



2003

Law in the Heart of Darkness: Atrocity & Duress


Rosa Ehrenreich Brooks

Georgetown University Law Center, rosa.brooks@law.georgetown.edu

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43 Va. J. Intl. L. 861-888 (2003)

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ESSAY

Law in the Heart of Darkness:

Atrocity & Duress

ROSA EHRENREICH BROOKS*

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I. INTRODUCTION

International human rights law is an optimistic enterprise. Although human rights law and international humanitarian law, its close cousin, arose in response to the worst atrocities humans are capable of committing, belief in the project of international human rights law represents a belief in the ability of reason to prevail over violence and

* Associate Professor of Law, University of Virginia School of Law. This essay is a revised version of a paper originally delivered in May 2002 at the International Conference on Philosophy and the Social Sciences in Prague. I am grateful to Steve Winter, Fuyuki Kurasawa, Steve Schiffrin, and Ed Baker for their helpful suggestions, and I am also grateful to my colleagues at the University of Virginia School of Law for their useful comments during a faculty workshop. I owe thanks in particular to Anne Coughlin, Richard Bonnie, and Paul Stephan.

terror. Human rights law is premised upon the idea that even the almost unimaginable extremes of human emotion and behavior can be made subject to the law's rationalizing power; that law can reach into the very heart of darkness, and make us better than we have so far proven to be.

Of course, one might say that *all* law is part of a fundamentally optimistic enterprise. While it is a truism to observe that if humans were angels, law would be unnecessary, we could equally turn the truism around, and note that if humans were devils, law would be pointless. In this sense, the law-making project always presupposes the improbability, if not the perfectibility, of humankind. Whether our view of human nature tends towards Hobbesian grimness or Lockean equanimity, we tend to think of law as critical to reducing brutality and violence, or at least a distinct convenience in that regard.

Our faith in the law is rarely tested, since in America, at least, few of us ordinary people ever find ourselves at the extremes, confronting violence and terror. But the extremes have a way of creeping up on us, and the unimaginable can quickly and imperceptibly begin to seem routine. Millions of ordinary Europeans discovered this in the middle of the last century, and thousands of ordinary Americans discovered it in Vietnam. Some Americans are discovering it again today in the mountains and deserts of Afghanistan and Iraq. Experientially, there is often no sharp dividing line between "ordinary" life and "ordinary" law, on the one hand, and the extremes, on the other. After Stalin, after Pol Pot, after the Balkan Wars and the Rwandan genocide, as well as the countless other smaller-scale conflicts around the globe, this truth should be apparent to us, but most of the time we prefer to forget or deny it.

What I want to do in this essay is look closely at one example of law operating at the extreme edge of human behavior and emotion, and see whether it has anything particularly satisfying to offer those people who do find themselves caught in the dark places of the earth—or any lessons for those of us who have not so far been tested.

The example I have in mind involves the first judgment handed down by the International Criminal Tribunal for the Former Yugoslavia (better known as "the Hague Tribunal").¹ It is the story of an ordinary man who found one day that the moral terrain around him had changed beyond recognition. It is also, of course, a story about law. The case,

1. The Hague Tribunal's full title is "The International Tribunal for the Prosecution of Persons responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991." The court's jurisprudence is available on the Internet at <http://www.un.org/icty/judgement.htm> (last visited Nov. 7, 2002).

Prosecutor v. Erdemovic,² was decided in 1997, but it has received only minimal attention in English-language journals. This is probably because, to many observers of the Tribunal, it seemed an unimportant and even disappointing case. It involved the wrongs of an obscure young Croatian soldier, not those of a general or a president, and its outcome, to many critics, was hardly a resounding or satisfying victory over the forces of evil.

Nonetheless, it is a fascinating case. It addresses a particularly troublesome issue in criminal law: the scope of duress as a defense. This issue in turn leads to difficult questions about what law in general can offer us, what it is fair and reasonable to expect of ordinary human beings caught in terrible times, and whether we it is wise to assume a sharp discontinuity between the ordinary and the extreme in life or in law. The Erdemovic case can be seen as a parable about the failure of law to live up to its optimistic promise (to protect humans from atrocity or provide guidance to those who wish to prevent atrocity). Alternatively, it can be seen as a parable about law's expressive and redemptive possibilities, even in the face of evil. It is these ambiguities that I want to explore here.

II. ERDEMOVIC'S STORY

Drazen Erdemovic was an ethnic Croat who lived in the Yugoslav republic of Bosnia-Herzegovina. In 1990, Erdemovic, aged 18, began his mandatory military service in the Yugoslav National Army, which was at that time still more or less multi-ethnic in composition. In 1992, voters in Bosnia-Herzegovina opted for independence from the Federal Republic of Yugoslavia (in a referendum in which most of the region's Bosnians and Croats participated, but most of the Serbs boycotted). The Republic of Bosnia and Herzegovina declared its independence from Yugoslavia shortly thereafter, and Erdemovic, who had just finished his service with the Yugoslav National Army, was briefly mobilized into the new republic's army as civil war engulfed the region. In November 1992, however, Erdemovic left the Bosnian army to serve with the Croatian Defense Council's police force. His tenure there was equally short.

By all accounts, Drazen Erdemovic 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

2. Judgement, *Prosecutor v. Erdemovic*, Case No. IT-96-22-A (I.C.T.Y., Appeals Chamber, Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-aj971007e.htm> (last visited Mar. 2, 2003).

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, Erdemovic 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 Karadzic's self-proclaimed "Republica Srpska," the Serb enclave within Bosnia.

Although whispers of concentration camps, torture, and other atrocities had already reached well beyond the region, most of these rumored atrocities were attributed to vicious Serb paramilitaries and police, not to regular soldiers. When he joined up with the Bosnian Serb Army, Erdemovic asked to serve in the 10th Sabotage Detachment because its members included Croats as well as Serbs, and because it was not a combat unit but dealt instead with specialized munitions tasks. For a time, all went well; Erdemovic's wife bore a son, money came in, and Erdemovic's military duties were not too onerous.³

On July 16, 1995, however, the 10th Sabotage Detachment was ordered to the Branjevo collective farm in Pilica, not far from the city of Srebrenica, for a mission that was not disclosed to the soldiers until five buses pulled up and several hundred captive Muslim men and boys were let off, hands tied together. The Muslims—all in civilian clothes—were lined up with their backs to the soldiers, and Erdemovic and his comrades were told that upon their commander's word, they were to shoot the civilians.⁴

Drazen Erdemovic was incredulous. As he later told the judges of the Hague Tribunal's Trial Chamber, "I said immediately that I did not want to take part in that and I said, 'Are you normal? Do you know what you are doing?'"⁵ But Erdemovic's commander told him bluntly that he had a choice: he could participate in the executions of the Muslim civilians, or, if he felt "sorry for them," he could "stand up, line

3. Sentencing Judgement, *Prosecutor v. Erdemovic*, Case No. IT-96-22-*Tbis* (I.C.T.Y., Trial Chamber, Mar. 5, 1998), available at <http://www.un.org/icty/erdemovic/trialc/judgement/crd-ts980305e.htm> (last visited Mar. 3, 2003).

4. See Judgement, *Erdemovic*, Case No. IT-96-A.

5. Separate and Dissenting Opinion of Judge Stephen, *Prosecutor v. Erdemovic*, Case No. IT-96-22-A (I.C.T.Y., Appeals Chamber, Oct. 7, 1997) at para. 11, available at <http://www.un.org/icty/erdemovic/appeal/judgement/crd-asojste971007e.htm> (last visited Jan. 20, 2003).

up with them and we will kill you too.”⁶

Faced with such a choice, Drazen Erdemovic reluctantly agreed to obey the order. He made one more effort to be merciful when he spotted an elderly man whom he recognized among the civilians. He told his commander that the man had helped save the lives of some Serbs on an earlier occasion, and suggested that at least his life might be spared. But his commander said that it was not possible to spare any of the civilians: none of them could be left alive as witnesses.

At this, Erdemovic gave up his efforts to resist, and participated, however unwillingly, in the slaughter. He later told journalists that he tried to kill as few people as possible, and he made an effort not to shoot at the youngest victims.⁷ But the buses kept leaving and returning with more victims, and by the day's end, Erdemovic estimated that his bullets might have killed as many as seventy or eighty people. Soldiers of the 10th Sabotage Unit killed some 1200 civilians that day, a goodly fraction of the estimated seven thousand Srebrenica civilians slaughtered during the course of that week by the Bosnian Serb army.⁸

Four months later, the Dayton Accords brought an ambiguous end to the war in Bosnia, and Drazen Erdemovic, now 25 years old, again found himself demobilized. But his personal war was not quite over. Erdemovic told his story to a journalist from the French newspaper *Le Figaro*, and informed her that he wanted to go to the Hague and tell his story there as well.

He did not have to wait long. The story in *Le Figaro* caused a sensation; it was the first acknowledgement by any of the perpetrators that Europe's worst massacre since the Holocaust had indeed occurred.⁹ In the wake of the Dayton Accords, Yugoslav premier Slobodan Milosevic was eager to throw a few bones to the international community. Handing over a general or a president like Ratko Mladic or Radovan Karadzic would be costly for Milosevic, but picking up a Croat foot soldier who seemed desperate to incriminate himself in any event was an easy way to keep everyone happy. Shortly after the *Le Figaro* article was published, Erdemovic was arrested by Yugoslav

6. Sentencing Judgement, *Erdemovic*, Case No. IT-96-22-Tbis.

7. See Charles Truchart, *U.N. Court Gives Bosnian Croat 10 Years for Part in Massacre; Croat Soldier is First Sentenced by U.N. Court*, *Austin-American Statesman*, Nov. 30, 1996, at A1 (citing a March 8, 1996, report by Renaud Girard for *LE FIGARO*); see also Amnesty International, *Bosnia-Herzegovina: To Bury My Brothers' Bones*, AI Index: EUR 63/15/96, Oct. 7, 1996 (citing the Girard report along with an account reported by Vanesa Vasic'-Janekovic', for NAA BORBA, published Mar. 13 1996).

8. Sentencing Judgement, *Erdemovic*, Case No. IT-96-22-T.

9. See, e.g., Elizabeth Neuffer, *War Crimes Probe Pains Srebrenica Genocide; Charges Stir Range Of Emotions In Bosnian City*, *BOSTON GLOBE*, Apr. 2, 1996.

authorities,¹⁰ and promptly transferred to the Hague.¹¹

At this point, the story of Drazen Erdemovic also becomes a story about law, and law's struggle to apply reason to terror. At the Hague, Erdemovic repeated and amplified the confession he had made to Le Figaro. His own confession was the only incriminating evidence against him, and prosecutors were at first somewhat reluctant to charge him; the Hague Tribunal had been established in 1992 with much fanfare and with pledges to bring to justice the most high-ranking perpetrators, and a conscience-stricken 25-year-old Croatian foot soldier was no one's idea of a good start.¹² In May 1996, however, Erdemovic was charged with one count of crimes against humanity and one count of war crimes.¹³

In November 1996 (after delays due partly to Erdemovic's shaky mental and emotional state), he pled guilty to the first charge. But as he entered his plea, he reiterated to the trial court that he had participated in the massacre only because he would have been killed if he had not. Done so. "Your Honour, I had to do this. If I had refused, I would have been killed together with the victims...I could not refuse because then they would have killed me."¹⁴

After his guilty plea, Erdemovic was sentenced by the trial court to ten years in prison. On appeal, his attorney argued that his guilty plea had been uninformed and equivocal, and that his statements should properly have been understood as a plea of not guilty because he had been under duress at the time he committed the acts charged.¹⁵

This raised a novel question for the Tribunal: is duress (if proven) a complete defense to charges of crimes against humanity or war crimes, when the crimes at issue involve the killing of innocent people? The trial court had assumed that duress was not a complete defense, and could serve only as a mitigating factor in sentencing. The Appeals Chamber, however, acknowledged that the precise scope of the defense of duress was ambiguous. The Chamber declared it a case of first

10. Ironically, he was arrested on suspicion of committing war crimes by the same regime complicit in ordering those crimes committed.

11. See, e.g., *Serbia Delivers Witnesses to Bosnia War Crimes Tribunal*, L.A. TIMES, Mar. 31, 1996, at A10.

12. I owe these insights into the inner workings at the Prosecutors office to a series of 1998 conversations with Payam Akhavan, a former prosecutor at the Hague Tribunal.

13. Indictment, Prosecutor v. Erdemovic, Case No. IT-96-22 (I.C.T.Y., Office of the Prosecutor, May 22, 1996), available at <http://www.un.org/icty/indictment/english/crd-ii960529e.htm> (last visited Nov. 7, 2002).

14. Sentencing Judgement, Prosecutor v. Erdemovic, Case No. IT-96-22-T (I.C.T.Y., Trial Chamber, Nov. 29, 1996), available at <http://www.un.org/icty/erdemovic/trialc/judgement/erdsj961129e.htm> (last visited Nov. 7, 2002).

15. I am skimming over the case's very complex procedural history here.

impression, and undertook to determine the appropriate international law rule relating to the scope of the duress defense.¹⁶

There was no issue of fact at stake. The Trial Chamber did not question Erdemovic's version of the story.¹⁷ The prosecution stipulated that they accepted the truth of Erdemovic's version of events, and agreed that he probably would have been shot by his commander had he refused to take part in the slaughter; indeed, his commander had shot another man in the unit for disobeying orders.¹⁸ Thus, the only question for the Appeals Chamber was whether duress should exonerate Erdemovic altogether or merely reduce his sentence.

The judges of the Appeals Chamber agreed, after a survey of possible sources of international law on the issue—e.g., treaties, customary international law, decisions of previous tribunals of an international or transnational character such as the Nuremberg Tribunals—that there was no unambiguous international legal standard on the scope of the duress defense. The majority of the Appeals Chamber (Judges McDonald, Vohrah, and Li) then sought guidance from state practice, and concluded that while virtually all civil law jurisdictions surveyed permitted duress as a complete defense to all crimes, virtually all common law jurisdictions preclude the defense of duress to charges of murdering innocent people.¹⁹

The majority concluded that in light of the divide between common law and civil law jurisdictions, there was no useful "general principle of law recognized by civilized nations" that could be extrapolated from state practice.²⁰ While they acknowledged a general principle that crimes committed under duress were less blameworthy than crimes committed without any duress or coercion, this did not resolve the question of whether an international criminal tribunal should properly treat duress as a complete defense or only as a mitigating factor.

16. See Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Prosecutor v. Erdemovic*, Case No. IT-96-22-A (I.C.T.Y., Appeals Chamber, Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/crd-asojmcd971007e.htm> (last visited Nov. 7, 2002).

17. Sentencing Judgement, *Prosecutor v. Erdemovic*, Case No. IT-96-22-Tbis (I.C.T.Y., Trial Chamber, Mar. 5, 1998), available at <http://www.un.org/icty/erdemovic/trialc/judgement/erd-ts980305e.htm> (last visited Nov. 7, 2002).

18. *Id.*

19. The U.S. was the sole exception, since a few U.S. states have adopted the Model Penal Code approach, which essentially mirrors the civil law approach. Nonetheless, most U.S. states adopt the traditional common law approach, and the U.S. military retains the common law approach. The Manual for Courts-Martial states that duress "is a defense to any offense except killing an innocent person." R.C.M. 916(h), *Manual for Courts Martial, United States* (2000 ed).

20. See Joint and Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemovic*, Case No. IT-96-22-A.

Ultimately, by a vote of 3-2, the majority of the Appeals Chamber decided to adopt the general common law rule.²¹ The plurality opinion by Justices McDonald and Vohrah declared that while duress might be a mitigating factor that would affect sentencing, duress was *not* a defense to charges of crimes against humanity. Drazen Erdemovic had properly entered a guilty plea; if duress existed, this might give rise to a lesser sentence, but no amount of duress could exonerate him altogether.²²

In some ways this seems like an astonishing conclusion. Drazen Erdemovic had had no desire to kill innocent civilians, and he did so only when threatened with his own imminent death. In the context, his death would probably have served no purpose: the Muslim civilians would surely have been killed with or without Erdemovic's participation, and refusal to participate in the massacre would merely have added Erdemovic to the list of victims. In a sense, then, Erdemovic's acquiescence in the massacre could even be said to have reduced the total amount of death and suffering that would take place, since at least it ensured that his own corpse would not be added to the pile at the end of the day. Had he persisted in his refusal to participate in the massacre, his refusal would have injured him irreparably and benefited no one, but his participation in the massacre benefited him—it kept him alive—while injuring no one who would not have been injured anyway.

Why then establish a legal standard disallowing the duress defense for Erdemovic? By establishing this standard, the majority of the Appeals Chamber essentially declared that Erdemovic's legal guilt was foreordained when he was ordered to Srebrenica. Erdemovic could only have preserved his legal innocence by sacrificing his life. At Srebrenica, the only way to be innocent was to be dead.

Of course, the Tribunal was only following the rule on duress that prevails in virtually all common law jurisdictions. To some degree, the Tribunal's decision in the *Erdemovic* case was not any more astonishing than the various common law decisions over the centuries that have similarly insisted that duress is no defense to murder.²³ But here I want to suggest that the traditional common law rule precluding duress as a defense to homicide is itself quite astonishing. The rule is not invoked often in "ordinary" life, since accused murderers rarely seek to claim duress as a defense. Nevertheless, the common law rule precluding

21. Judgement, *Erdemovic*, Case No. IT-96-22-A.

22. Joint and Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemovic*, Case No. IT-96-22-A.

23. *See, e.g.*, *United States v. LaFleur*, 971 F.2d 200 (9th Cir. 1991), *cert. denied*, 507 U.S. 924 (1993).

duress as a defense to homicide seems puzzling and anomalous in a way that little recent scholarship has addressed.²⁴

III. REASONABLENESS IN LAW

To see the ways in which the general common law rule is anomalous, we have to place it against the background of legal understandings of "reasonableness." The idea of "reasonableness" is a critical standard in the law.²⁵ In particular, it is the backdrop against which virtually all legal liability is assessed in tort and criminal law. This is so obvious to most lawyers that it is rarely discussed explicitly, except perhaps in the context of introductory courses for beginning law students.

The importance of the concept of reasonableness is often rendered explicit in the statutory definitions of crimes. For instance, to be convicted of a crime in the United States, a defendant must be proven guilty "beyond a reasonable doubt." Criminal negligence under the U.S. Model Penal Code involves "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."²⁶ We find similar references to reasonableness in the laws of every state; in New York, to cite but a typical instance, to successfully plead self-defense to avoid criminal liability for shooting someone, a defendant must show he "reasonably believe[d]" he was in imminent danger of death or serious bodily harm, and that he further "reasonably believe[d]" that only his own use of force would deter that threat.²⁷ Even when the word "reasonable" is not used in the statutory definition of crimes, judges often read in a "reasonableness" requirement.

The use of reasonability as an all-purpose legal yardstick is so

24. Even the ubiquitous Joshua Dressler has given the issue only passing attention. See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989).

25. See, e.g., KENT GREENAWALT, *LAW & OBJECTIVITY* (1992); JULIUS STONE, *LEGAL SYSTEM & LAWYERS' REASONINGS* (1964); Neil MacCormick, *Reasonableness & Objectivity*, 74 NOTRE DAME L. REV. 1575 (1999), observing:

[W]hen we think of legal reasoning in the common law systems or in mixed systems...the category of the reasonable has great importance and many uses.... In many branches of the law, "reasonableness" is the standard set by the operative principles and rules of conduct and of judgment.... [There is] a very general tendency to rely in the law upon the standard of reasonableness as a criteria of right decision making, of right action, and of fair interpersonal relationships.

Id. at 1578-79. Anthropologist Max Gluckman claimed that "the reasonable man is recognized as the central figure of all developed systems of law." MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* 83 (1967). Although, as Michael Saltman's work demonstrates (see MICHAEL SALTMAN, *THE DEMISE OF THE REASONABLE MAN* (1991)), Gluckman's observation appears to be something of an overstatement, it is not much of one.

26. Model Penal Code, § 2.02(2)(d) (American Law Inst. 1985) [hereinafter MPC].

27. N.Y. PENAL LAW § 35 *et seq.* (McKinney 1998).

widespread that generations of American and British law students have become familiar with the mythic being known as the Reasonable Man. The law's "Reasonable Man" is a kind of paragon of normalcy: he exercises a reasonable degree of care as he goes about his daily activities. His emotions are reasonable and temperate, and on the rare occasions when he ceases to be temperate, his intemperance is no more than is reasonable under the circumstance. He is a bloodless, tidy sort on the whole, although in extreme circumstances (when he stumbles upon his wife and her lover *in flagrante*, for instance, or when he is attacked by a burglar), he occasionally gives way to an irresistible impulse and lashes out in anger or in fear. Still, the Reasonable Man's anger and fear are always proportionate to the provocation, and afterwards he returns to his normal state of carefulness and calm. His behavior never lands him in prison or subject to a hefty judgment, because the law tends to view him as the unsanctionable norm.

These days, of course, law students soon learn that the Reasonable Man is not only a purely mythical beast, but sometimes a dangerous one as well. The concept of the reasonable man has been criticized not only as an artificial construct but as a construct that privileges certain modes of understanding and reacting over others. In particular, feminists and critical race theorists have drawn attention to the ways in which the "reasonableness" demanded by the law is often merely the typical attitudes of well-nourished white males. Even the gender neutral "Reasonable Person" frequently turns out to hold typically male attitudes.

Some scholars have proposed more context-dependent notions of reasonableness, which might, on occasion, replace the reasonable person with the reasonable woman, or the reasonable battered woman, or the reasonable poor person, or the reasonable Asian immigrant, or the reasonable striking worker. These proposals are premised on the idea that there is no "one size fits all" type of reasonableness, and that broad categories of difference between persons merits legal recognition in the form of more nuanced and contextual conceptions of reasonableness. Nevertheless, this critique of the idea of the reasonable shares the assumption that when something goes wrong, legal liability can and should derive from deviations from the reasonable, as long as we can agree on the base characteristics of the reasonable person in a particular setting.

We might distinguish between two somewhat different understandings of the term "reasonable." There is a weak sense of the word and a strong sense. First, much of the time, when we speak of the reasonable man (or reasonable woman, or reasonable poor person, etc.),

we are speaking in fact of the “ordinary,” normal or typical man (or woman, or poor person, etc.); that is, someone who thinks, feels and behaves in an average sort of way. He or she may turn out not to be particularly “reasonable” in the sense of always reaching well-reasoned decisions, but even if his or her decisions are poorly reasoned, they are poorly reasoned in a way that is typical of the ordinary person. This first and weaker understanding of the “reasonable person” presumes a great bell curve applying to all realms of human behavior, and the reasonable person is the one we find at the bell curve’s very middle. We may choose to imagine separate bell curves for men and for women, or for abused domestic partners, or for minorities, but on this conception of legal reasonableness, the reasonable person is always perched at the top of the bell curve.

This conception of the reasonable person is unquestionably rather impoverished (and in some areas of law it is considered legally insufficient: doing whatever everyone else does will not necessarily prevent liability). But the weak conception of reasonableness has the virtue of being, at least hypothetically, more determinate than the various other ways we might understand the idea of reasonableness. After all, if the reasonable person is simply the average person (or perhaps the average person with certain characteristics or past experiences), we could determine whether a given defendant should be held liable by a more or less sophisticated study or opinion poll. Such a study or poll could presumably tell us what other similarly situated people do or believe they would do in the defendant’s situation.

If we think this conception of reasonableness as ordinariness is too impoverished, we can turn to a second conception of reasonableness, one that is more substantive and robust. We could insist that a defendant’s potential liability should be measured not by what an average or typical person with his characteristics *would* have done in a similar situation, but by what an average person *could or should* have done. As one scholar puts it, this stronger conception of reasonableness means that:

The reasonable person has the virtue of *prudentia* and uses this in action. [Reasonableness] is a virtue that is incompatible with fanaticism or apathy, but holds a mean between these, as it does between excessive caution and excessive indifference to risk. Reasonable people take account of foreseeable risks, but with regard to serious possibilities and probabilities, not remote or fanciful chances. They do not jump to conclusions, but consider the evidence and take account of different points of view. They are aware that any practical dilemma may involve a meeting

point of different values and interests, and they take the competing and converging values seriously....”²⁸

In this stronger conception of the reasonable, the reasonable person is inevitably some species of utilitarian; reasonableness depends precisely upon the capacity to balance harms. This second understanding of “reasonableness” as a standard for imposing liability is a great deal more demanding. It insists that to avoid liability, a person must be reasonable *not* in the sense of being ordinary, but in the sense of thinking through his actions and their consequences in a thoughtful, reasoned way, and behaving in ways that are sensible, careful, and prudent.

This conception of reasonableness is more nuanced and powerful, and consequently gives rise to new problems. How much care is enough? What reasons are good reasons? What risks are foreseeable? Which interests and values should come first? This understanding of reasonableness also seems to some critics to offer little when it comes to evaluating human emotions. In evaluating whether a defendant’s use of force was legitimate in self-defense, for instance, the law may ask whether the defendant “reasonably feared” imminent bodily harm, or whether a woman’s fear that she might be raped was a “reasonable fear.”²⁹ But what can it mean to ask whether someone’s fear was “reasonable” when fear itself is an inherently “unreasonable” emotion?³⁰ Similarly, when we deal with issues of provocation in criminal law, or emotional distress in tort law, we may be faced with questions such as whether a person “reasonably” felt shame or humiliation or disgust. Like fear, these emotions are not about reason at all. Although we can certainly ask whether a typical person in a similar setting would feel shame or fear, it is unclear what we gain by asking whether the emotion itself is reasonable, or whether the person could or should have felt otherwise.

Much of the time, these two rather different conceptions of the reasonable person—the weak and the strong—are not clearly distinguished by courts. Courts often speak of what a “reasonable person” could have foreseen and of what was “reasonably foreseeable,” as if these two statements are identical; they speak of whether a

28. See MacCormick, *supra* note 25, at 1579.

29. See, e.g., *Rusk v. State*, 406 A.2d 624 (Md. Ct. Spcc. App. 1979), *rev’d by State v. Rusk*, 424 A.2d 720, 727 (Md. 1981) (reversing, the Court of Appeals for Maryland noted that “the vast majority of jurisdictions have required that the victim’s fear be *reasonably grounded*.” (emphasis added)).

30. See, e.g., Martha Nussbaum & Dan Kahan, *Two Views of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

reasonable person would have felt outraged and of whether the outrage was reasonable; they speak of persons “of reasonable firmness,” and of when the law can reasonably expect that a person of reasonable firmness will experience a reasonable fear.³¹

Nonetheless, all of these discussions of the concept of reasonableness and the reasonable person share a core assumption. They all take for granted the idea that you can be held legally responsible if your behavior was unreasonable in some way, whatever precisely is meant by “reasonable.” Conversely, if your behavior was at all times reasonable—if a reasonable person would have done nothing other than what you did, or if it would have been *unreasonable* to expect you to have done other than what you did—you cannot and should not be held responsible. Certainly, when it comes to criminal law, at least, most scholars take this as a basic premise.³²

IV. THE ANOMALOUS ASPECTS OF THE DURESS DEFENSE

Against this backdrop, the common law rule precluding duress as a defense to charges of homicide seems peculiar. If someone puts a gun to your head and places another gun in your hand and says, “Shoot that person over there or I will blow your brains out,” what would a reasonable person do? Assuming that the threat is credible and there is no doubt that the man with the gun to your head can and will blow your brains out if you disobey, it seems unlikely that most “ordinary” people would choose to accept death themselves rather than cause the death of a third party, at least if the third party is not known to them. In the weakest sense of “reasonableness as ordinariness,” the reasonable thing to do is cooperate. In the strongest sense of the term reasonable, it seems unlikely that a prudent, thoughtful, careful person would choose her own death over another’s death. In fact, it seems thoroughly *unreasonable* to expect anyone to sacrifice her own life in such circumstances.³³ Yet this is just what the law apparently expects in most common law jurisdictions: a willingness to value the lives of others over one’s own life, and to sacrifice one’s own life, if necessary, for the good of another. A willingness to make such a sacrifice may be a virtue, but it

31. This imprecision has also been much criticized, on the grounds that the purpose of a “reasonableness” standard is to provide some determinacy and objectivity in assessing legal liability. See GREENAWALT, *supra* note 25, at 100–08. If the very idea of “reasonableness” is incoherent or biased or itself “unreasonable,” the concept does not do the work we need it to do.

32. There are a few exceptions (strict liability offenses, for example), but these tend to be trivial.

33. Not impossible, of course, just not terribly likely. Instances of heroism do occur, but they seem less common than incidences of cowardice.

is probably not a virtue of ordinary, reasonable people. It seems more like a virtue belonging to heroes and saints.

It is for this reason that the drafters of the American Model Penal Code abandoned the traditional common law approach to duress, and proposed making duress available as a defense to all crimes, including homicide.³⁴ To do otherwise, they stated in the commentary, would be both imprudent and unfair:

law is ineffective in the deepest sense, indeed...hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust.³⁵

Return to Drazen Erdemovic. Had he not participated in the massacre of Muslim civilians, he would almost surely have been killed himself. There is, of course, a *possibility* that his commander would have spared him and allowed him to sit out the massacre, but the possibility must have seemed to Erdemovic to be vanishingly small—and even the Hague’s prosecution team agreed that Erdemovic was reasonable in his assessment of the grave danger he faced.³⁶ And if Erdemovic had nonetheless heroically declared, “Go ahead, shoot me, but I won’t kill these civilians,” the civilians would almost surely have been slaughtered even without his participation. Here too, there is a faint possibility that Erdemovic’s refusal to participate might have sparked a broader resistance among the other soldiers, but again the possibility was vanishingly small; Serb war crimes in Bosnia were numerous and systematic, and it is overwhelmingly likely that with or without Erdemovic, and even with or without his comrades in the 10th Sabotage

34. See MPC § 2.09(1):

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

Id.

35. MPC § 2.09, explanatory note at 374-75. Dressler proposes an approach similar to that of the MPC. Duress, he thinks, should not be precluded as a defense to any crime; the question we should ask in determining whether it succeeds as a defense is whether “we could fairly expect a person of non-saintly moral strength to resist the threat.” Dressler, *supra* note 24, at 1367.

36. Sentencing Judgement, Prosecutor v. Erdemovic, Case No. IT-96-22-*Tbis* (I.C.T.Y., Trial Chamber, Mar. 5, 1998), available at <http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj980305e.htm> (last visited Nov. 7, 2002).

Detachment, the Muslims of Srebrenica would have been slaughtered sometime that week.

So: Erdemovic was effectively faced with a choice.³⁷ He could participate in the massacre, and the civilians would die, but he would live, or he could refuse to participate and he would die right along with the civilian victims. Is it reasonable to expect Erdemovic to have chosen other than as he did?

Under the weak conception of reasonableness—reasonableness as ordinariness—Erdemovic was certainly reasonable. Recall his anguished question to his commander and comrades when faced with an order he knew to be unconscionable: As Erdemovic recounted to the judges at the Hague, “I said, ‘Are you normal? Do you know what you are doing?’”³⁸ Sadly, Erdemovic’s colleagues were “normal” indeed: they were average humans who followed orders and didn’t stick their necks out to save people they did not know. It was only Erdemovic who was atypical enough even to lodge a protest (and even protesting must have taken some courage in a unit where others had already been shot for disobeying orders).

Erdemovic's ultimate decision seems to hold up against the more rigorous understanding of reasonability, as well. Erdemovic was prudent and thoughtful; he correctly assessed the risks and benefits of each course of action. Indeed, in a strict utilitarian sense, his participation in the massacre may well have minimized the number of deaths, by ensuring that at least he would not join the victims. On any reasonableness standard, Erdemovic appears to have made a defensible choice. Asking him to make any other choice is akin to demanding that he make a martyr of himself, for no practical purpose. Who among us could meet that standard? And if we acknowledge that few of us would have ourselves had the courage to accept death rather than participate in an atrocity of such magnitude, how can holding Erdemovic liable be anything but the sort of hypocrisy decried by the drafters of the American Model Penal Code, the sort of hypocrisy that renders law meaningless, ineffective and unjust?

No less a person than Judge Antonio Cassese (no slouch on human

37. As Dressler observes, older analyses of duress tended to claim that duress was a defense because the existence of coercion made the act an involuntary act, or the coercion overbore the will. *See, e.g.*, Dressler, *supra* note 24. Most recent commentators have insisted that duress does not negate the voluntariness of the act in a strict sense: the duress actor consciously engages in the act. *See generally id.* Such commentators observe that the actor under duress does not lack a choice in the matter of his action; rather, he is faced with a difficult or unfair choice. *Id.*

38. *See* Sentencing Judgement, Prosecutor v. Erdemovic, Case. No. IT-96-22-Tbis (I.C.T.Y., Trial Chamber, Mar. 5, 1998), available at <http://www.un.org/icty/erdemovic/trialc/judgment/erd-tsj980305c.htm> (last visited Nov. 7, 2002).

rights and humanitarian law) takes this view. Writing for the 2-judge dissent in *Erdemovic*, Cassese first disputes the majority's assertion that there exists no clear general principle of law on the scope of the duress defense. He argues that a "correct" understanding of the case law would suggest that duress should be a defense even to charges of murder.³⁹ Moreover, even if there was no clear principle, given the differing common law and civil law standards, Cassese insists that the Tribunal ought to have had recourse to the principle most favorable to the defendant.⁴⁰

More importantly, by declaring that duress cannot be a defense to charges of crimes against humanity or war crimes, Cassese suggests, in effect, that the majority has abandoned the most basic legal principles.⁴¹ Had *Erdemovic* "compl[ie]d with his legal duty not to shoot innocent persons," writes Cassese, "he would [have] forfeit[ed] his life for no benefit to anyone and to no effect whatsoever apart from setting a heroic example for mankind (which the law cannot demand him to set): his sacrifice of his own life would be to no avail."⁴² Cassese believes that this sets the standard unacceptably high: "Law is based on what society can reasonably expect of its members. It should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behavior falling below those standards."⁴³

Given these compelling arguments, how did the plurality on the Appeals Chamber justify adopting an apparently anomalous common law rule of such obvious harshness?

The Appeals Chamber was ready enough to acknowledge the harshness of its rule, but viewed this harshness as no more than was necessary, citing Stephen: "Surely it is at the moment when the temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary."⁴⁴

I want to quote at length here from the plurality opinion:

[T]he law should not be the product or slave of logic or intellectual hair-splitting, but must serve broader normative

39. Separate and Dissenting Opinion of Judge Cassese, *Prosecutor v. Erdemovic*, Case No. IT-96-22-A (I.C.T.Y., Appeals Chamber, Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/crd-adojcas971007e.htm> (last visited Jan. 18, 2003).

40. Separate and dissenting opinion of Judge Cassese, *Erdemovic*, Case No. IT-96-22-A, at paras. 11–49.

41. *Id.*

42. *Id.* at para. 44.

43. *Id.* at para. 47.

44. Joint and Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemovic*, Case No. IT-96-22-A, at para. 74.

purposes in light of its social, political and economic role. It is noteworthy that the authorities we have just cited [e.g., Stephen] issued their cautionary words in respect of domestic society and in respect of a range of ordinary crimes including kidnapping, assault, robbery and murder.

Whilst reserving our comments on the appropriate rule for domestic national contexts, we cannot but stress that we are not, in the International Tribunal, concerned with ordinary domestic crimes. The purview of the International Tribunal relates to war crimes and crimes against humanity committed in armed conflicts of extreme violence with egregious dimensions.... We are concerned that, in relation to the most heinous crimes known to humankind, the principles of law to which we give credence have the appropriate normative effect upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict situations.

The facts of this particular case, for example, involved the cold-blooded slaughter of 1200 men and boys by soldiers using automatic weapons. We must bear in mind that we are operating in the realm of international humanitarian law which has, as one of its prime objectives, the protection of the weak and vulnerable in such a situation where their lives and security are endangered....

If national law denies recognition of duress as a defense 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. If national law denies duress as a defense even in a case in which a single innocent life is extinguished due to action under duress, international law, in our view, cannot admit duress in cases which involve the slaughter of innocent human beings on a large scale. It must be our concern to facilitate the development and effectiveness of international humanitarian law and to promote its aims and application by recognising the normative effect which criminal law should have upon those subject to them.⁴⁵

Indeed, Security Council Resolution 827, adopted in 1993, establishes the International Tribunal expressly as a measure to "halt and effectively redress"⁴⁶ the widespread and flagrant

45. *Id.* at para. 75.

46. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/827 (May

violations of international humanitarian law occurring in the territory of the former Yugoslavia and to contribute thereby to the restoration and maintenance of peace.⁴⁷

The plurality went on to cite a number of policy reasons for their decision,⁴⁸ insisting that "It would be naive to believe that international law operates and develops wholly divorced from considerations of social and economic policy.... 'There is no avoiding the essential relationship between law and politics'."⁴⁹

Cassese, in his dissent, calls this impermissible judicial law-making:

In my view international law [on this issue] is not ambiguous or uncertain...[and] to uphold in this area of criminal law the concept of recourse to a policy-directed choice is tantamount to running foul of the customary principle *nullum crimen sine lege*. An international court must apply *lex lata*, that is to say, the existing rules of international law as they are created through the sources of the international legal system. If it has instead recourse to policy considerations...it acts *ultra vires*.⁵⁰

In the end, the plurality does not rest its decision upon any pragmatic or utilitarian calculus at all, but falls back on pure "moral principles." Ultimately, they find themselves relying on the arguments of canonical English legal scholars, and quoting from Hale's Pleas of the Crown: "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

25, 1993), at 29, *reprinted in* 32 I.L.M. 1159 (1993).

47. *Cf. Regina v. Howe*, 2 W.L.R. 568, 582 (1987) (opinion of Lord Hailsham). Responding to the argument that earlier prohibitions on the use of duress as a defense to homicide were antiquated and unfair in their insistence that it is better to die than take an innocent life, Hailsham wrote: "[It] ill becomes those of us who have participated in the cruel events of the 20th century to condemn as out of date those who wrote in defence of innocent lives in the 18th century." *Id.*

48. Joint and Separate Opinions of Judge McDonald and Judge Vohrah Opinion, *Erdemovic*, Case No. IT-96-22-A, at para. 73. They reasoned, for instance, that permitting duress as a defense to homicide might permit leaders of gangs or terrorist organizations to effectively "immunize" their members from prosecution by threatening them with death if they failed to obey the leader's orders. *Id.* (internal citations omitted). Similarly, they asserted that precluding duress as a defense to murder might make individuals more willing to refuse to kill, knowing they might be punished later. *Id.* (internal citations omitted). This seems a weak argument, however, for few people would likely see possible future prosecution as more worrisome than imminent death.

49. *Id.* at para. 178 (quoting ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 5 (1994)).

50. Separate and Dissenting Opinion of Judge Cassese, *Erdemovic*, Case No. IT-96-22-A, at para. 49.

ought rather to die himself, than kill an innocent.”⁵¹ And again from Blackstone: A man under duress “ought rather to die himself, than escape by the murder of an innocent.”⁵²

The plurality opinion acknowledges that an

argument often advanced by [those] in favour of allowing duress as a defence to murder rests upon the assertion that the law cannot demand more of a person than what is reasonable, that is...“that which can be expected of the ordinary, average person in the particular circumstances...[The argument goes that] only they who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person...’⁵³

Nevertheless, they note sternly that they reject “utilitarian logic.... The approach we take does not involve a balancing of harms for and against killing.”⁵⁴ Even if those slaughtered at Srebrenica would have died anyway, with or without Erdemovic’s participation in the massacre, he still should not have taken part, even if it meant his own death. Better by far, said the appeals Chamber majority, to be suffer and die but be innocent than to taint one’s life by committing crimes against humanity. To Cassese’s claim that this violates “basic principles of law,” (i.e. law based on what society can reasonably expect of its members), the plurality opinion replies, essentially, “What of it?” The plurality’s position is unyielding: “[O]ur rejection of duress as a defence to the killing of innocent human beings *does not depend upon what the reasonable person is expected to do*. We would assert an absolute moral postulate which is clear and unmistakable for the implementation of international humanitarian law.”⁵⁵

Implicitly, we have here a statement about the acceptable moral contours of a human life, a statement about what it is that makes us human beings, without which we might as well be dead.

51. Joint and Separate Opinions of Judge MacDonald and Judge Vohrah, Prosecutor v. Erdemovic, Case No. IT-96-22-A, at para. 71 (quoting LORD HALE, 1 PLEAS OF THE CROWN 51 (1800)).

52. *Id.* (quoting WILLIAM BLACKSTONE, COMMENTARIES 28 (1857)).

53. *Id.*

54. *Id.* at para. 83.

55. *Id.* at para. 82 (quoting Lynch v. DPP for Northern Ireland, AC 683, 711 (1975) (opinions of Lords Wilberforce and Davies)). Italics added.

V. ASSESSING THE DECISION

How should we feel about this instance when the law seems to ask something unreasonable of us—this moment when the law seems to require heroism and martyrdom?

On the one hand, surely Antonio Cassese and the drafters of the American Model Penal Code are right to object. Few of us have ever been put to the test, and if we were, few of us would likely have done any better than Drazen Erdemovic. Can it be either just, fair, or reasonable, then, to declare him a criminal and lock him up?

On the other hand, the plurality decision also has a powerful normative pull. True, few of us have been put to the test; but if we were to find ourselves in Erdemovic's situation, would we not each *hope* we would have the courage to choose death over participation in the slaughter of innocents? And if our courage failed us, would we not each feel that we had committed a crime?

Although I have been sympathetic in this essay to the views of Cassese and the Model Penal Code drafters, and although I consider the view that duress does not justify homicide to be an interesting anomaly in the criminal law, I tend to think that if I had been in the Appeals Chamber at the Hague, I would ultimately have joined the plurality decision, not Cassese's dissent. As the plurality says, when push comes to shove there seems to be an "absolute moral postulate" that says that killing innocent people in order to save ones own life is always wrong.⁵⁶

But can this view be defended without recourse to foundationalist or natural law theories? Is there any way to appeal to an even more robust understanding of the reasonable, one that can make the majority decision seem fair, and make the traditional common law rule on duress seem something other than a natural law island in a utilitarian sea?

I am not sure, frankly. We might have recourse to a Rawlsian conception of public reason,⁵⁷ as glossed by Alessandro Ferrara, who suggests that the product of public reason is "the most reasonable," the "exemplary," the "reflective endorsement of our self-conception, an idea of who we could be at our best."⁵⁸ Perhaps a process of public reason would indeed lead us to conclude that it is always better to be killed than to kill, and that if we fail to make that choice on the spot, we would agree that we should be punished, even though our options were all bad ones.

56. *Id.* at para. 83.

57. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV 765 (1997).

58. Alessandro Ferrara, *Public Reason and the Normativity of the Reasonable*, Comments Delivered at the International Conference on Philosophy and the Social Sciences, Prague, May 11, 2002.

Similarly, we might look to Habermasian discourse theory for help. If legal norms are those "to which all possibly affected persons could agree as participants in rational discourses,"⁵⁹ could we defend the common law rules on duress? It is not obvious that we could if we abandon the "exemplary" in favor of agreement based on mere "rational discourse." While many participants in such rational discourse might agree that it is more noble to choose death over participation in atrocity, some would surely resist the notion that the failure to be noble should result in punishment as a criminal.

Where we come out on this has a great deal to do with our conceptions of the appropriate temporal framework for understanding the events at issue. On the spot, it seems unfair to punish someone as a criminal just because he could not quite bring himself to die for the sake of a principle. But if we go back far enough—before the choices became so stark and unforgiving, before the threat of violence became so palpable and imminent—perhaps it is fair after all. Here, taking a different temporal view, the focus shifts to how the actor ended up in such a bad situation in the first place.⁶⁰

Put another way: when we evaluate Drazen Erdemovic's behavior on the farm outside Srebrenica, a lot depends on whether we see his story as a narrative about inevitability and determinism, or as a narrative about choice. To Antonio Cassese, Erdemovic's story is a story about inevitability, and the very worst sort of moral luck. Erdemovic was caught up in events beyond his control, and he had no more freedom than a pawn on chessboard: he was an ordinary man who one day simply found himself in an untenable situation. He was as much a victim as the murdered Srebrenica civilians. *Someone* was guilty of a terrible crime at Srebrenica, no question—but it was not Drazen Erdemovic, young and frightened and anxious about the fate of his wife and child. We may assume that to Cassese, the true criminals were the likes of Mladic, Karadzic, and Milosevic, the architects of Bosnia's ethnic cleansing.

To the majority, however, Erdemovic's story is (implicitly) a narrative about choice. The majority treats Erdemovic as a moral agent whose failure was only consummated at Srebrenica, but begun much earlier. Erdemovic's crime, on this view, goes back some years; his crime was his repeated failure to take a real stand, to insist on loyalty to any one group or idea.

This is ironic, in a conflict replete with crimes committed in the name

59. JURGEN HABERMAS, BETWEEN FACTS AND NORMS 107 (1996).

60. *Cf.* MPC § 209(2). The defense of duress is unavailable if "the actor recklessly placed himself in a situation in which it is probable that he would be subjected to duress." *Id.*

of nationalism, ethnicity, religion and other particularist loyalties. Erdemovic, unlike many of his comrades in arms, is no particularist fanatic. If anything, he is just a little bit too cosmopolitan: he drifts from army to army, committed to nothing but unable to bring himself to resist wholly. He does not just find himself unaccountably in the heart of darkness one day—he has been complicit, little by little, in allowing Bosnia to become one of the earth's dark places. By the time he finally tries to take a stand (and as I have said, even questioning his order outside Srebrenica undeniably took courage, in an unit in which men had already been shot for disobeying orders), it was too late.⁶¹ Erdemovic's cosmopolitan horror at slaughtering civilians just because of their different ethnicity gets him nowhere. He then shifts tack and tries a particularist appeal, when he suggests to his commander that they at least spare a man who has helped other Serbs. But this too fails, as his commander says there can "no witnesses" to the slaughter.⁶²

Erdemovic was then out of options, leaving nothing but violence and terror. Hobbes tells us that the laws of nature require men to do anything to preserve their own lives.⁶³ For Erdemovic, the Hague Tribunal is far away, and so he gives in to his own survival instincts and to the sovereign's command—which is to say that he obeys the man with the gun who controls the other men with guns.

But despite his commander's insistence that there be no witnesses, Erdemovic, by turning his back on the cosmopolitan ideals of Rawls and Habermas and obeying instead Hobbes' darker conception of law, survives to be a witness himself. And certainly this is one way to understand this case: as a story about the redemptive possibilities of witnessing. If Erdemovic had not valued his own life a little bit more than a hero ought to value his own life, there might have been no one who was later willing and able to tell the tale of how the Bosnian Serb Army systematically slaughtered thousands of Srebrenica civilians. Erdemovic's fellow soldiers were able, but unwilling to implicate themselves; the victims would have been willing, but, being dead, they were not able.

Erdemovic's moral ambivalence proved crucial here: he was conscience-stricken enough to recognize the massacre as a terrible crime, and if he was not *quite* conscience-stricken enough to prefer

61. Separate and Dissenting Opinion of Judge Cassese, Prosecutor v. Erdemovic, Case No. IT-96-22-A (I.C.T.Y., Appeals Chamber, Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/crd-adojcas971007e.htm> (last visited Jan. 18, 2003).

62. Judgement, Prosecutor v. Erdemovic, Case No. IT-96-22-A (I.C.T.Y., Appeals Chamber, Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/crd-aj971007e.htm> (last visited Nov. 7, 2002).

63. And it is thus folly to make laws against their doing so.

death to the moral taint of participation, he was sufficiently conscience-stricken to confess to the first journalist he could find when the war ended, sufficiently conscience-stricken to confess once more at the Hague and plead guilty, and sufficiently conscience-stricken to provide critical information to Tribunal investigators that could help them prepare indictments against numerous more important suspects, such as General Ratko Mladic and Republica Srpska President Radovan Karadzic. As the prosecution team at the Hague Tribunal acknowledged, without Drazen Erdemovic's eyewitness account of the massacre (later corroborated by forensic experts who examined the site) and his detailed description of the command structure of the Bosnian Serb Army, the Tribunal's efforts to build cases against the numerous much bigger fish would have been far more difficult. Perhaps, then, the very moral weakness that enabled Erdemovic's survival also enabled him to do something morally good: bear witness to the crimes in which he had taken part, and honor the victims by acknowledging the horror of their deaths.

If the story of *Prosecutor v. Erdemovic* is a story about one man's moral failure, partially redeemed by the process of bearing witness, it can also be read as a parable about of the international community, its half-hearted institutional efforts to address and prevent atrocities, and the limits and possibilities of law.

The Hague Tribunal was the ultimate cosmopolitan institution, with all that is glorious and all that is troubling about cosmopolitan institutions. Its establishment by the United Nations Security Council in 1993 represented the first major international judicial effort to punish and deter atrocities since the Nuremburg and Tokyo Tribunals nearly fifty years earlier. Its formation was linked in the minds of many of its creators with the long-term goal of creating a permanent international criminal court, one that could truly act as the conscience of humankind and ensure the end of impunity for human rights abusers. But the Tribunal also suffered from its very cosmopolitanism: a creature of the UN bureaucracy, it was accountable to no one in particular, unrooted in any legal or political culture, unable to connect in any meaningful way to the people whose lives it claimed to effect. Since it depended upon the military muscle and intelligence reports of its Security Council sponsors, the Tribunal was, by itself, nearly toothless: it couldn't get the NATO powers to arrest any of its most wanted but still politically useful criminals.

Of course, though its coercive powers were minimal, the Tribunal could, and did, lock up former Private Erdemovic. Was its decision to declare Erdemovic a criminal in part an act of expiation for law's

failings—for the failure of human rights and humanitarian law to live up to its promises, and the failure of the international community to care enough to stop the slaughter in the former Yugoslavia?

Certainly there was plenty of moral failure to go around during the Bosnian war, and the massacre of seven thousand Srebrenica civilians in July 1995 represents one of the international community's most glaring and shameful failures during the conflict. But there is almost no mention in any of the Appeals Chamber opinions in *Prosecutor v. Erdemovic* of the institutional and political context in which the Srebrenica massacre occurred. In a case that could be read as a parable about moral cowardice and the (possibly) redemptive aspects of bearing witness, the Tribunal's silence about this is loud indeed.

Recall that in 1995, unable to summon the political will to take sides in the Bosnian conflict or impose a peace, but dogged by media reports of atrocities against civilians, the UN Security Council came up with the idea of declaring certain areas within Bosnia UN "safe areas," to which civilians could go and be protected by UN peacekeeping troops. Srebrenica was one such "safe area," and in the summer of 1995 thousands of Bosnian Muslim civilians poured into Srebrenica to seek protection from the incursions of the Bosnian Serb army and paramilitaries. As the plurality opinion in the Erdemovic case dryly notes, however, the Dutch UN troops protecting the "safe area" of Srebrenica (the judges had enough sense of shame to keep the term in quotation marks) surrendered their weapons to the Serbs and withdrew rather than risk a fight. It was their abandoned civilian charges who were brought by the busload for Erdemovic and his fellow soldiers to slaughter.

Naturally, none of the Dutch UN peacekeepers were ever brought up on criminal charges for their failure to protect the civilians they were pledged to protect, and no high-ranking UN officials were charged as accomplices in the murder of the thousands who died, and none of the Security Council powers who gave the UN leaders their marching orders will ever truly be called to account.⁶⁴ Peacekeeping soldiers and their political leaders are protected by a web of ad hoc and treaty-based immunities from prosecution, and for the most part this is probably as it should be. Nonetheless, it is worth noting that had these immunities been absent, and had ordinary common law principles of criminal liability applied, some or all of these actors might well be considered criminally liable for the deaths of the thousands of massacred

64. The Dutch cabinet faced a belated political reckoning in the wake of a recent report about Srebrenica, which led ultimately to a rash of resignations. See *Srebrenica Muslims to request UN, Dutch responsibility before ICJ*, AGENCE FRANCE PRESS, Apr. 21, 2002.

Srebrenica civilians.⁶⁵ Certainly, the Srebrenica massacre could not have occurred without countless political and moral failures of the first order made by people and institutions with far more power and information than Private Drazen Erdemovic.

By declaring that under international law, duress is not a defense to charges of killing innocent people, and by sentencing Drazen Erdemovic to prison, perhaps the Hague Tribunal was acknowledging these collective failures in the only way available—even at the risk of appearing breathtakingly hypocritical. After the failure of the international community to prevent the Srebrenica massacre, and the embarrassing failure of the Tribunal to get its hands on any high-ranking suspects, how could the Tribunal permit the very first defendant brought before it—a man who *admitted* killing 70 to 100 innocent people—to walk free? Punishing Erdemovic was the Tribunal's sole mechanism for honoring the pain of the victims at Srebrenica. Thus, the eloquent plurality opinion insisting on "absolute moral postulates" and declaring that not even the desire to avoid one's own death could justify atrocities. This allowed the majority on the Appeals Chamber to use law itself as a mechanism for bearing witness to the inexcusable moral failures of our collective institutions.

VI. BACK TO ERDEMOVIC

All very well, but despite the numerous and collective moral failures, only Drazen Erdemovic went to prison. Someone had to be punished, and he was available, the sacrificial lamb. So, back to Erdemovic: what did he make of the whole business?

The Tribunal's insistence that duress is no defense to the killing of innocent people may seem to create an international legal standard more suitable for heroes and saints than for ordinary mortals. But Erdemovic himself seemed to have agreed with the majority's view of the issue. During his sentencing hearing in November 1996, he wept as he explained to the judges why he had decided to plead guilty, despite his conviction that he had acted under duress. At Srebrenica, he said,

[My commander] said, "If you do not want to [participate in the executions], stand with them...so that we can kill you too..." I

65. Although ordinarily omissions do not give rise to criminal liability, the peacekeepers stood in a special relationship to the civilians, arguably had something analogous to a contractual duty to protect them, and certainly promised to protect them, effectively dissuading the civilians from seeking to escape the region as they might have done had no claims about "safe areas" been made.

was not afraid for myself at that point, not that much...but what would happen to my child and to my wife? So there was this enormous burden falling on my shoulders...I knew that I would be killing people, that I could not hide this, that this would be burning at my conscience...⁶⁶

[My attorney] told me, "Drazen, can you change your mind, your decision [to plead guilty]?...I do not know what will happen..." [But] I told him because of those victims, because of my consciousness, because of my life, because of my child and my wife, I cannot change what I said...because of the peace of my mind, my soul, my honesty, because of the victims and war and because of everything.

Although I knew that my family, my parents, my brother, my sister would have problems because of that, I did not want to change it. Because of everything that happened I feel terribly sorry, but I could not do anything....Thank you. I have nothing else to say.⁶⁷

In July 1995 Erdemovic could not bring himself to say to his commander, "Go ahead, shoot me, because if I participate in this massacre something in me will die anyway." But afterwards, he all but turned himself over to the authorities, and pled guilty. Had he not come forward voluntarily and confessed, he would likely never have been found or prosecuted, and had he not pled guilty he would almost certainly never have been convicted; the only evidence against him was his own words, and the prosecutors at the Hague had better things to do than go after young privates. Perhaps for Erdemovic, pleading guilty—and accepting his sentence—was part of restoring his sense of himself as a moral person. Perhaps, from his own point of view, suffering his sentence (he ultimately served five years) was necessary to redemption.

VII. WHAT CAN WE CONCLUDE?

The story of Drazen Erdemovic's life and trial is full of painful ambiguities. This may lead some to dismiss its significance, either on the "hard facts make bad law" theory, or on the theory that the situation

66. Sentencing Judgement, *Prosecutor v. Erdemovic*, Case No. IT-96-22-Tbis (I.C.T.Y., Trial Chamber, Mar. 5, 1998), available at <http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj980305e.htm> (last visited Nov. 7, 2002).

67. Separate and Dissenting Opinion of Judge Stephen, *Prosecutor v. Erdemovic*, Case No. IT-96-22-A (I.C.T.Y., Appeals Chamber, Oct. 7, 1997) at para. 11, available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojste971007e.htm> (last visited Jan. 20, 2003).

Erdemovic faced was so extreme that it offers no lessons for the rest of us ordinary people: we, after all, are not soldiers, and not in a war, so what can Erdemovic's story possibly have to teach us?

But it is the very ambiguities in this story that should give us pause. First, the story of Erdemovic should raise serious questions about how far apart "ordinary life" really is from the heart of darkness. For Drazen Erdemovic and his fellow soldiers at Srebrenica, the darkness crept up slowly and imperceptibly. One day Bosnian Muslims were neighbors and friends, and only a short time later, the "normal" men of the 10th Sabotage Detachment were willing to slaughter their former neighbors without hesitation. Only for Erdemovic was the darkness visible, and even he was unable to resist its pull.

Erdemovic's story seems extreme, but the last century suggests that there is not a sharp disjuncture between the ordinary and the extreme. We often prefer to imagine wars and genocides and atrocities as events that "just happen" every now and then, much like tornadoes or lightning strikes; this metaphor suggests that we can't generalize from them, since they are radically discontinuous with ordinary life. This is dangerously misleading, however. Genocides and atrocities do not "just happen": some people work very hard over a long time to make them happen, and others permit them to happen by averting their eyes or failing to cry out against the encroachment of darkness.

Today we Americans are in a "war against terrorism." Without wishing to be too apocalyptic, I would suggest that this is a time for us to be particularly alert to the risks of sliding towards the extremes. Government encroachments on civil liberties; a rise in hate crimes against Muslims and Arabs; a growing popular sentiment that "anything" is justified in the name of national security—all of these are danger signs. The press has reported on allegations that American soldiers in Afghanistan beat and abused prisoners (including some prisoners who turned out to be US allies, captured in error).⁶⁸ Similarly, there have been recent reports that U.S. government personnel have tortured Al Qaeda suspects at secret interrogation centers in Afghanistan and elsewhere.⁶⁹ Without additional evidence, there is no reason to assume that these allegations are true. But after a century that has seen so many atrocities committed by so many ordinary people, there is also no reason to assume that the allegations are false.

68. See, e.g., Eric Slater, *Response To Terror; U.S. Forces Beat Afghans After Deadly Assault, Ex-Prisoners Say; War: Reports Add To Evidence Suggesting That The Attack Targeted Innocent People*. L.A. TIMES, Feb. 11, 2002, at A1.

69. See, e.g., Don van Natta, *Threats And Responses: Interrogations; Questioning Terror Suspects In a Dark and Surreal World*. New York Times, March 9, 2003, at A1.

Keeping all this in mind, what I earlier described as an anomaly in domestic criminal law may make more sense. In common law jurisdictions, duress is a generally a complete defense to all crimes—except for murder. This is puzzling if we think that “ordinary life” always remains ordinary, for if it does, why not just be consistent, and allow the duress defense across the board? If we realize that the ordinary can become extreme in the blink of an eye, however, the refusal to permit duress as a defense to the murder of innocents seems less an anomaly than a stern warning of how easily events may slide out of control. Perhaps the rule is meant to say to us, “If you find yourself having to choose between killing an innocent person and preserving your own life, you have already chosen wrong.” Perhaps the rule is meant to draw our attention to the slipperiness of the descent into darkness.

Even so, if this is all that the law can do for us, the optimistic dream of using reason and law to reach into the dark places of the earth is still far, far from being realized. Not all our law or all our philosophy were of much use to Drazen Erdemovic as he faced his commander on the farm outside Srebrenica. Reason and law still seem to lack sufficient normative force in the face of violence and terror: they provide us with what appears to be prospective guidance on how we should behave in some hypothetical future, and retrospective guidance on how we ought to have behaved in the past, but little guidance when we’re actually on the spot.

“*Inter arma silent legis*,” Cicero said famously: in time of war, the law is silent. The project of advancing human rights and humanitarian law is dedicated to eliminating that silence, but it has not yet succeeded in doing so, and perhaps it never will succeed; Erdemovic, alone at the eye of the storm, heard not even a still small voice. There was no law for Erdemovic, or for those he so unwillingly killed: only power, and fear. Law came later.