings of the Hungarian people,” the memorandum complains about those elements “working without the slightest hindrance for rehabilitating the Jews in the eyes of the Hungarian people.” Accordingly, in adopting Finta’s inaccurate submission that there was “a general publicly-stated belief in newspapers in Hungary that Jews were subversive and disloyal to the war efforts of Hungary,” Cory, J., may have been misled into believing that, if this were true, it somehow gave an “air of reality” to a defense of mistaken belief.¹⁹⁹

This statement gives the impression that Finta was aware that Jewish people were innocent of the accusations of “subversiveness” and “disloyalty” but shut his mind to it. On the other hand, the Canadian Supreme Court was of the opinion that Finta made an unreasonable mistake of fact in genuinely believing that Jewish people posed a threat to Hungary. From the Supreme Court’s perspective, Finta would not be equivalent to the assassin in the MPC example because his reason for committing crimes against Jewish people was not an idiosyncratic one if we tell the story his way: It was to protect his society from a threat he (mistakenly) perceived.²⁰⁰ In addition, the reason why the Canadian Supreme Court appeared sympathetic toward Finta can be linked to its finding of a correlation between Nazi hate propaganda as a whole and Finta’s bizarre beliefs, which in its opinion affected the defendant’s racial thought processes. Thus the Supreme court appeared to distinguish between a defendant who kills someone and then relies on his racist views to mitigate his offense (because he has a “reasonable” explanation for his anger) and

199. See Judith Hippler Bello and Irwin Cotler, *International Decisions: Regina v. Finta*, 90 Am. J. Int’l L. 473 (1996).

200. Relevant literature excusing the mistakenly unjustified actor (i.e., an individual acting under the mistaken belief that he or she is under attack), includes the following: Paul H. Robinson, *Competing Theories of Justification: Deeds versus Reasons*, in *Harm and Culpability* 283–84 (Andrew P. Simester & Tony Smith eds., 1996) (“[T]he mistakenly unjustified actor is excused.”); see also Greenawalt, *supra* note 20, at 1908–09 (maintaining that the mistakenly unjustified actor is “warranted”); Fletcher, *supra* note 15, at 564–65.



one who through deceit and misrepresentation was led to believe the situation to be radically different than it was. The latter clearly does not appear to be as culpable as the former.

In the *Finta* case, Justice Cory cited the following factors that supported the mistake of fact defense:

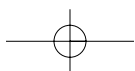
1. The accused position in a para-military organization;
2. the existence of a war;
3. an imminent invasion by Soviet forces;
4. the general, publicly stated belief in newspapers in Hungary that Jewish people were subversive and disloyal to the war efforts of Hungary;
5. the universal public expression in the newspapers cited by one of the witnesses of approval for the deportation of Hungarian Jews;
6. the organizational activity involving the whole Hungarian state together with their ally, Germany, in the internment and deportation;
7. the open and public manner of the confiscation under an official, hierarchical sanction;
8. The deposit of seized property with the National Treasury or in the Szeged Synagogue.²⁰¹

Arguably many of these factors were also present in some form in the former Yugoslavia and in Rwanda, and therefore may well have affected defendants who genuinely believed the situation to be radically different than it was. In the *Tadić* case, the use of hate propaganda to “engineer” the commission of international crimes in the former Yugoslavia is evident in the following statement by Scharf:

The story that emerged from the *Tadić* trial was of a country whose people were swept into the hurricane of ethnic nationalism. Witness after witness testified that there had been general ethnic harmony and a high rate of inter-faith marriage in Bosnia before the ethnic conflict began in 1992. The trial proved that the hatred that emerged in 1992 had been engineered, not innate. Serb-controlled television and radio broadcasts spread ethnic hatred like an epidemic. By way of comparison, one of the witnesses asked the judges to imagine what would happen if former Ku Klux Klan leader David Duke seized control of all the television and radio stations in the United States. The lesson of the *Tadić* trial is that given the right set of circumstances, almost any body in any country can become a “willing executioner.”²⁰²

201. See *Regina v. Imre Finta*, *supra* note 137.

202. See Michael P. Scharf, *The Prosecutor v. Dusko Tadic*, 60 *Alb. L. Rev.* 861–82, 865–66 (1997). Of relevance here is the following statement by Janey Greene, *A Provocation*



In addition, the factors listed in the *Finta* judgment draw ICL attention to the systematic and deliberate campaign of hate propaganda and incitement by leaders' vis-à-vis. In the context of Nazi Germany, Baird observed, "Nazi propaganda was unique in the way it merged the practical and political with the mythical. Hitler, more than any other twentieth-century leader, focused on the irrational through myths and symbols in his propaganda; all the day-by-day themes he employed were subsumed in the mythical whole, the Hitlerian ethos based on race. The Jewish enemy was clearly defined as a group on which the collective fears of the nation must be directed, and thereby purged."²⁰³ Vis-à-vis Nazi Germany, Gulseth commented on the link between emotions and the effectiveness of propaganda:

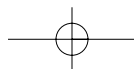
The propagandist does not engage in genuine argument because his/her answers are determined in advance. . . . For instance, the Nazi propaganda mobilized the Germans by appealing to their emotions rather than their capacity for rational arguments. Since all the basic motives in human beings are emotionally conditioned, a propagandist makes ample use of love, anger, fear, hope, guilt, and other feelings and sentiments to manipulate the public.²⁰⁴

Manipulation of emotions via the dissemination of false information and propaganda is also evident in the context of Rwanda and the former

Defence for Battered Women Who Kill?, 12 *Adel. L. Rev.* 146, 148 (1989) ("An alternative justification for the defence of provocation is that certain categories of people are placed by society in situations in which they well might be provoked to kill. . . . Human weakness cannot be remedied; social problems which encourage social weakness can be. . . . Society cannot justly insist on giving full weight to its own concerns with preserving human life and social order when these are counterbalanced by society's having placed the defendant at high risk of being provoked to kill. . . ."); See William C. Heffernan, *Social Justice/Criminal Justice*, in Heffernan & Kleinig, *supra* note 181, at 10 (2003) (asking the following question: "if someone suffers a social wrong (as defined by a specific conception of social justice), should that person be excused from liability if his conduct is traceable to the wrong he suffered?").

203. See Jay W. Baird, *The Mythical World of Nazi War Propaganda 1939–1945*, 3 (1974). See also, generally, the following: Marlis G. Steinert, *Hitler's War and the Germans: Public Mood and Attitude during the Second World War* (1977); David Bankier, *The Germans and the Final Solution* (1992); Zbynek A. B. Zeman, *Nazi Propaganda* (2nd ed. 1964); Aristotle A. Kallis, *Nazi Propaganda and the Second World War* (2006).

204. See Hege Løvdal Gulseth, *The Use of Propaganda in the Rwandan Genocide: A Study of Radio-Télévision Libre des Mille Collines (RTL)M*, 38 (2004).



Yugoslavia. For instance, Kressel linked propaganda with conformity in the context of Rwanda:

Once fired up and misled by inflammatory media broadcasts, a frenzied mob psychology also propelled many Hutus in the general population over the brink to mass murder. Had these people been asked to act alone, they might never have become killers. Even hate-poisoned, angry, and misled people would possibly have felt moral inhibitions against picking up machetes and using them against unarmed women and children.²⁰⁵

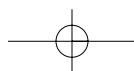
Kressel also saw analogies between the former Yugoslavia and Rwanda:

Extremists in Serbia and Rwanda used the mass media very effectively to ignite and fan the animosities which had historical origins but which had not flamed up recently. In both instances, the target of the hate propaganda was a group that had, itself, been associated with mass slaughter in the past. Thus, Serb leaders were able to obscure the critical distinction between present-day Croats and Muslims, on the one hand, and Ustashas from the World War II era on the other. Extremist Hutus drew on the knowledge that Tutsis in Burundi had murdered tremendous numbers of Hutu in 1972, 1988, and most recently in 1993; they also revived fears that returning Tutsis would reappropriate Hutu land and restore the Hutu to their historically subordinate position in Rwandan society. Thus Serb and Hutu militants created a public atmosphere of fear, where a strategy of mass murder became widely perceived as the only effective defense against attack.²⁰⁶

In addition, the correlation between hate propaganda and the commission of international crimes draws attention to cognitive dissonance and difficulties defendants encounter when exposed to misleading information that contradicts what they already know and are committed to. This leads to the following question: Why do individuals appear to be more gullible vis-à-vis lies when told by the state than to the same lies when told by private individuals? Arguably one main reason is the increase in state power, in wartime situations, over individual thought and action at the expense of community values. In this respect Gopalani observed, “The conventional marketplace of ideas analogy for the justification of free speech does not apply in many cases of genocide. Imperfections in the marketplace,

205. See Neil J. Kressel, *Mass Hate* 116 (1996).

206. See *ibid.*, 118.



most notably the concentrated power of the mass media, interfere with the discovery of truth.”²⁰⁷

Furthermore, in support of these statements are results of field work undertaken by Malešević and Uzelac vis-à-vis the Yugoslav context amongst students at Zagreb University in May 1992 and June 1993.²⁰⁸ Their research provides an insight into how the media shaped public opinion in that region. It should be recalled in this respect that in the context of the Yugoslav conflict, government officials in the republics of Serbia and Croatia were known to have utilized their near-monopoly control of the news media to fuel their publics’ ethnic prejudices, mobilizing a popular nationalist constituency to support their rule while discrediting more liberal opponents. In measuring the success of this monopoly on public perceptions of other ethnic groups at that time, Malešević and Uzelac research offers ample evidence of the impact of the media in molding Croatian public opinion, which had previously been favorable toward the Muslims. In May 1992, when the first sample of their study was taken, the distance perceived by Croats between themselves and Muslims was said to have been the lowest compared with other ex-Yugoslav ethnic groups. However the second sample, taken in June 1993, revealed a dramatic change: Muslims now “were classified in the same manner and in the same category as Serbs and Montenegrins.” Malešević and Uzelac observed that the change “would not be so striking if the respondents had actually experienced Muslim misdeeds or atrocities personally.”²⁰⁹ It follows that in this case, when the entire war was perceived through the media, it could be concluded that the same media at least partially induced an increase in social distance. Between May 1992 and June 1993, “Croats from Croatia read in their daily newspaper about their new enemy—the Muslims.”²¹⁰ In sum, the media “thus served as an instrument for the legitimization of the actions of the Croatian political elite.”²¹¹

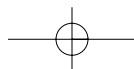
207. See Gopalani, *supra* note 46, at 110.

208. See S. Malešević & G. Uzelac, Research Note: Ethnic Distance, Power and War: The Case of Croatian Students, 3(2) *Nations and Nationalism* 291–98 (1997).

209. See *ibid.*

210. See *ibid.*

211. See *ibid.* See Otto Lerbinger, *Designs for persuasive communication* 6 (1972) (the “new scientific methods of persuasion” in combination with mass media devices such as TV and radio have led to the possibility of “hidden persuasion” or “the engineering of consent” among large numbers of people.).

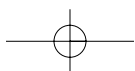


In the light of the above, it is clear that individuals appear to be more gullible vis-à-vis lies told by the state than the same lies told by private individuals, as a result of the abundance of resources at the disposal of a state. These resources are employed by the elite in “tracking” their citizens into participating in a war that benefits mainly a few. This in a sense constitutes a violation of individual autonomy. It is here that one can, for instance, draw some parallels with the concept of entrapment under domestic law. For instance, under domestic law in the context of cases involving the entrapment defense, the same actions that would merit acquittal if done by the state, provide no defense if done by a private citizen. One justification for this differential treatment, which may be useful in evaluating state conduct vis-à-vis the ICL context, is that of autonomy. In this respect, Carlon citing Yaffe, pointed out the following:

[I]n practice, police entrapment is different from private entrapment in that the former “tracks” the defendant (the analogy is to a heat-seeking missile “tracking” its target). If a defendant first rejects a temptation, the state will try another, and another, and so forth, until it achieves its results. . . . At least theoretically, the state will continue to tempt until it achieves its goal—essentially predetermining that the target will engage in crime, and giving him no effective choice to do otherwise. A private individual would never engage in such a lengthy process to convince another to commit a crime; eventually she would become discouraged and go find someone else. (Indeed, just soliciting someone who clearly does not want to engage in crime presents tremendous risk.) Professor Yaffe maintains, then, that it is this aspect—that, objectively, the target does have no choice, since the state will continue to try different ways to tempt until it finds the right price—that allows us to distinguish between police and private entrapment.²¹²

A second possible explanation for why individuals appear to be more gullible vis-à-vis lies told by the state than by private individuals is the psychological difference in relying on the words of a state agent, which are meant to be authoritative, and in relying on those of a private agent, which do not carry the same weight. Parry gave the following domestic law examples: “Consider a person who is upstairs in a house when an intruder begins to break in below. Grabbing a gun from the nightstand drawer, he retreats to a back room and calls the police from a cellular

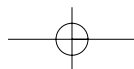
212. See Andrew Carlon, *Entrapment, Punishment, and the Sadistic State* 93 (4) Va. L. Rev. 1081–34, 1111 (2007).



phone. The police assure him that he has a right to use his gun to defend himself from an intruder. Relying on this advice, he shoots the unarmed intruder at the door of the back room. If the law of that jurisdiction requires an actual threat to life and limb to justify use of deadly force in self-defense, then he may be in the wrong, but undoubtedly has the right to present the defense to a jury.”²¹³

From all of the above, it follows that there is a likelihood that in some instances the defense of mistake, when used in conjunction with provocation, may be valid, where that mistake led the accused to believe that their actions were excusable. Thus a charge of murder as a crime against humanity may be negated by genuine mistake of fact that the victim posed a threat. As unpalatable as such a result may appear, there is a need to focus on the big picture. Depriving genuine claims of excuse would leave the

213. See John T. Parry, *Culpability, Mistake and Official Interpretation of Law*, 25 *Am. J. Int'l L.*, 1–78, n.88 (1997); see also *United States v. Barker*, 546 F. 2d 940 (D.C. Cir. 1976) (The defendants were recruited by a former CIA agent who was at that time working as a White House employee to participate in a national security operation. Their convictions were reversed on appeal. The Court of Appeal attempted to carve out an exception to the mistake of law rule that would enable exoneration of a defendant who relied on authority that was merely apparent, but not real. The defendants were granted a defense of reasonable reliance on the advice of a government official.). In the ICL context arguably a form of vicarious liability should exist between the superior and the subordinate who obeys an illegal order based on the right of the former to govern, supervise, manipulate, and control the action of the latter. See, e.g., Nico Keijzer, *Military Obedience* 145 (1978); Matthew Lippman, *Conundrums of Armed Conflict: Criminal Offences to Violations of the Humanitarian Law of War*, 15 *Dick. J. Int'l. L.* 1, 4–5 (1996) (“Low-level combatants were ill-equipped to evaluate the context of a command. An order might appear invalid but in fact be legally justified as an act of reprisal. The extension of criminal culpability would condemn soldiers to the often conflicting commands of domestic and international law.”); James B. Insko, *Defense of Superior Orders before Military Commissions*, 13 *Duke. J. Comp. & Int'l L.* 389–418, 406 (2003) (writing in relation to First Lieutenant William Calley’s defense of obedience to superior orders in relation to his participation in the My Lai Massacre, the court held that the order on which Calley relied for a defense “is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful.” The public outcry in the United States was overwhelming, and on Apr. 1, 1971, one day after the sentence was imposed, President Nixon ordered Calley’s release.). The conviction and release of Calley illustrate the conflict between law and morality in such cases; see Herbert C. Kelman & Lee H. Lawrence, *Assignment of Responsibility in the Case of Lt. Calley*, 28(1) *J. Soc. Issues* 177–212 (1972) (A national survey conducted between May and June 1971 demonstrated that the majority of Americans opposed not only the verdict and sentence meted out to Calley, but also the fact that a trial had taken place at all.).



international criminal justice system without any tools by which to grade culpability. As Singer noted,

Any utilitarian approach to criminal law, however, misses the critical point: that the engine of the criminal law is to be ignited primarily for imposing blame, and an actor who honestly believes the facts allow her to act legally, is not blameworthy, however badly mistaken. For at least three hundred years the criminal law exonerated those who acted upon mistakes of fact, reasonable or unreasonable. Neither Hale's explanation that an act done in mistake is "morally involuntary" nor Blackstone's conclusory declaration that an act done in mistake is done "without a will" is helpful in terms of explanatory force. Yet each suggests a widely held consensus that people who act while mistaken are not to be treated equally with those who act while they are not mistaken, who know precisely what they are doing, and understand precisely the implications and potential results of their acts.²¹⁴

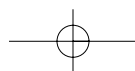
Finally, it should be added that provocation should not be employed as a default mens rea for unreasonable mistake of fact, as mistake of fact even when unreasonable is given the same status as a reasonable mistake of fact under some jurisdictions. It follows that, although some domestic jurisdictions limit the availability of mistake of fact to mistaken belief that was reasonably held, others such as England allow an unreasonable mistake of fact defense.²¹⁵ In relation to the latter, the fact that mere honesty of belief would support a mistake of fact defense even where it is unreasonable does not constitute a carte blanche for violent conduct. Thus where the accused willfully blinded himself to the facts before him, honest belief, in the sense that that accused had no specific knowledge to the contrary, would not afford a defense, because in such a situation that accused is fixed by law with actual knowledge and his belief in another state of facts is irrelevant.

2. Duress and Coercion: Subjectivity v. Objectivity

In the corresponding section above (II.C.), it was stressed that a high degree of ambiguity exists in relation to situations involving duress and coercion under international criminal law. As noted previously, the Trial

214. See Richard Singer, *The Resurgence of Mens Rea II*, 28 B.C. L. Rev. 459, 513 (1987).

215. In the case of English law, see *R v. Letenock* (1917) 12 Cr. App. R. 221, CCA; see Law Commission, *Partial Defences to Murder*, Final Report, 68, para. 3.157 (2004), [http://www.lawcom.gov.uk/docs/lc290\(2\).pdf](http://www.lawcom.gov.uk/docs/lc290(2).pdf) (last visited Dec. 2, 2009). For Australia, which limits the availability of mistake of fact in provocation cases to mistaken belief that was reasonably held, see *R v. Abebe* (2000) 1 V.R. 429; *R v. Dib* (2002) 134 A. Crim. R. 329.

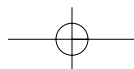


Chamber in the Mrdja case, in determining the accused's duress defense, included characteristics such as his age and low rank, but omitted "intellectual" and "personal ability" and, more significantly, the "constant anti-Muslim brainwashing and hate propaganda." This raises the following fundamental issue: For the purpose of evaluating duress claims, should war crime defendants be treated as belonging to a category of people whom the fact finder might think less able to resist pressure than people not within that category?

It is argued here by revisiting the Mrdja deliberations that a more subjective standard should be employed in relation to ICL cases involving duress. It should be recalled that the defense made reference to the fact that the accused was a "low-ranking member of the Intervention Platoon" who was subjected "to the constant anti-Muslim brainwashing and hate propaganda of his superiors." The defense accordingly submitted that, "[a]lthough, without any doubt, he had the legal and moral obligation to oppose the order given to him and the other members of the Platoon, [Darko Mrdja] had neither the intellectual nor personal ability to do so." In support of its submissions, the defense made reference to the Erdemović Sentencing Judgment and the case law of the German Supreme Court, which acknowledged that duress is, in some circumstances, a mitigating factor. However, the prosecution counterargued that the circumstances of the Erdemović case were different from the present case in that Erdemović expressly refused to comply with his superior's orders, was threatened with execution, and only then committed the crimes.

This brought into focus the role of physical versus nonphysical means in effectuating duress, and framing the issue as whether duress can emanate from psychological as opposed to physical coercion. As already explained, the Trial Chamber was of the opinion that duress is limited to physical coercion and that psychological coercion was insufficient to effectuate duress.²¹⁶ It therefore refused to subjectify duress with the defendant's personal characteristics and situational circumstances. It is argued

216. See, however, research on cognitive restructuring by Keiser & Keiser (1987): "... citing research conducted after World War II and the Korean War, in which it was found that the techniques of physical coercion create resistance and result in only superficial changes. Cult conversion by cognitive restructuring, however, does not involve physical coercion but results in deeper and more lasting changes in beliefs and attitudes because the receiver is brought to cognitive agreement with the worldview being presented"; extracted from Powers, *supra* note 125, at 133.



herein that greater flexibility is needed in this area since, in practice, the absence of voluntary participation in the perpetration of atrocities may be evidenced by the presence of various factors other than force or threats of force, such as taking advantage of a person who is unable to resist or misrepresentation.²¹⁷ It follows that duress and coercion should not be interpreted narrowly, as is currently the case, as it could encompass most conduct that negates consent.

In the light of these considerations, this section calls for a reformulation of the concept of duress in the ICL context along the lines of the U.S. Model Penal Code (MPC). Under the MPC's formulation of the defense, duress is a defense whenever "a person of reasonable firmness in [the defendant's] situation would have been unable to resist."²¹⁸ In the official comment to this provision, the American Law Institute explained that "persons of reasonable firmness surely break at different points depending on the stakes that are involved"; it further observed that "even homicide may sometimes be the product of coercion that is truly irresistible, that danger to a loved one may have greater impact on a person of reasonable firmness than a danger to himself, and, finally, that long and wasting pressure may break down resistance more effectively than a threat of immediate destruction."²¹⁹ What the MPC essentially achieves is an expansion of the concept of duress²²⁰ "by removing many of its threshold elements and designating them as mere factors for consideration by the fact-finder."²²¹

Of particular significance here is the MPC's stipulation that "long and wasting pressure may break down resistance more effectively than a threat of immediate destruction."²²² This is important as it ensures that the defendant in the *Mrdja* case would be given the same opportunity as the accused in the *Erdemović* case to raise the plea of defense of duress by

217. For a comparative analysis of the concepts of coercion versus persuasion, see Richard H. Price et al., *Principles of Psychology*, 510–11 (1982); see also Powers, *id.*, at 125 ("Persuasion and coercion are types of influence. Persuasion is commonly considered to be morally justifiable, while coercion is considered to be unethical and morally justified only in limited types of circumstances.").

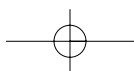
218. Model Penal Code § 209, subd. (1).

219. See Model Penal Code & Commentaries, com. 3 to § 209, p. 376.

220. For a discussion of how the Model Penal Code expands the concepts of duress, see Joshua Dressler, *Understanding Criminal Law*, 270–72 (1987).

221. See Dore, *supra* note 118, at 718–19.

222. See Model Penal Code, *supra* note 219.



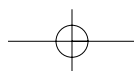
asserting that he was coerced to perform the act by the continued use of unlawful force. It follows that even though neither force nor threat of force was used on a particular occasion, such an accused may argue that he is responding to earlier psychological conditioning. Thus a defendant who commits crimes under the shadow of a coercive hate propaganda campaign should be allowed to claim duress. It therefore should be irrelevant whether the coercion was physical or psychological, or whether it occurred immediately prior to the act or long before the act. Finally, with a formulation similar to the MPC's, all of the factors relevant to evaluating Mrdja's responsibility—his age, low rank, "intellectual" and "personal ability," and the "constant anti-Muslim brainwashing and hate propaganda"—would form part of the calculus of the defendant's situation in duress cases. This however would not necessarily absolve the defendant of blame.

3. Mental Abnormality (diminished responsibility) and Mental Normality (provocation)

Previously it was established that the separation of provocation and diminished responsibility has created a gap in coverage into which a worthy defendant could land, finding no avail in either of the two defenses under international criminal law. Also demonstrated was how the accused in both the Banović and Celebici cases appeared to have fallen into such a gap. In this section an attempt is made to fill this gap by incorporating abnormality into the assessment of normality. To achieve this, the aim here is not to advocate a wholesale merger of provocation and diminished responsibility under international criminal law, rather it is to enable a defendant with abnormalities short of diminished responsibility to rely on a provocation defense. Therefore the two defenses could be pleaded together by that defendant.

There is a need to explain why a merger of both defenses has been rejected in favor of retaining the two defenses separately.²²³ The main reason for rejecting a merger is that it takes us back to square one. In other words,

223. Interestingly, this issue has provoked lively debate amongst English law scholars. See Ronald D. Mackay & Barry J. Mitchell, *Provoking Diminished Responsibility*, *Crim. L. Rev.* 745 (2003); John Gardner & Timothy Macklem, *No Provocation Without Responsibility*, *Crim. L. Rev.* 219 (2003); James Chalmers, *Merging Provocation and Diminished Responsibility*, *Crim. L. Rev.* 198 (2004).



under a merger, all degrees of mental abnormality would be considered under a provocation defense. This would lead to the importation of problematic aspects of diminished responsibility such as the admissibility of expert evidence and a change in the burden of proof in the context of a provocation defense,²²⁴ resulting in much disagreement amongst expert witnesses and the failure of the provocation defenses in some instances.²²⁵ On the other hand, retaining both defenses would ensure that lesser abnormalities that do not meet the minimum threshold for diminished responsibility would be considered in the context of a provocation defense.²²⁶ Such an approach would necessitate employing a standard of reasonableness that abandons the objective test in favor of a subjective test that takes account of the accused's mental abnormalities in the assessment of his loss of self-control.²²⁷

The Banović case can be employed to demonstrate the effect of including mental abnormalities short of diminished responsibility in the assessment of loss of self-control relevant to provocation. Applying subjective provocation to the defendant in the Banović case, the issue that a fact finder would need to resolve would be whether someone with a low level of education and modest intellectual capabilities is more susceptible to succumbing to war propaganda and experiencing an emotional outburst. Of interest is the fact that several studies establishing a correlation between low literacy level and propensity to succumb to hate propaganda have already been conducted in the ICL context. For instance, an important study by Wood and Stagner²²⁸ gives insight into why certain categories of people respond to propaganda messages. According to their study:

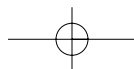
224. See generally Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses*, 77 *Colum. L. Rev.* 827 (1977).

225. See *ibid.*

226. See *ibid.*

227. This is already the case under English law, where the doctrine of particularization is recognized. See *Reg. v. Dryden* [1995] 4 All E.R. 987 (The Court of Appeal said that the obsessiveness and eccentricity of the defendant should have been left to the jury as "mental characteristics," which they should have taken into account as relevant to provocation.). See *R v. Humphreys* [1996] *Crim. L. Rev.* 431 (on immature and attention-seeking personalities); *Reg. v. Thornton* No. 2 [1996] 2 All E.R. 1023 (on personality disorders).

228. See generally Wendy Wood & Brian Stagner, *Why Are Some People Easier to Influence than Others?*, in *Persuasion* 149–74 (Sharon Shavitt & Timothy C. Brock eds., 1994).



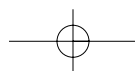
. . . persons with high intelligence, are more likely to attend to and comprehend the message position but are also less likely to yield to it. The low level of yielding occurs because intelligent individuals possess knowledge contradicting the message and can use the information to refute message arguments. . . . In general, then, given a complex, well-reasoned message, the people who understand the message position should be more likely to adopt it. The enhanced reception associated with high intelligence should result in such individuals being more influenced by a complex message than those with low intelligence. Alternately, if the message is easy to understand and not well reasoned, yielding becomes the crucial factor, and less intelligent recipients should be more readily persuaded.²²⁹

This observation is in line with the results of Hovland, Lumsdaine, and Sheffield's study, which demonstrated that better-educated men were more likely than those less educated to be persuaded by convincing, high-quality arguments such as "Appeasement of Germany by Britain and France would only make things worse in the long run." Better-educated men were less persuaded by silly arguments such as "The Germans, if victorious, would try to control our country completely and force Americans to work as slaves."²³⁰ Furthermore, in Rwanda, Gulseth observed, "The less educated and informed the people to whom agitation propaganda is addressed, the easier it is to make. Therefore it is particularly suited in Africa. . . . In 1994, the school attendance rate in the country [Rwanda] was only 36.4%."²³¹ In addition, of relevance to understanding why so many Hutus participated in the genocide is the following historical account of the comparative educational levels of Hutus and Tutsis by Gulseth: "Under Belgian rule, education became a portal which gave access to political power. It was also the portal of the Catholic Church. Political conflict in Belgium, and lack of money and men in Rwanda, left

229. See *ibid.*

230. See, generally, *Experiments on Mass Communications* (Carl I. Hovland, Arthur A. Lumsdaine, & Fred D. Sheffield eds., 1949).

231. See Gulseth, *supra* note 204, at 33–34 (2004). From a legal perspective, see Toni Pickard & Phil Goldman, *Dimensions of Criminal Law*, 467 (1992) ("Human frailties encompass personal characteristics habitually affecting an accused's awareness of the circumstances which create risk. Such characteristics must be relevant to the ability to perceive the risk. For example . . . illiteracy may excuse the failure to take care with a hazardous substance identifiable only by a label, as the accused may be unable, in this case, to apprehend the relevant facts. . . .").



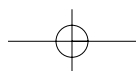
the educational system almost entirely in missionary hands. Most often, they restricted admission mainly to the Tutsi, especially in the upper schools. Since the Tutsi were the “natural born chiefs,” they had to be given priority in education so that the Church could enhance its control over the future elite of the country. In schools where both Hutu and Tutsi children were admitted, the latter group was given a ‘superior’ education taught in French.”²³²

Finally, the above discussion highlights the need for redrawing the boundaries between the notions of normality and abnormality in the ICL context. In relation to the Banović case, it would be stretching the truth to say that the accused was abnormal since such characteristics as low level of education and modest intellectual capabilities are part of ordinary human weaknesses. The case therefore should have been dealt with under provocation. On the other hand, Landzo’s personality characteristics should have constituted a dual disability that should have been examined in relation not only to diminished responsibility but also to the provocation defense.

CONCLUSION

The ICL field is currently facing a problem that criminal law has grappled with for hundreds of years—the imposition of blame. As evidenced by the herein, attributing blame in relation to some of the most serious crimes known to humankind is a complex process. Whereas international crimes are indeed extraordinary in their level of heinousness, the men and women who commit them are very much ordinary. This contradiction necessitates a fact-finding process that evaluates the criminal responsibility of perpetrators in the light of all the circumstances. The point of this discussion was precisely to illuminate the circumstances of men and women who kill and restore some humanity into this category of criminals. At present, one has the impression that there is a policy of judicial stripping away a war crime defendant’s situational context from the judgments of the international criminal tribunals. The weeding out of normatively deviant elements by ICL judges leaves the international criminal event with a very meager plot line, thereby augmenting the defendant’s apparent deviance: the war crime

232. See Gulseth, *ibid.*, 70.



defendant, using a weapon on an unarmed civilian, intentionally fired multiple shots. Devoid of the inflammatory media broadcasts that may have turned many like the defendant against individuals belonging to another group, and devoid of historical animosities between the defendant's group and the deceased's group, which would not have flamed up but for hate propaganda, the defendant's act of killing seems opportunistic, manifesting the violent, dangerous character of an evil and racist person. This is, however, far from being the case: hate propaganda overshadowed the extermination of Jewish people, the massacres of Tutsis, and the ethnic cleansing of Muslims, and therefore should be very much a part and parcel of the assessment of the criminal responsibility of the accused.

