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

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ABSTRACT

This Article discusses the Erdemovic *case in order to examine whether duress should be a defense to a crime against humanity. Although the Article contends that the arguments in favor of permitting the defendant to claim duress weaken as the seriousness of the offense charged increases, the Article also argues that the duress defense should usually succeed if it can be proved that the actor could not have prevented the threatened harm by refusing to capitulate to the coercion.*

After balancing the competing considerations, the Author concludes that the defendant in Erdemovic *should have been able to claim duress as a defense to the killing of dozens of civilians. Because the civilians would have died anyway at the hands of other soldiers, resisting the threats would have been useless. Even though this fact does not negate the wrongfulness of the defendant's act (i.e., justify his conduct), it should exempt him from responsibility (i.e., excuse his liability).*

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

Prosecutor v. Erdemovic[1] presents a particularly difficult case for the defense of duress. In *Erdemovic*, the International Criminal Tribunal for the former Yugoslavia (ICTY) tried the soldier Drazen Erdemovic for crimes against humanity. He was charged with systematically killing Muslim men and children in July 1995 as a

1. Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment on Appeal, ¶ 10 (Oct. 7, 1997).

member of the Bosnian Serb army.[2] Initially, he refused to take part in the shootings, but his superiors threatened to kill him if he did not comply.[3] At trial, Erdemovic confessed that he succumbed to the threats and killed nearly seventy people.[4] Ultimately, the question before the ICTY Appeals Chamber was whether the defense of duress is available when the offense charged is a crime against humanity.[5]

After struggling to come to grips with the problem, a majority of the justices in the ICTY concluded that, according to customary international law, duress is not a defense to murder.[6] In contrast, the dissenters believed that duress could, in principle, exclude responsibility for the killing of innocent human beings; however, they concluded that the defense of duress is subject to strict proportionality requirements.[7] Thus, the dissenters ultimately concluded that, in light of the grave harm caused when crimes against humanity are committed, it would be nearly impossible to establish the requisite proportionality between the harm effected and the harm averted.[8]

The question before the ICTY in *Erdemovic* was a momentous one. Determining whether duress should be a defense to a crime against humanity requires delving deeply into the distinction between justification and excuse in order to address three foundational problems that cut straight to the heart of criminal law theory: (1) Is duress a justification or an excuse? (2) Is the common law rule disallowing duress as a defense to murder sound? (3) Is it proper to condition the availability of the defense on the existence of strict proportionality between the harm caused by the defendant's actions and the harm averted?[9]

Unfortunately, the justices who took part in the *Erdemovic* case did not adequately address these fundamental queries.[10] They assumed that the defense raised was a justification, even though a plausible argument could have been made in favor of classifying it as an excuse.[11] Therefore, the justices failed to examine whether Erdemovic was claiming that his wrongful act should be excused

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2. *Id.* ¶ 1.
3. *Id.* ¶ 8.
4. *Id.*
5. *Id.* ¶ 18.
6. *Id.* ¶ 19.
7. Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 41 (Oct. 7, 1997).
8. *Id.* ¶ 50.
9. *See generally* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989) (discussing the importance of the justification versus excuse distinction).
10. *See* Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment on Appeal, ¶¶ 17–21 (Oct. 7, 1997).
11. *Id.*

because he was coerced, rather than that his act was justified because he did the right thing by choosing the lesser evil. The fact that they ignored this is particularly surprising in light of many, if not most, scholars' belief that the defense of duress is an excuse and not a justification.[12]

Complicating the matter is the fact that, even if one were to conclude that duress functions as an excuse, it is not evident that it should be a defense to every crime. Some have suggested that duress should not be a defense to murder.[13] Furthermore, even if one believes that duress should be a defense to murder, one could still argue that duress should not excuse the commission of a crime against humanity that involves the commission of many murders.[14] To ascertain whether it is correct to excuse those who commit murder or crimes against humanity because they were coerced, it is necessary to examine the rationale that justifies excusing those who perform wrongful acts. Even though some have tackled the question of whether the rationale for excusing actors should compel the legal community to accept duress as a defense to murder, a similar analysis is wanting in the context of crimes against humanity.[15]

Finally, it is unclear whether a defendant should be able to successfully plead duress when the harm caused was of epic proportions. It may very well be that, under certain extreme circumstances, society could legitimately require the coerced actor to do everything in her power, even sacrifice her own life, to avert the grave harm that would be inflicted if she succumbed to the threat. Therefore, it makes sense to ask whether a defendant like Erdemovic

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12. *See, e.g.*, Dressler, *supra* note 9; *see also* MARKUS DUBBER, CRIMINAL LAW: MODEL PENAL CODE 251 (2002) (describing duress as "the excuse analogue to the justification of necessity"); Kyron Huigens, *Duress is Not a Justification*, 2 OHIO ST. J. CRIM. L. 303 (2004) (discussing duress as an excuse). The drafters of the Model Penal Code also believed that duress was an excuse and not a justification. *See* MODEL PENAL CODE AND COMMENTARIES § 2.09 cmt. 2 (1985).

> The problem of § 2.09 [duress], then, reduces to the question of whether there are cases where the actor cannot justify his conduct under § 3.02 [choice of evils], as when his choice involves an equal or greater evil than that threatened, but where he nonetheless should be excused because he was subjected to coercion.

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

14. It should be noted that crimes against humanity include acts other than murder, such as rape, enslavement, torture, etc. For a discussion of the different modes of commission of crimes against humanity, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 74–81 (2003). The defendant in *Erdemovic*, however, was charged with having committed the offense by way of the perpetration of multiple murders.

15. *See* Dressler, *supra* note 9, at 1367–74.

should be held responsible in view of the fact that the harm he inflicted (the deaths of dozens of people) is significantly graver than the one he averted (the loss of his own life).[16] A satisfactory answer to this question requires an elucidation of the role of proportionality in the context of excuse defenses.

This Article will examine these three problems in four parts. Part II probes the opinions in the *Erdemovic* case with the purpose of demonstrating that both the majority and the dissent treated the duress defense as if it were a claim of justification. Part III argues that their conclusion was injudicious and that, properly understood, duress is an excuse, not a justification. Part III also argues that, in light of the nature of the defense, it is unwise to disallow claims of duress when the offense charged is murder.

Part IV attempts to show that the arguments in favor of permitting the defendant to claim duress weaken as the seriousness of the offense increases. This contention, which this Article calls the "seriousness of the offense" thesis, provides intuitive support for distinguishing cases in which the defendant pleads duress to a crime involving the killing of one human being from those in which the actor claims duress as a defense to the killing of dozens or hundreds of persons. While human sensibilities seem to point toward allowing the defense in cases of the former type, these intuitions do not support permitting the claim in situations of the latter type.

This Article finds theoretical support for the intuitions upon which the seriousness of the offense thesis is grounded in what the Author terms the "understandable choice" theory of duress. According to this theory, a coerced actor is properly excused when her decision to engage in wrongful conduct finds sufficient understanding amongst the community to warrant an exemption from liability. The latter portion of Part IV points out two factors that should be taken into account when making the aforementioned determination, namely: (1) whether the defendant had a legal duty to resist the threats he faced, even if refusing to succumb would lead to the defendant's death; and (2) whether the actor could have prevented harm to the victims by refusing to capitulate to the coercion.

Finally, Part V applies the understandable choice theory of duress to the facts in the *Erdemovic* case. After balancing the competing considerations, Part V concludes that the defendant should have been able to claim duress as a defense to the killing of dozens of civilians. Because the civilians would have died anyway at the hands of other soldiers, resisting the threats would have been useless. Even though this fact does not negate the wrongfulness of the defendant's

16. *See* Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgment on Appeal, ¶ 3 (Oct. 7, 1997) (setting forth the facts of the case).

act (i.e., justify the conduct), it should exempt Erdemovic and those like him from responsibility (i.e., excuse the defendant from liability).

II. CHRONICLES OF A CONFUSION FORETOLD: THE OPINIONS IN THE *ERDEMOVIC* CASE[17]

A. *The Majority Opinion: Duress as a Justification*

Three of the five ICTY justices who decided *Erdemovic* ruled that duress is not a defense to murder or to crimes against humanity.[18] In doing so, they adopted the common law rule that duress is not a defense to the killing of innocent human beings.[19] After examining the writings of common law scholars such as Blackstone and Stephen, they concluded that "[i]f national law denies recognition of duress as a defence in respect of the killing of innocent persons, international criminal law can do no less than match that policy since it deals with murders often of far greater magnitude."[20]

This conclusion was greatly influenced by Hale's famous assertion that "if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact for he ought rather to die himself, than kill an innocent."[21] Underlying the position adopted by the majority is the maxim that it can never be right to kill an innocent human being because the contrary rule would violate the "special sanctity that the law attaches to human life."[22] Consequently, no one should have a

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17. For a more detailed account of the different opinions in the *Erdemovic* case, see Ramón I. Ragués, *Debe el Miedo Insuperable Exculpar a un Soldado Acusado de Crímenes de Lesa Humanidad?*, 7 REVISTA DE DERECHO PENAL Y CRIMINOLOGÍA 95 (2001).

18. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judges McDonald and Vohrah (Oct. 7, 1997); Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li (Oct. 7, 1997).

19. *See generally* Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgment on Appeal (Oct. 7, 1997).

20. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judges McDonald and Vohrah, ¶ 75 (Oct. 7, 1997); *see also* Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, ¶ 12 (Oct. 7, 1997) (expressing his agreement with Judges McDonald and Vohrah's views regarding the applicability of the duress defense to the case at bar).

21. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judges McDonald and Vohrah, ¶ 71 (Oct. 7, 1997) (citing 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 51 (1800)).

22. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judges McDonald and Vohrah, ¶ 71 (Oct. 7, 1997) (quoting R. v. Howe, [1987] A.C. 417, 439 (H.L.) (conjoined appeals) (U.K.)).

legal right to choose that one innocent person be killed instead of another.[23]

As this Author has discussed at length elsewhere,[24] these are the same considerations that underpin the common law rule that one cannot justify the killing of an innocent person by way of the necessity or choice of evils defense.[25] However, one important difference between the common law rules that "necessity is not a defense to murder" and "duress is not a defense to a crime involving the death of an innocent human being" is that necessity is a justification, whereas duress is usually considered an excuse.[26]

The importance of the aforesaid fact should not be understated. Justifications negate the wrongfulness of the act, while excuses merely exclude the actor's culpability without eliminating the wrongful nature of the conduct.[27] Therefore, when an actor claims to be justified, he is asserting that he has a right to engage in the prima facie prohibited conduct.[28]

For example, if Joe alleges that he justifiably killed Mary in self-defense, he is claiming that he had a right to avert Mary's wrongful attack, even if that involved violating the prima facie prohibition against killing people. However, when an actor claims to be excused, he is not asserting a right to engage in the prima facie wrongful conduct.[29] Excused actors merely contend that they should be exculpated because they did not perform the admittedly wrongful act

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23. *Id.*

24. *See* Luis E. Chiesa, *Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing*, 10 NEW CRIM. L. REV. 102 (2007) (discussing considerations that underpin the common law rule that one cannot justify the killing of an innocent person by way of the necessity or choice of evils defense).

25. *See, e.g.*, R. v. Dudley & Stephens, (1884) 14 Q.B.D. 273.

26. *See, e.g.*, Dressler, *supra* note 9; *see also* DUBBER, *supra* note 12, at 251 (discussing duress and necessity); Huigens, *supra* note 12 (same).

27. *See, e.g.*, Dressler, *supra* note 9; *see also* DUBBER, *supra* note 12, at 251 (discussing duress and necessity); Huigens, *supra* note 12 (same).

28. For a cogent defense of the idea that justifications confer rights to infringe on a prohibitory norm, see EUGENIO RAÚL ZAFFARONI, DERECHO PENAL PARTE GENERAL 590 (2d ed. 2002) (stating that justification attaches when the prohibitory norm is "qualified" in such a manner that it is recognized that justified actors are "exercising a right" to engage in a prima facie wrongful action). Fletcher prefers to say that justifications confer "privileges" to infringe on the prohibitory norm. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 562–66 (2000). This Author does not think there is an important difference between Fletcher's description of justifications as the exercise of privileges and the Author's definition of justifications as the exercise of rights. See Fletcher's statement that "justifications generate prima facie rights" in George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 978 (1985).

29. B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1 DUKE J. COMP. & INT'L L. 169, 170 n.9 (1991) (asserting that justifications confer a right to engage in the prima facie prohibited conduct, whereas excuses do not).

in a blameworthy manner.[30] Thus, if Joe alleges that he killed Mary while he was insane, he is not claiming that he had a right to harm Mary. Rather, he seeks to be exonerated because he did not kill Mary in a blameworthy manner, as he was insane when he committed the offense.[31]

Therefore, the question that the majority of the justices in *Erdemovic* asked—whether the coerced defendant had a *right* to kill innocent civilians—was only relevant if the defendant alleged that he was justified in committing the offense.[32] However, if the defendant's claim was merely that he should have been excused for wrongfully killing innocent civilians, inquiring whether he had a privilege or a right to commit murder is entirely irrelevant.[33] Evidence of coercion would be pertinent to establishing whether he should be excused from blame for killing innocent civilians but not for demonstrating that his actions were justified.

Because the justices conceived of the defense as one of justification, they then followed the common law and concluded that Erdemovic could not plead duress as a defense to a crime against humanity.[34] They did not consider that his claim might have been examined as one of excuse.[35] As subsequent Parts of this Article will demonstrate, treating duress as a defense of excuse might have changed the outcome of the case.

B. *Judge Cassese's Dissenting Opinion: Duress as a Halfway House between Justification and Excuse*

Judge Cassese, dissenting in the *Erdemovic* decision, criticized the majority's approach to the question of whether duress should be a

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30. Owen S. Walker, *Why Should Irresponsible Offenders be Excused?*, 46 J. PHIL. 279, 279 (1969) (stating that excuses render violators of norms blameless); *see also* Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 261 (1987) (asserting that excuses deny blame for a harm done).

31. The Author chose to illustrate the nature of excuses by way of the insanity defense because there is some debate regarding whether other claims, such as self-defense or duress, constitute justifications or excuses. However, there is no controversy about the fact that insanity is an excuse. Thus, as Professor Kim Ferzan has stated, insanity is the "classic instance" of an excuse. Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 218 (2004).

32. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgment on Appeal (Oct. 7, 1997).

33. Continental scholars agree with this criticism of the *Erdemovic* case. *See, e.g.*, Ragués, *supra* note 17, at 130 (stating that "when the majority [of the judges in the case] conflate claims of justification with claims of excuse . . . they are turning their back on the real core of the debate.").

34. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgment on Appeal, ¶ 5 (Oct. 7, 1997).

35. *Id.*

defense to a crime against humanity.[36] He particularly disapproved of the conclusion that the common law rule against raising duress as a defense to a crime involving the death of innocent persons should be adopted in the international arena.[37] His argument can be summarized as follows:

> (1) Under international law, the general rule is that duress can be pleaded as a defense as long as several stringent requirements are met;[38]
>
> (2) No customary rule of international law has crystallized regarding whether duress can be raised in a case involving war crimes or crimes against humanity;[39]
>
> (3) In the absence of a specific rule of international criminal law governing the subject, the general rule regarding duress should apply in cases of crimes against humanity. Therefore, a claim of duress can be raised in these cases as long as the strict requirements that condition the availability of the defense under traditional international law are met.[40]

Judge Cassese thoroughly examined the applicable case law on the subject and concluded that the evidence in favor of an exception to the general rule that duress can be pleaded as a defense to any crime was scarce and, in any case, inconclusive.[41] Additionally, he cited several Italian and German cases that provided support to his claim that duress could be raised as a defense to a crime involving the murder of innocent human beings.[42]

However, Judge Cassese concluded that duress could only be a defense to the killing of innocent civilians if the harm caused was less than the one averted.[43] By inserting this strict proportionality requirement, he infelicitously attached a justificatory constraint to

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36. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese (Oct. 7, 1997).

37. *Id.* ¶ 11.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* ¶ 44.

42. *Id.* ¶¶ 35–36 (discussing *Bernardi and Randazzo*, a decision of the Italian Court of Cassation of July 14, 1947 (handwritten text on file with International Criminal Tribunal)); Cass., sez. pen., 6 Nov. 1947, n.2557, Giur. It. Cass. Crim. 1947, 414; Landgericht [LG] [Trial Court] May 21, 1948, 2 Justiz und NS-Verbrechen 521 (F.R.G.)).

43. It is not clear whether necessity can be claimed as a justification to the killing of innocent people. Judge Cassese's opinion could be read in a way that supports an affirmative answer to this question. It should be pointed out, however, that the common law rule seems to be that the necessity defense cannot justify the taking of innocent life. *See, e.g.*, R v. Dudley & Stephens, (1884) 14 Q.B.D. 273. However, the drafters of the Model Penal Code suggest that the actor should be justified if he saves more lives than the ones that he sacrifices. *See* MODEL PENAL CODE AND COMMENTARIES § 3.02 cmt. 3 (1985). For a more detailed examination of these issues, see Chiesa, *supra* note 24.

the defense of duress. Judge Cassese's solution elides the difference between choice of evils and duress defenses and, consequently, between justifications and excuses. Because necessity is a justification, it seems proper to limit the scope of the defense by requiring that the harm averted be greater than the harm caused. Only then should the conduct not be regarded wrongful.

However, if Erdemovic was claiming that his admittedly wrongful act should be excused because of duress, it would not make much sense to subject his claim to stringent proportionality requirements.[44] By definition, excused conduct is wrongful conduct. Consequently, the reason the excused actor is acquitted is because the circumstances of the offense indicate that it would be unfair to blame her for committing the wrongful act.[45] Whether or not the excused actor's conduct was the lesser of two evils is, in principle, irrelevant. Therefore, as Professor Paul Robinson has correctly pointed out, limiting the scope of excuse defenses by conditioning their availability upon the existence of strict proportion between the harm caused and the harm averted would

> [erroneously] impl[y] that the actor must avoid a greater harm to receive an [excuse] defense. Such a requirement undermines the rationale for [excuse defenses]. As [the previous discussion] illustrates, justifications encourage conduct that creates a net benefit, while excuses exculpate actors who cause a net harm but who are blameless.[46]

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

Unfortunately, the drafters of the Rome Statute of the International Criminal Court seemed to follow Cassese's position regarding duress.[47] Hence, according to the Rome Statute, duress is a defense if, and only if, "the person does not intend to cause a greater harm than the one sought to be avoided."[48] This provision blurs the distinction between justification and excuse under international

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

45. *See supra* note 44.

46. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 367–68 (1984).

47. Statute of the International Criminal Court art. 31(d), July 17, 1998, 37 I.L.M. 999.

48. *Id.*

criminal law because it conditions the availability of the defense upon a proportionality requirement characteristic of justifications, even though duress is considered by many to be an excuse.[49] Surprisingly, international law scholars have uncritically accepted the Rome Statute's take on the subject.[50] Gerhard Werle, for example, recently stated that duress can only be pleaded as a defense when the crime committed is "on balance, the lesser of two evils."[51]

If the international legal community adopts Justice Cassese's and the Rome Statute's position that duress should be conceived of as a variation of the justificatory necessity defense that is only available when the actor chooses the lesser of two evils, then it seems clear that duress would seldom, if ever, be a defense to a crime against humanity involving the commission of multiple murders. The evil of killing many civilians will always be equal to or greater than the evil of killing the coerced actor.[52] Consequently, it would be nearly impossible for defendants like Erdemovic to prove that they chose the lesser evil when they committed the crime. However, if duress were considered an excuse, there would be no need to restrict its scope by requiring that the harm caused by the actor be strictly proportional to the one prevented.[53] The most relevant consideration would be whether the actor should be blamed and punished for having committed the crime while under coercion to do so.

It is precisely this claim—that duress is an excuse that should not be subjected to stringent proportionality standards—that the next Part of this Article defends.

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

As proposed in Part II, in order to establish whether the duress defense functions as a justification or as an excuse, one should ask whether it negates the wrongfulness of the act (and thus is a

49. *See, e.g.*, FLETCHER, *supra* note 28, at 831–33; *see also* Kent Greenawalt, Natural Law and Political Choice: The General Justification Defense—Criteria for Political Action and the Duty to Obey the Law, Lecture at the Catholic University of America (Apr. 15, 1986), *in* 36 CATH. U. L. REV. 1, 24–25 (1986) (suggesting that duress, as opposed to the lesser-evils defense, is an excuse, not a justification).

50. *See, e.g.*, GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 147 (2005).

51. *Id.*

52. It might, however, be argued that the evil of killing many civilians is less than the evil of killing the coerced actor if the coerced actor could not have prevented the civilians' deaths.

53. It should be noted that continental criminal law theorists also believe that an actor can have a valid duress claim even if he inflicts more harm than the one averted. *See, e.g.*, JUAN J. BUSTOS RAMÍREZ & HERNÁN HORMAZÁBAL MALARÉE, II LECCIONES DE DERECHO PENAL 380–87 (1999).

justification)[54] or the blameworthiness of the actor (and thus is an excuse).[55] It is illustrative of the point to analyze a hypothetical case of exculpatory duress in order to ascertain whether the defendant should be acquitted because he made the right choice, or rather because the defendant performed a wrongful act in a non-blameworthy manner.

Assume, for example, that Larry threatened to kill Joe and his family if Joe refused to help him rob the First National Bank. Assume also that Larry's threat is real, that he has the capacity to cause the threatened harm, and that Joe's only genuine chance of avoiding this harm is to help Larry rob the bank. If Joe decides to help Larry rob the bank in order to save himself and his family, he probably would not be convicted robbery because he acted under duress. Although it seems intuitive that Joe should be exonerated, the reason is not entirely clear. Is it that, under the circumstances, robbing the bank was the right thing to do, or that, even though robbing the bank was a wrongful act, it would be unjust to punish Joe for his wrongdoing?

This Article proposes that the proper conclusion is that Joe committed an unjustified act that should nevertheless be excused. Justified acts are acts that ought to be encouraged, or at least tolerated, by society, and robbing a bank to avoid personal harm is not conduct that society should encourage or tolerate.[56] A society might be willing to acquit the coerced bank robber out of compassion for his circumstances, but not out of a belief that others should opt to rob banks when faced with similar threats.[57] It might also be argued that the state should not punish its citizens for failing to resist threats that most citizens would also have failed to resist. It does not follow, however, that such a failure should escape condemnation. Acquittal in these cases is more the product of a concession to human frailty than of a societal determination that the actor's conduct was, on balance, not wrongful.[58]

Even though there are good reasons to conclude that Joe's act should not be justified, the same cannot be said about whether it should be excused. Excuses express understanding for the actor who, because of extreme circumstances or personal disabilities, cannot be

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54. DUBBER, *supra* note 12, at 251.

55. *Id.*

56. Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 749 (1990).

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

58. Jeremy Horder, *Autonomy, Provocation and Duress*, 1992 CRIM. L. REV. 707, *in* READINGS IN CRIMINAL LAW 487 (Russell L. Weaver et al. eds., 1998)

fairly expected to abstain from committing the wrongful act.[59] Thus, in order to determine if Joe's robbing of the bank should be excused, one must ask whether a reasonable person in his position would also have elected to commit the crime. Usually, it would be unfair to punish someone for succumbing to a threat that a normal law-abiding citizen would have been unable to resist. In Joe's case, it seems quite clear that it would be unfair to punish him for deciding to rob the bank in order to avoid harm to himself and his family. Most people would probably have chosen the same course of action. Consequently, Joe's wrongful act should be excused. His conduct, however, remains wrongful. Society should condemn the acts of those who yield to threats and inflict significant harm on innocent persons. Nonetheless, it is sensible not to punish such actors who were subjected to coercion that made their decisions to engage in the criminal acts understandable. All in all, their conduct, though wrongful, is not blameworthy.[60]

If it is true, as this Part has attempted to show by way of this hypothetical, that duress is an excuse, then it would, as a general rule, be improper to limit its availability to cases where the actor chose the lesser evil. The reason excused actors are acquitted is that it is not fair to blame them for their actions, not that their actions were right. Thus, the only pertinent inquiry is whether society could have reasonably required the defendant to overcome the coercion and resist the threats. Consequently, whether the harm caused by the coerced actor was greater than the one averted is, as a general rule, not determinative.[61]

If duress is an excuse, the common law blanket rule excluding it as a defense to murder should be rejected. Granting an excuse to an actor who kills under coercion is not tantamount to recognizing that she had a right to kill her victim.[62] In these cases, the harm averted by the actor was not greater than the one produced and, therefore, her conduct is still considered wrongful. However, in most cases, someone who wrongfully kills an innocent human being while under coercion should not be punished if most members of the society would

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

60. Recently, Peter Westen and James Mangiafico argued that duress is better conceived as a justification. *See* Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why it Matters*, 6 BUFF. CRIM. L. REV. 833 (2003). Their position, though provocative, is ultimately unconvincing. For a refutation of Westen and Mangiafico's arguments, see Huigens, *supra* note 12.

61. *See* ROBINSON, *supra* note 46, at 368 (stating that the concerns underpinning the notion that duress should only be available when the actor's conduct avoided a greater harm that the one caused are "misplaced").

62. *Id.* at 368–69.

have done the same thing.[63] In these instances, punishing those who succumb to the threat and commit murder would typically not be warranted on either utilitarian or deontological grounds. From a utilitarian perspective, people who kill a stranger in order to avoid harm to themselves or their loved ones are not deterrable by criminal sanctions.[64] In contrast, from a deontological standpoint, punishing someone who succumbed to a threat to which most people would have also yielded is unjust.[65] Hence, as the drafters of the Model Penal Code have stated, imposing punishment in such cases is almost invariably "bound to be an ineffective threat [and would] be divorced from any moral base."[66]

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

A. *Proportionality, Demanding Heroism, and the Seriousness of the Offense Thesis*

Crimes against humanity often involve murder.[67] Therefore, one could argue that if duress is a defense to murder, it should also be a defense to crimes against humanity that involve murder. However, a majority of the justices in *Erdemovic* reasoned that, even if duress is a defense to murder, it does not follow that it should also be a defense to the large-scale killings of innocent civilians.[68] According to these judges, crimes against humanity, unlike discrete acts of murder, "affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location."[69] As a result of this, they contend that a crime against humanity is a more heinous offense than murder and, for that reason, defendants should not be allowed to plead duress as a defense to a crime against humanity even if they are allowed to do so when charged with murder.[70]

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63. *See, e.g.*, Steven J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159 (2006); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 325–26 (4th ed. 2005) (discussing whether duress is a justification or an excuse); FLETCHER, *supra* note 28, at 830–31 (discussing duress as an excuse).

64. *See supra* Parts II–III.

65. *Id.*

66. MODEL PENAL CODE AND COMMENTARIES §2.09 (1985).

67. *See* CASSESE, *supra* note 14 (discussing crimes against humanity).

68. *See* Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judges McDonald and Vohrah, ¶ 75 (Oct. 7, 1997).

69. *Id.* ¶ 21.

70. It is said that, all things being equal, a crime against humanity is a graver offense than a discrete murder because of the "collective nature" of the victim. *See*

This Article refers to the aforementioned argument as the "seriousness of the offense" thesis. Proponents of this thesis hold that, even though duress is usually a defense to any crime, it may properly be disallowed when the social harm caused by the commission of the offense is extremely disproportional to the harm averted.[71] The following hypotheticals test the viability of this thesis:

(1) *The Coerced Murderer*: Hugo threatened to take the life of Angel's son if Angel refused to kill Gary, an innocent third person. Angel capitulated to the threat. He was charged with murdering Gary. Angel pleaded duress.

(2) *The Coerced Terrorist*: Frank threatened to kill Jerry, a well-known maker of explosives, if Jerry refused to help him build a bomb that was to be placed inside a government building. Jerry succumbed to the threat and helped Frank build the bomb and place it inside the building. More than one hundred innocent people died when the bomb exploded. Jerry was charged with murdering the people inside the building. He pleaded duress.

(3) *The Nuclear Bomb*: Jack is a nuclear physicist employed by the government to help with the design of nuclear bombs. Lazarus threatened to kill Jack's family if Jack refused to design, manufacture, and help him detonate a nuclear bomb over Los Angeles. Jack yielded to the coercion and helped Lazarus fulfill his plan. Over half a million people died. Jack was charged with murdering the people who died when the nuke exploded. He pleaded duress.

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

(1) *The Coerced Murderer*: The harm produced by the defendant (Gary's death) is not much graver than the one averted (Angel's son's death). Therefore, there are good arguments in favor of

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Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 59 (2007).

71. *See, e.g.*, Dressler, *supra* note 9; *see also* DUBBER, *supra* note 12, at 254 ("Even in extreme emergencies, facing almost certain death, the Code thus allows a defense only if the actor balanced the potential harms of action and inaction, to herself and others, and then chooses the less harmful course of action (or inaction).").

permitting the actor to plead duress as a defense to the crime charged.

(2) *The Coerced Terrorist*: The harm wreaked by the defendant (the deaths of one hundred people) is greater than the loss prevented (his and his family's deaths). In spite of this, it is not clear of how much greater a magnitude was the harm produced than the one averted. However, it is plausible that, in light of the large number of deaths caused by the defendant's action, his plea of duress as a defense to the crime charged should fail.

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

The arguments in favor of allowing the coerced murderer to plead the duress defense while at the same time disallowing the defense by the nuclear physicist are well-established. The case of the coerced terrorist is a closer call, but the seriousness of the offense thesis offers intuitive support for punishing the defendant.

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

> [s]ociety . . . has a right to expect a person to demonstrate a higher level of moral strength when ordered to kill a hundred innocent children than when commanded to kill one. A jury might also rightly expect people to manifest the utmost moral strength—even, at some point, to choose death—when they have reason to know that they are playing a part, even a minor role, in an especially barbaric scenario, such as the Holocaust.[72]

Similarly, Professor Fletcher has stated that "if the cost in human lives is sufficiently high we could properly expect someone to resist threats to his own life."[73] Likewise, Professor Paul Robinson concluded in his treatise on criminal law defenses that

> [i]t is reasonable to assume that given threats of equal gravity, **the resistance of the person of reasonable firmness would be directly related to the seriousness of the compelled offense.** The law-abiding person may be unable to resist coercion if he must commit

72. Dressler, *supra* note 9, at 1374.
73. FLETCHER, *supra* note 28, at 833.

> forgery to avoid the threat but able to resist the same threat if he must kill an innocent.[74]

The intuitions grounding the seriousness of the offense thesis are shared by criminal law theorists on the other side of the Atlantic. Spanish commentators Bustos and Hormazábal, for example, have asserted that "although [duress] allows for an exemption from punishment in cases in which the harm caused is greater than the one [avoided], the harm caused cannot be disproportionately greater [than the one averted]."[75]

These scholars hint at the possibility that, under certain circumstances—such as when the harm that the actor is coerced to inflict is extremely disproportional to the one averted—it might be proper for society to demand that the agent resist the threat even if this requires sacrificing her own life. Although this conclusion is intuitively appealing, it raises several problems.

Accepting this thesis would lead to punishing the defendants in the coerced terrorist and nuclear bomb cases for failing to make a heroic sacrifice so that many people can live. This is contrary to the principle that the law has no right to demand that people engage in acts of heroism.[76] This principle is so entrenched in U.S. criminal law that the drafters of the Model Penal Code expressly stated that the basis for the exculpation afforded by the duress defense is that it would be socially debilitating to "demand that heroism be the standard of legality."[77] After all, "the standard is that of the reasonable man, not the reasonable hero."[78] Moreover, for the law to demand heroic self-sacrifice would be hypocritical because most persons of reasonable moral firmness are incapable of abiding by such a high standard.[79]

This alone does not resolve the question against demanding that ordinary people act in heroic ways, as Professor Dressler has rightly pointed out:

> It is not inevitably hypocritical for a juror to concede that most people in the same situation, including the juror, would have acted as the defendant did, yet still believe that the coerced actor deserves to be punished. As long as the juror believes that the juror also would be

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74. ROBINSON, *supra* note 46, at 367 (emphasis added).

75. BUSTOS RAMÍREZ & HORMAZÁBAL MALARÉE, *supra* note 53, at 387.

76. For cases that suggest that the law cannot demand heroism from its citizens, see, for example, *State v. Toscano*, 378 A.2d 755 (N.J. 1977), and *State v. Van Dyke*, 825 A.2d 1163 (N.J. Super. Ct. App. Div. 2003).

77. MODEL PENAL CODE AND COMMENTARIES § 2.09 (1985).

78. Alan Reed, *Duress and Provocation as Excuses to Murder: Salutary Lessons from Recent Anglo-American Jurisprudence*, 6 J. TRANSNAT'L. L. & POL'Y 51, 55 (1996).

79. MODEL PENAL CODE AND COMMENTARIES § 2.09 (1985).

> deserving of punishment (and, presumably, would accept it) in the same situation, there is no hypocrisy.[80]

An additional problem with the seriousness of the offense thesis is that it cannot be easily reconciled with the widely defended "hard choice" and "involuntariness" theories of duress. According to the hard choice theory of duress, an actor is excused when the coercive situation puts him in the undesirable position of having to decide to preserve either his interests or the interests of others.[81] Those who face this "do it or else" situation do not act culpably if they choose to harm others because society believes that a reasonable person facing the same hard choice would have acted in the same manner.[82] The hard choice theory of duress produces different results than the seriousness of the offense thesis because the actors in the cases of the coerced terrorist and the nuclear bomb faced what could be called an unfairly hard choice. Thus, contrary to the conclusion reached earlier in this Subpart regarding these cases, they should both be acquitted under the hard choice theory of the duress defense.

The same results follow from an examination of the involuntariness theory of duress.[83] According to this theory, duress exculpates actors whose choice-making capabilities are substantially reduced by the coercive situation that generates the defense.[84] This reduction in the actor's capacity to choose not to yield to the threat makes her choice to engage in the wrongful act tantamount to a decision that has been forced upon her.[85] Thus, it has been stated that the actor's choice to protect her interests at the expense of others is in reality "no choice at all" and that duress exculpates the actor because her capacity to choose to do otherwise is "absent" in light of the coercion.[86] In a similar vein, an English court has asserted that duress is an excuse when the coercion faced by the defendant

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80. Dressler, *supra* note 9, at 1368–69.

81. *See infra* note 82.

82. For an examination and defense of the "hard-choice" theory of excuse and duress, see Stephen J. Morse, *Deprivation and Desert*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 124–29 (William C. Heffernan & John Kleinig eds., 2000); Michael S. Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563, 1567, 1663–64 (1990).

83. The involuntariness theory of duress has informed various state supreme court decisions about the scope and nature of the defense. *See, e.g.*, State v. Rouleau, 528 A.2d 343, 350 (Conn. 1987) (stating that since the effect of duress is to "reduce the person to a state of involuntariness," the prosecution should bear the burden of disproving the defense beyond a reasonable doubt); *see also* People v. Graham, 57 Cal. App. 3d 238 (Cal. Ct. App. 1976) (asserting that a claim of duress "casts doubt on the *voluntariness* of the [defendant's] acts" (emphasis added)).

84. *See* Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 997 (1992) ("[T]he defense of duress does not suggest a total lack of choice. Instead, the defendant points to a severe limitation of choice caused by a serious threat made against him.").

85. DUBBER, *supra* note 12, at 251.

86. *Id.*

"overb[ears]" the defendant's will to such a degree that the offense committed can "no longer" be considered to be the consequence of her "voluntary act[s]."[87]

The involuntariness theory is also incompatible with the intuitive solution to the cases of the coerced terrorist and the nuclear bomb. While the seriousness of the offense thesis would lead to the convictions of both defendants, they would be acquitted under an involuntariness theory of duress because the coercion to which they were subjected significantly reduced their ability to choose not to commit the crime.

Despite the logical appeal of the seriousness of the offense thesis, it seems fair to say that, in view of the aforementioned problems, "[v]ery much more needs to be said about duress . . . and in particular about whether the law can properly sometimes demand heroism of us."[88] Thus, the next Part elaborates an alternative conception of the duress defense that can adequately account for the seriousness of the offense thesis without falling prey to the problems that plague the hard choice and involuntariness theories. First, however, the next Part demonstrates why these two conceptions of duress cannot satisfactorily explain many features of the defense.

B. *Beyond the Hard Choice and Involuntariness Theories: Duress as an "Understandable Choice"*

Contrary to what some well-known scholars have argued, the exculpatory nature of the duress defense does not entirely lie in the fact that the coercive situation substantially reduced the choice-making capabilities of the actor, in the extremely hard nature of the choice faced by the person coerced, or in the involuntariness of the actor's decision to engage in the conduct.[89] Regarding the hard choice theory, it is not difficult to imagine examples of cases in which a person would be convicted of an offense even though his decision to commit the offense was the product of an extremely unfair and hard choice. For example, someone who causes serious bodily harm to an innocent person in order to avoid losing all his possessions should be punished, even though his decision to engage in the conduct constitutive of the offense was the consequence of an unfair and hard choice.

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87. R v. Hudson, (1971) 2 Q.B. 202, 206.

88. R. A. Duff, *Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147, 177 n.48 (2002).

89. *See generally* DUBBER, *supra* note 12, at 251–59 (discussing the duress defense); Morse, *supra* note 82 at 124–29 (giving an overview of the involuntariness and hard-choice theories, respectively).

Regarding the involuntariness theory, it should be noted that a coerced actor's decision to yield to threats is not really involuntary.[90] Even though the choice that the actor faces is a difficult one, the actor retains the capacity to choose not to capitulate to the coercive demands. Thus, describing his conduct as involuntary is either false or misleading.[91] Furthermore, the law routinely authorizes imposing unmitigated punishment on defendants who lack a substantial capacity to control their acts.[92] Take, for example, the case of a defendant who, in a moment of temporary loss of self-control, shoots and injures someone who had just finished raping his wife. Assuming that the victim survived the defendant's attack, the law affords him no partial or full excuse for his conduct.[93] If defendants in this context are not excused in spite of their impaired volitional faculties, it is unclear why they should be exempted from responsibility when the alleged involuntariness is the product of coercion.

An examination of German criminal law and the German Penal Code further illustrates the shortcomings of the hard choice and involuntariness conceptions of duress. According to § 35 of the German Penal Code, duress is a defense when the coerced actor "commits an unlawful act to avert [an imminent danger to life, limb, or freedom] from himself, a relative or person close to him."[94] Notice that the defense does not apply if the coerced actor yields to the threat so that harm to property can be avoided.[95] Thus, even though Aunt María loves Roxy—her three-year-old Yorkie—as if she were her child, she would not be entitled to a duress defense under § 35 of the German Penal Code if she chose to destroy the property of

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90. *See* Westen & Mangiafico, *supra* note 60, at 901 (stating that situations of duress "differ significantly" from instances in which involuntariness is deemed to be a defense to criminal liability).

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

92. *See* Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1214 n.92 (1994) (noting that individuals who "fail to control . . . impulses" such as "anger" can be "liable for unmitigated homicide or murder" (quoting GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 247 (1978))).

93. *Id.* It should be pointed out that had the victim in this hypothetical case died, the defendant would have a valid "heat of passion" claim that would reduce his responsibility from murder to manslaughter. The Author finds allowing "passion" as a partial defense to murder and disallowing it in other contexts is somewhat arbitrary. For a convincing argument in favor the creation of a generic claim of "partial responsibility" available as a defense to any crime, see Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 289 (2003).

94. Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998 BGBI. I at 945, § 35, ¶ 1 (F.R.G.) *translated in* 28 THE AMERICAN SERIES OF FOREIGN PENAL CODES (Edward M. Wise ed., Joseph J. Darby trans., 1987), *available at* http://wings.buffalo.edu/law/bclc/germind.htm.

95. *Id.*

another in order to avoid harm to her beloved dog. This limitation makes little sense under a hard choice or involuntariness theory of duress. Aunt María loves Roxy very, very much. Consequently, choosing between the wellbeing of her dog and causing harm to the property of a stranger represents an unfairly hard choice for María. Also, in light of the incredible, almost maternal, love that she feels for Roxy, her capacity to choose not to harm her dog is substantially reduced by the coercive situation. Alas, even if her choice is a very difficult one and her decision is not free from unfair constraints, she has no duress defense according to German criminal law.

The limitations that § 35 of the German Penal Code imposes on the duress defense are not unique to continental legal systems. The drafters of the U.S. Model Penal Code (MPC) also intended to limit the defense in a similar manner. Even though at first glance the provision contained in § 2.09 of the MPC appears to provide a defense to anyone who yields to threats as long as it is demonstrated that a "person of reasonable firmness" in the actor's situation would have also succumbed to the coercion,[96] the Commentaries to the MPC make it clear that some threats should never give rise to a valid claim of duress.[97] Thus, the Commentaries to § 2.09 state that:

> Given the nature of the problem [regarding the proper limits of the duress defense] and the criteria proposed for its solution, it is reasonable to confine the exculpation to the case where force against the person of the actor or another, or the threat thereof, is the instrument of coercion . . . . [W]hen the claimed excuse is that duress was irresistible, *threats to property or even reputation cannot exercise sufficient power over persons of "reasonable firmness" to warrant consideration in these terms.*[98]

It turns out that, despite its apparently broader formulation, the MPC duress provision is almost identical in scope to the duress provision of the German Penal Code. Whereas threats to the life or limb of the coerced actor might provide a valid excuse under the German Penal Code and the MPC,[99] threats to property and other legally protected interests are not susceptible to the duress defense under either code.[100] Hence, Aunt María would not fare better in an

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96. MODEL PENAL CODE § 2.09(1) (1962).

97. *See* MODEL PENAL CODE AND COMMENTARIES § 2.09 cmt. 3 (1985) (outlining limitations to the duress defense).

98. *Id.* (emphasis added).

99. Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998 BGBI. I at 945, § 35, ¶ 1 (F.R.G.) *translated in* 28 THE AMERICAN SERIES OF FOREIGN PENAL CODES (Edward M. Wise ed., Joseph J. Darby trans., 1987), *available at* http://wings.buffalo.edu/law/bclc/germind.htm; MODEL PENAL CODE § 2.09(1) (1962).

100. *See* Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998 BGBI. I at 945, § 35, ¶ 1 (F.R.G.) *translated in* 28 THE AMERICAN SERIES OF FOREIGN PENAL CODES (Edward M. Wise ed., Joseph J. Darby trans., 1987), *available at* http://wings.buffalo.edu/law/bclc/germind.htm (excluding application of the duress

MPC jurisdiction, for a threat of harm to her dog is, as a matter of law, not sufficient coercion to warrant an exemption from criminal responsibility.

The best way to explain this limitation on the scope of the defense is to understand that the exculpation afforded to those who act under duress is the product of a societal determination that the choice to commit a crime in order to avoid harm to an actor's interests or the interests of her loved ones is sufficiently comprehensible to warrant an exemption from punishment, while the choice to commit a crime to avert harm to a dog (or other highly valued property) is not. Thus, as the German scholar Claus Roxin has asserted:

> The truth is that the [limitations set forth in § 35 of the Penal Code] [are] explained by the fact that only in [the cases that fall within the scope of the text of the provision] does the wrongful act performed [under duress] find sufficient ***understanding*** amongst [the public] that the [exculpation] seems defensible.[101]

Therefore, according to this conception of duress, which this Article calls the "understandable choice" theory, the gist of the defense lies in the "understandable" or "comprehensible" nature of the choice made by the coerced actor and not in the "psychological pressure" or "unfair choice" created by the threat.[102] Of course, there are situations in which the emotional pressure produced by the threat or the unfair choice should be taken into account when deciding whether the actor should escape punishment because his decision to engage in harmful conduct is understandable. However, the existence of one or both of these circumstances—emotional pressure or a hard choice—does not conclusively establish that the actor should be absolved from responsibility for engaging in the wrongful act. Furthermore, the absence of either of these factors does not necessarily make the defense fail. Thus, one might reasonably conclude that the extreme pressure suffered by the actor and the unfair choice that the actor faced do not generate sufficient "understanding amongst the public" to warrant an exemption from punishment. This explanation describes precisely what happens in the case of Aunt María.

Various Spanish commentators have advanced similar conceptions of the duress defense.[103] Professor Varona Gómez, for example, has stated that society usually excuses people who act

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defense to harm to property); MODEL PENAL CODE AND COMMENTARIES § 2.09 cmt. 3 (1985) (same).

101. CLAUS ROXIN, DERECHO PENAL PARTE GENERAL 909 (Luzón Peña trans., 2d ed. 2000).

102. *Id.*

103. *See, e.g.*, BUSTOS RAMÍREZ & HORMAZÁBAL MALARÉE, *supra* note 53; DANIEL VARONA GÓMEZ, UNA RECONSTRUCCIÓN DE LA EXIMENTE DESDE UNA TEORÍA DE LA JUSTICIA (2000).

under duress because of a shared understanding that the coerced actor "cannot turn away from his concrete interests when he is evaluating the [dilemmatic choice with which he is confronted]."[104] This, in turn, leads the person who acts under duress to "give more weight to his own personal interests and to those of his loved ones" than to the interests of strangers.[105] By exculpating coerced actors who choose to avoid personal injury at the expense of harming others, the state acknowledges that, even though from an objective point of view the interests of a person who acts under duress have no more weight than the interests of the actor's innocent victim, it is comprehensible that citizens attach more value to their own ends than to the ends of the strangers or of the community.[106] That is, society generally considers that the coerced actor's conduct is wrongful, but understandable.[107] In a similar vein, Bustos Ramírez and Hormazábal Malarée have claimed that coerced individuals should be excused because their decision to prefer their own interests over those of others is socially comprehensible.[108] In light of the comprehensibility of these preferences, the law should not punish those who solve the dilemma by harming others in order to avoid personal injury.[109]

Asking whether the coerced actor's decision to engage in the wrongful act is understandable from a societal perspective can better explain the seriousness of the offense thesis than asking if the actor faced an unfairly hard choice, or whether her act was voluntary or a product of her free will. While it is clear that a person who kills many people in order to save herself or her loved ones faces an unfairly hard choice and that her capacity to choose freely to resist the threats is significantly reduced by the coercive situation, it is less clear whether her decision to engage in such an act finds sufficient understanding among the community to warrant an exemption from punishment. This is particularly true when the actor's decision to perform the wrongful act jeopardizes the continued existence of the community, which might occur when the offense committed by the coerced defendant is a crime against humanity.

An actor who chooses to save herself by wiping out a significant number of members of the community is unlikely to provoke

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104. VARONA GÓMEZ, *supra* note 103, at 122.

105. *Id.*

106. *Id.*

107. Professor Larry Alexander also appears to believe that the understandability of the actor's decision to engage in a wrongful act is an essential feature of excuse defenses. *See* Larry Alexander, *Self-Defense, Justification and Excuse*, 22 PHIL. & PUB. AFF. 53, 53 (1993) (stating that excuses represent "*understandable* though regrettable human reaction[s]" to extreme circumstances (emphasis added)).

108. BUSTOS RAMÍREZ & HORMAZÁBAL MALARÉE, *supra* note 53.

109. *Id.* at 380–81.

sufficient feelings of understanding among the public to justify relieving her of criminal responsibility. Thus a society might legitimately require heroic self-sacrifice in the face of coercion to commit a crime against humanity. The same society, however, might properly decline to demand such a high level of courage when the interests at stake are not as monumental.

In view of these considerations, the understandable choice theory improves upon its competitors' explanation of the defense of duress, retaining the advantages of the seriousness of the offense thesis while avoiding its problems. However, the limitations of the duress defense in light of this theory remain unexplored. The remaining Part considers factors that should be taken into account when determining whether a coerced actor's conduct is understandable from a societal viewpoint. Ultimately, these factors determine what degree of proportionality, if any, should exist between the harm caused and the harm averted in order for the duress defense to be pleaded successfully.

C. *Communitarian Obligations, Proportionality, and the Understandable Choice Theory of Duress*

1. Voluntarily Assumed Obligations of Self-Sacrifice and Proportionality Standards

Whether a coerced actor's decision to harm a third party in order to avoid harm to the actor's personal interests generates sufficient understanding among the public to warrant exempting him from criminal liability depends in large part on whether the actor breached his communitarian obligations when he chose to engage in the wrongful act.[110] It has been said that duress should be disallowed as a defense when "the persons involved had assumed a special duty to protect the collectivity."[111] This is most evidently the case when the coerced actor capitulates to threats even though in the past he had voluntarily assumed obligations of self-sacrifice that required him to resist coercive threats.[112]

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110. *See* Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1555 n.122 (1993) (noting that "[t]he duress defense . . . entails a standard that looks to the values and politics of the affected community.").

111. ROXIN, *supra* note 101, at 914–15.

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

Cases involving law enforcement agents, firefighters, soldiers, and seamen are paradigmatic examples of this type of situation.[113] To determine, for example, whether to excuse a police officer who was coerced into harming an innocent third party in order to avoid harm to herself, one should consider not only what a person of reasonable firmness would have done in her situation, but also what duties police officers typically owe to innocent third parties. When evaluating the coerced police officer's claim of duress, the decisive consideration seems to be that the police officer had a duty to resist threats to her own life in order to keep innocent third parties out of harm's way. It is reasonable to conclude that, in light of this voluntarily assumed duty of self-sacrifice, a police officer who fails to protect innocent people because she yields to coercion will not generate sufficient understanding among the community to gain an exemption from punishment. Thus, as one leading German criminal law theorist has aptly pointed out,

> The [duty] to control the instinct of self-preservation is . . . required of those who have assumed the obligation to tolerate [threats] in light of their profession, even when the threats endanger their lives. [The reason for this is that] it is in precisely these circumstances when the community should be able to rely on them.[114]

Accordingly, whether a coerced actor voluntarily assumed duties of self-sacrifice should have a profound effect on the proportionality that society is willing to require in order for the actor to successfully plead duress. While a claim of duress might succeed even when the harm caused by the defendant is greater than the harm averted, this is surely not the case when the actor had voluntarily assumed a duty of self-sacrifice that required her not to yield to the coercion giving rise to the defense. In the latter cases it seems proper to deny the actor's duress claim unless the harm averted by submitting to the threat is significantly greater than the one caused by complying with the coercer's demands.[115] Thus, a police officer should not be exempted from liability if, to avoid a threat of grave bodily harm, she yields to a demand that she kill an innocent person; however, the police officer could be relieved of responsibility if, to avoid the same threat, she yields to a demand that she steal property.

The average person would have a sound duress claim in both cases. However, because police officers have voluntarily assumed duties of self-sacrifice that require them to "control their instinct of

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113. GÜNTHER JAKOBS, DERECHO PENAL PARTE GENERAL 694 (Cuelo Contreras & Rodriguez de Murillo trans., 1995).

114. HANS HEINRICH JESCHECK & THOMAS WEIGEND, TRATADO DE DERECHO PENAL 523 (Miguel Olmedo Cardenete trans., 5th ed. 2002).

115. *Id.* at 523–24.

preservation" more than the average person, they would only have a valid duress defense in the latter case.[116]

2. Involuntarily Assumed Obligations That Require Self-Sacrifice and More Stringent Proportionality Standards

Although most duties of self-sacrifice are voluntarily assumed, there are some instances in which such duties are imposed involuntarily. This is most evident in the case of familial relationships, such as relationships between parent and child.[117] For example, the parent-child relationship requires that a father refuse to capitulate to a threat that he will be killed unless he murders his small child.[118] This involuntarily imposed obligation surely affects the parent's ability to plead duress successfully as a defense to a crime involving harm to his child. It seems unlikely that a father's decision to save his own life at the expense of his child's life will generate sufficient understanding among the community to justify relieving him of criminal responsibility.

The existence of such communitarian duties of self-sacrifice, both voluntarily assumed and involuntarily imposed, invites an examination of the proportionality that should be required in order for a parent to successfully plead duress as a defense to a crime involving harm to his child. Because of the parent-child relationship, it seems fair to require that the parent endure greater harm before yielding to the coercion than would be required from a person unrelated to the child.[119] Hence, a father should only be able to plead duress as an excuse to harming his child if the harm avoided by yielding to the coercion was significantly greater than the one caused to the child by capitulating to the threats.[120] This represents an inversion of the proportionality analysis that is undertaken in the typical duress case that does not involve communitarian duties of self-sacrifice.[121]

Involuntary obligations of self-sacrifice also arise in circumstances in which the only way for a coerced actor to protect her interests is by causing a harm that is grossly disproportionate to the threatened harm. Consequently, a coerced actor has a duty to suffer moderate physical injury if the only way of avoiding that injury is by

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116. *Id.* at 523.

117. ROXIN, *supra* note 101, at 920.

118. *Id.*

119. *See* David Schmidtz, *Islands in a Sea of Obligation: Limits of the Duty to Rescue*, 19 LAW & PHIL. 683, 699 (2000) (noting that "it is relatively easy to argue that people have positive obligations to children, especially their own children.").

120. *Id.*

121. Involuntary duties of self-sacrifice arising out of familial relationships may extend to case other than those involving a parent and his child. Thus, for example, a husband may have similar obligations towards his wife. ROXIN, *supra* note 101.

killing an innocent third party.[122] Similarly, a defendant should not be able to excuse the killing of hundreds or thousands of people by pleading that she would have been killed if she had acted differently. The reason for this is that society requires citizens to assume minimum obligations of solidarity toward their fellow citizens in order to make life in community possible.[123] Thus, notwithstanding the unfairly hard choice faced by the defendant and the substantial reduction of choice-making capabilities that the coercive situation produces, a person who decides to inflict a grossly disproportionate harm to the one averted probably will not find sufficient understanding among the community to warrant an exemption from punishment.[124]

3. Communitarian Family Obligations and Laxer Standards of Proportionality

The drafters of the MPC concluded that a coerced actor may be excused from liability for greater harm caused when attempting to save a loved one than when trying to save himself.[125] This position is grounded in the fact that "danger to a loved one may have greater impact on a person of reasonable firmness than a danger to himself."[126] While this might be true, the stronger argument in favor of this contention seems to be that there are communitarian duties stemming from familial relationships that allow for coerced actors to inflict more harm than would be allowed absent such a relationship.[127] Once again, this can be more clearly grasped in cases involving a parent-child relationship. While people have an obligation to do everything in their power to keep their children free from harm, they do not have a similar obligation to keep themselves out of harm's way.[128] As a result of this, it seems reasonable to allow a coerced actor to inflict more harm when the lives of his children are at stake than when his own life is threatened.

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122. *Id.*

123. *See, e.g.*, Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1912 (2001) (arguing that "a state obligation to provide for minimal capabilities requisite to a fully human life" requires "some degree of communal solidarity among citizens" and an "obligation toward . . . co-citizens").

124. *Cf.* DUBBER, *supra* note 12, at 254 ("Even in extreme emergencies, facing almost certain death, the Code thus allows a defense only if the actor balanced the potential harms of action and inaction, to herself and others, and then chooses the less harmful course of action (or inaction).").

125. MODEL PENAL CODE § 2.09 (1962).

126. MODEL PENAL CODE AND COMMENTARIES § 2.09 cmt. 3 (1985).

127. *See* Schmidtz, *supra* note 119, at 699 (noting the strength of the duties of parents toward their own children).

128. *Id.*

In these cases the coerced actor's decision to harm a third party in order to save his child is understandable both because of the difficult nature of the choice and because saving the child's life fulfills the parent's communitarian duty to protect his family. In contrast, when a coerced defendant chooses to harm an innocent person merely to safeguard her personal interests, the understandability of the decision will not be bolstered by a finding that the actor satisfied her family obligations by choosing to harm the third party. This should lead to a modification of the standard of proportionality that typically conditions the availability of the duress defense: more disproportionality between the harm caused and the harm averted will be allowed in cases in which an actor yields to coercion in order to save her loved ones than in cases that do not involve such interests.

4. Understandability and the Capacity to Prevent the Harm Threatened from Occurring

Another important consideration to take into account when deciding whether to exempt a coerced actor from penal liability is whether he could have avoided harming his victims by choosing to resist the threats. This factor appeared to be determinative for Judge Cassese in *Erdemovic*; in his dissenting opinion, he argued that a coerced actor who kills innocent human beings should be relieved of criminal responsibility if "it is highly probable, if not certain, that if the person acting under duress had refused to commit the crime, the crime would in any event have been carried out by persons other than the accused."[129]

Judge Cassese's position assumes that, in these instances, deciding to kill the innocent people constitutes the lesser evil because "the evil threatened (the menace to [the life of the coerced actor] and his subsequent death) would be greater than the remedy (his refraining from committing the crime, i.e., from participating in the execution)."[130] Therefore, he suggests that this type of case invites a variation of the justification commonly known as the "choice of evils" defense.[131]

An example in Judge Cassese's dissent illustrates this lesser evil argument.[132] Suppose that "a driver of a van . . . transporting victims to a place of execution . . . is told by the executioners he must shoot

129. Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 44 (Oct. 7, 1997).

130. *Id.*

131. *Id.*; *see* MODEL PENAL CODE § 3.02 (1962) (providing a description of the "choice of evils" defense).

132. Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 47 (Oct. 7, 1997).

one of the victims or he himself will be shot."[133] Assuming that "[t]he victims who are at the execution site will certainly die in any event,"[134] shooting the innocent victim would constitute the lesser evil because:

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

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

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

Based on this logic, Judge Cassese concludes that, even though "the crime committed under duress must be, on balance, the lesser of two evils,"[135] someone who is coerced into "participating in the killing of . . . civilians who would be killed in any case by the other[s]" has a valid duress defense.[136]

Judge Cassese's contention is objectionable because it presupposes an oversimplified calculus of what constitutes the lesser evil. In addition to comparing the number of people that would have been killed had the coerced actor resisted the threats with the amount of people that would have been killed had the actor yielded to the coercion, one should also take into consideration that, by giving way to the threats, the actor is aiding someone else in the commission of a wrongful and heinous act. This collaboration in the perpetration of a crime is, in and of itself, an evil that should weigh against yielding to the threats. Thus, as the philosopher Frances Kamm has suggested, these types of decisions are "not merely a matter of weighing the lives saved versus the life lost," for the agent's moral integrity is compromised by his forced involvement in the production of evil.[137]

Similarly, Professor Robinson has stated that "the harm to the social order inherent in unjustified aggression" should be taken into

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133. *Id.*
134. *Id.*
135. *Id.* ¶ 16(iii).
136. *Id.* ¶ 50(iii).
137. F.M. Kamm, *Responsibility and Collaboration*, 28 PHIL. & PUB. AFF. 169, 172 (1999).

account when balancing evils.[138] Scholars in continental legal traditions also argue that the evil inherent in human collaboration with wrongful conduct is a relevant consideration in deciding which conduct constitutes the lesser evil.[139] One Spanish criminal law scholar has asserted that when balancing evils one must keep in mind that

> [t]he law compares "evils", not "personal interests". [This is crucial], since the gravity of an "evil" is not only determined by the value of the "personal interest" harmed, but by the *way* in which it is harmed as well. Since a harm produced by nature does not allow for an assessment of anything else besides the personal interest harmed, the gravity of the "evil" in such a case is equal to the importance of the injured interest. However, the "evil" caused [by the conduct of another] entails not only the harming of a personal interest, but, additionally, a perturbation of the social order .... Thus, [a valid lesser evils defense requires that the personal interest saved] be sufficiently more important [than the one harmed] to compensate for the additional [harm] that the [perturbation of the social order entails].[140]

Therefore, it may not be true, as Judge Cassese suggests, that killing "x" people is necessarily a lesser evil than killing "$x + 1$" people.[141] When engaging in this delicate balancing of interests, one must take into account not only the lives at stake but also the evil that the coerced actor's aggression represents.[142] Thus, in the case of a coerced actor who saves her own life by killing many people who would have died soon anyway, one must weigh not only the number of lives sacrificed and saved but also the evil inherent in the actor's collaboration with the wrongful conduct of the coercer. It is nevertheless unclear whether this additional consideration tilts the balance decisively against justifying the coerced actor's conduct constituted as the lesser of two evils.

Fortunately, there is no need to engage in this delicate balancing act. The fact that the coerced actor's victims would have died soon anyway is relevant to determining whether the actor's conduct generates sufficient understanding among the public to warrant an exemption from criminal liability. Although this fact is not necessarily determinative when examining whether the actor's conduct is justified as a choice of the lesser evil, it is decisive when evaluating whether her action should be *excused* because of the coercion.

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138. Paul Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 3 n.4 (1985).

139. *See, e.g.*, SANTIAGO MIR PUIG, DERECHO PENAL PARTE GENERAL (7th ed. 2004).

140. *Id.* at 463–64.

141. Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 47 (Oct. 7, 1997).

142. *See* Kamm, *supra* note 137, at 172 (noting that factors other than the number of lives saved or lost must be taken into account).

Thus, although a coerced actor who harms an innocent victim may act wrongfully despite the fact that she could not have prevented the harm, this fact provides a sound reason to excuse her conduct.[143] There is no need to inquire whether the harm caused was proportional to the harm averted in order to determine whether to excuse the coerced actor. Because the actor effectively lacked the capacity to prevent the harm threatened from occurring, punishing the actor for deciding to save her own life instead of dying to protect innocent people who were going to die anyway would be unfair. In sum, yielding to the coercive threats in this case is wrongful but perfectly understandable and, hence, not punishable.

V. APPLYING THE UNDERSTANDABLE CHOICE THEORY TO THE *ERDEMOVIC* CASE

Analyzing the *Erdemovic* case in light of the understandable choice theory of duress is no easy task. As this Article has demonstrated in the preceding Parts, whether the defendant faced an unfairly hard choice and whether his choice-making capabilities were reduced by the coercive situation are relevant factors, but neither is decisive according to the understandable choice theory of duress.[144] While actors who face unfairly hard choices or whose will is overcome by threats generally find sufficient understanding among the community to warrant an exception from liability, in some cases they will nevertheless be held responsible.[145]

Coerced actors will typically be punished for yielding to threats that presented them with unfairly hard choices if they had a duty not to capitulate to such coercion.[146] These duties can be voluntarily assumed, as in the case of firefighters and police officers.[147] However, they can also be involuntarily imposed, as in the case of obligations arising out of familial relationships.[148] Furthermore, people have a general obligation based on their relationships with fellow citizens to resist threats to which yielding would produce harm that is grossly disproportionate to the harm averted.[149]

Several of these principles suggest that the ICTY was correct to conclude that Erdemovic should not have been able to claim duress as

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143. Professor Kent Greenawalt, for example, has stated that the argument that coerced conduct that causes harm to an innocent human being should be excused but not justified "has some power." Greenawalt, *supra* note 49, at 25.

144. *See supra* Part IV.A.

145. *See supra* Part IV.B.

146. *See supra* Part IV.C.

147. *See supra* Part IV.C.1.

148. *See supra* Part IV.C.2.

149. *See supra* Part IV.C.3.

a defense to the killing of dozens of civilians. Chief among the relevant considerations is that, as a soldier, Erdemovic had an obligation to protect innocent noncombatants.[150] In the standard case, a soldier is required to resist threats to his own life and bodily integrity in order to protect innocent people.[151] While the law should not generally demand that most people resist threats to their lives in order to avoid harm to third parties, it is perfectly legitimate to require such a degree of courage from people who, like soldiers, have assumed certain duties towards to the general populace.

The seriousness of the offense thesis also supports convicting Erdemovic. Even though claiming duress as a defense to a single murder is not particularly problematic, allowing it as a defense to a crime involving the killing of dozens of people is more complicated. While it is not difficult to see how a coerced actor who kills one innocent person in order to avoid death can generate sufficient understanding from the community to be exempted from punishment, it is more doubtful that someone who kills a number of people can expect the same degree of comprehension from the public.

These factors are trumped, however, by the fact that Erdemovic did not have the capacity to prevent the deaths of the innocent civilians that he killed in order to save his life.[152] Any resistance on his part would ultimately have been futile, because the civilians would have died at the hands of other soldiers.[153] As a result of these considerations, punishing Erdemovic for not symbolically resisting the coercion is unnecessarily harsh.

However, contrary to Judge Cassese's argument in his dissenting opinion,[154] this reasoning does not make Erdemovic's decision to kill the innocent civilians any less wrongful. The conclusion that the defendant chose the lesser evil when he participated in the execution of nearly seventy innocent people is dubious at the very least. Nevertheless, had the justices considered the fact that Erdemovic could not have saved his victims by refusing to capitulate to the threats, they should have found that fact a compelling and sufficient reason to excuse his wrongful conduct.

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150. *See* Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 84 (Oct. 7, 1997) (noting the "view that soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians").

151. *Id.*

152. *See* Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment on Appeal, ¶ 4 (Oct. 7, 1997) (containing defendant's testimony that he himself would have been killed had he not shot the victims in question).

153. *Id.*

154. Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 50 (Oct. 7, 1997).

VI. CONCLUSION

A majority of the justices in the *Erdemovic* case believed that duress should not be a defense to a crime against humanity. They justified their decision by appealing to the common law rule that disallows the defense whenever a defendant is charged with a crime involving the killing of innocent human beings. This rule is based on the idea that killing an innocent human being should never be considered the lesser of two evils.

As this Article has argued, the justices' application of the common law rule is unsound. Properly understood, duress is an excuse. Therefore, actors who commit crimes under duress are acquitted out of compassion for their circumstances. Their conduct, however, remains wrongful. Hence, when a coerced defendant is excused it is because, in light of the circumstances surrounding his action, his choice to engage in wrongdoing is understandable—not because he chose the lesser evil. Consequently, a rule allowing an actor to plead duress only when his conduct averted a greater evil improperly conditions the availability of the excuse on the existence of justificatory circumstances—circumstances that make the act performed, on balance, the right thing to do under the circumstances. Therefore, the legal community should reject the common law rule that duress is not a defense to murder because the killing of an innocent human being cannot ever be considered the right thing to do.

The situation is different, however, when the coerced actor pleads duress as a defense to a crime involving the killing of numerous human beings. As the seriousness of the offense increases, the arguments in favor of allowing the defendant to plead duress get progressively weaker. Thus, the fact that the coerced defendant in *Erdemovic* killed dozens of people suggests that he should not be allowed to plead duress as a defense to the crime charged. Another sound reason to deny his duress claim is that soldiers have a duty not to kill innocent civilians, even if refusing to kill civilians requires the soldiers to ignore threats to their lives.

Ultimately, despite the above-mentioned considerations, Erdemovic should have prevailed on a plea of duress. Because he could not have prevented the deaths of his victims even if he had resisted coercion, it is unfair to punish him for choosing to yield to the coercion in order to save his own life. Hence, although the fact that he lacked the capacity to prevent the death of the civilians should not be considered a sufficient reason to justify his conduct, it offers compelling grounds for excusing his admittedly wrongful act.