Duress As a Defense to a Crime Against Humanity or War-Crimes Whose Underlying Offense is Murder: Prosecutor v. Erdemovic: A Questionable Direction for War-Crimes Jurisprudence.

Copyright 2001, Noah Gradofsky

ABSTRACT: This article reviews the decision of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in Prosecutor v. Drazen Erdemovic, which found that duress could not be asserted as an affirmative defense to a Crime Against Humanity where the underlying offense of that crime was murder. The decision is a vestige of the idea that a person should rather die than murder others. The author argues that the decision of the ICTY was incorrect, on several grounds. First, the court failed to grant sufficient consideration to whether the person under duress could actually have improved the situation by refusing to carry out the murders which he was ordered to do. Second, the author argues that duress should be available as a defense to those who commit murder, and that the legal standard should be, as always whether the crime that was committed was disproportionate to the evil threatened. The author also discusses some implications of the Erdemovic case on the future of international prosecution of genocide, crimes against humanity, and related offenses.

TABLE OF CONTENTS

Table of Contents ii
I. Introduction. 1
II. The Erdemovic Case. 5
  A. Background. 5
  B. The Trial Chamber's Holding. 6
  C. Appeals Chamber Decision. 8
    1. The Majority Opinions. 9
    2. The Dissenting Opinions 15
  D. Erdemovic Trial Chamber II. 21
III. Conclusion 22
  A. Policy Concerns - Is Deterrence a Valid Reason For a Decision of Law? 23
  B. The Duress Defense - How Will Future Tribunals Apply the Requirement of Proportionality? 24
    1. Duress Under The Rome Statute. 26
  C. Parting Thoughts 28

I. INTRODUCTION.

The International Criminal Tribunal for the former Yugoslavia ("ICTY") is a piece of the fledgling infrastructure of international control of serious crimes perpetrated against civilian populations. It is one of several courts that represent the legacy of the war crimes tribunals in the aftermath of the Second World War. The few decisions that have already been made by this court, and by the International Criminal Tribunal for Rwanda ("ICTR") provide significant indications as to the direction that war crimes jurisprudence will take. One significant case that came before the ICTY was Prosecutor v. Drazen Erdemovic, IT-96-22[1]. Amongst the significant issues taken up by both the ICTY Trial Chamber and Appeals Chamber was whether duress can constitute a complete defense to a war crime or crime against humanity whose underlying offense is murder of an innocent person. The trial chamber found that duress could provide a

[1] This paper will cite to the varying opinions written in Prosecutor v. Erdemovic. All these opinions can be accessed through http://www.un.org/icty/Judgement.htm. The following chart provides specific information about each opinion, as well what will be used as short citation form for each decision. Citations in this paper will include this form plus a point number. The point number refers to the point numbers provided in the individual opinion.

Date	Chamber	Judge(s)	Nature of Opinion	Text Available At http://www.un.org/icty/erdemovic/ . . .	Short Citation Form
11/29/96	Trial		Sentencing Judgment	trialc/judgment/erd-tsj961129e.htm	"Trial Chamber I"
10/7/97	Appeals		Judgment	appeal/judgment/erd-aj971007e.htm	"Appeals Chamber Judgment"
10/7/97	Appeals	McDonald and Vohrah	Joint Separate Opinion	appeal/judgment/erd-asojmcd971007e.htm	"McDonald and Vohrah"
10/7/97	Appeals	Li	Separate and Dissenting Opinion	/appeal/judgment/erd-asojli971007e.htm	"Li, dissenting"
10/7/97	Appeals	Cassese	Separate and Dissenting Opinion	appeal/judgment/erd-adojcas971007e.htm	"Cassese, dissenting"
10/7/97	Appeals	Stephen	Separate and Dissenting Opinion	appeal/judgment/erd-asojste971007e.htm	"Stephen, dissenting"
3/5/98	Trial		Sentencing Judgment	trialc/judgment/erd-tsj980305e.htm	"Trial Chamber II"
3/5/98	Trial	Shahabuddeen	Separate Opinion	trialc/judgment/erd-tsojsha980305e.htm	"Trial Chamber II, Shahabuddeen"

complete defense. The Appeals chamber (3-2) held that duress could not be a defense to such crimes. Four opinions were written on this issue. The Judges agreed that the ICTY statute does not provide direct instruction on the availability of a duress defense. The opinions were divided on whether international law or generally accepted principles of law gave definitive guidance on this issue. The learned decisions spend a great deal of time explaining their understandings of international and national statutory and case law. These impressive analyses are quite enlightening, but far more interesting is how the Judges dealt with the perceived lack of binding law. The Judges engaged in meaningful discussions of policy concerns, as well as the application of those concerns to Erdemovic's case. Though the court in Erdemovic was careful to limit their decision to this specific question of duress as a defense for murder of an innocent person [2], the thoughts expressed by the Judges are no doubt indicative of thoughts and concerns that will guide other Judges in future decisions of international human rights law.

The goal of this paper is to analyze and criticize some of the ideas discussed in the Erdemovic decision. Analysis of the factors considered by the Erdemovic decision provides an interesting prospective into the thoughts and concerns of Judges who are sitting or will sit on international courts such as the ICTY. As the opinions are reviewed, the reader should keep the following questions in mind: (1) How will the concerns expressed by the Erdemovic court effect other questions of duress that come before the ICTY or other courts? and (2) Are there more general concerns expressed by the court which are likely to effect the tribunal's decision-making process on other issues? (3) To the extend that general concerns can be detected, are the concerns raised worthy of consideration when making decisions of law?

---

[2] *See* McDonald and Vohrah point 41.

In the opinion of this author, the answers to third question is quire alarming. Ideas expressed in Erdemovic merit a great deal of concern. Specifically, the court expressed a notion that the defense of duress should be limited in cases of crimes against humanity and war crimes involving murder because these are particularly heinous crimes which have global impact. I fail to see how the important impact of these cases should gravitate toward any specific decision of law. One might argue the opposite point - that legal safeguards are more necessary where crimes are particularly reprehensible, so as to keep emotions in check. Second, the majority of the Appeals Chamber took a strong absolutist view, which seemed to indicate the tribunals preference for "punting" rather than allowing a trial court to make important decisions of fact based on the specific case.

As to the first question, the specific influence that the concerns expressed in Erdemovic will have on future cases of duress will depend greatly on the statute being applied. The crimes prosecuted under the ICTY Statute are very similar to the crimes prosecuted under the Rome Statute, which purports to create a court for future cases of crimes against humanity and other war crimes[3]. While the text of these statutes are quite similar, and will probably be read in light of each other, there may be some disagreements as to the requirements of intent in these statutes. Some of the Erdemovic court's discussion bares on whether one who acts under duress acts with a criminally culpable intent. This analysis is only relevant where intent is required by the statute. Additionally, the ICTY adjudicated the Erdemovic case without statutory guidance as to the availability of a duress defense. Similarly, the ICTR statute provides no direct statements on duress. The Rome statute, on the other hand, provides in Article 31:

[3] *See* ICTY Statute, http://www.un.org/icty/basic/statut/statute.htm;
ICTR Statute, http://www.ictr.org/ENGLISH/basicdocs/statute.html; and
Rome Statute: http://www.un.org/law/icc/statute/romefra.htm. *See also* Appendix I, which provides a side-by-side comparison of these three statutes on Genocide and Crimes against humanity.

> 1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
> . . .
> (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
> (i) Made by other persons; or
> (ii) Constituted by other circumstances beyond that person's control.[4]

Though this section explicitly provides for the availability of a duress defense, it requires that the person acting under duress may not "intend to cause a greater harm than the one sought to be avoided." The relative relationship between harms is a point which is debated at great length in the Erdemovic decision. Further, the nature of a person's "intent" in the face of duress is subject to debate in Erdemovic, and may be significant to an analysis of this provision of the Rome Statute. The implications of Erdemovic toward this section of the Rome Statute will be taken up more specifically after a review of the opinions in Erdemovic.

[4] See Rome Statute supra note 3 at Article 31.

II. THE ERDEMOVIC CASE.

A. BACKGROUND.

On July 16, 1995, Drazen Erdemovic and seven members of his unit in the Bosnian Serb army were informed by their superiors that buses were on their way carrying Bosnian Muslim civilians between ages 17 and 60. As the buses arrived, the exiting men were placed in groups of ten. The men were escorted to a field where they were lined up with their backs to the firing squad. The members of Erdemovic's unit shot and killed each Muslim. An estimated 1,200 Muslims were killed, and Erdemovic estimated that he was responsible for about 70 of those deaths.[5] Erdemovic claimed that he originally refused to carry out the order. He claimed that he was told, "If you don't wish to do it, stand in the line with the rest of them and give others your rifle so that they can shoot you." He further claimed that this was a credible threat of death, and that he feared for his own life as well as the lives of his wife and child. Erdemovic claimed to have seen another person order an officer to be killed for refusing to obey an order.[6] Despite his failure to control this situation, Erdemovic maintained that he later opposed the order of a lieutentant colonel to participate in the execution of 500 Muslim men, and that he was able to avoid committing that act because other fellow officers refused to obey as well.[7] Although not directly related to Erdemovic's claim of duress, it is worth noting that Erdemovic was praised by the prosecutor for his co-operation with the prosecutor's investigation. His co-operation was described as "full and comprehensive," as well as "unconditional." The prosecutor was also entirely unaware of the above offense until they were revealed to him by Erdemovic.[8]

[5] Trial Chamber supra note 1 at point 78.
[6] Id. at point 80.
[7] Id. at point 81.
[8] Id. at point 99. The dissenting opinion of Judge Cassese, supra note 1 at point 56 notes that the actions of a person after the crime is committed may be probative evidence that can indicate the actual presence of duress.

Drazen Erdemovic pleaded guilty to a count of a crime against humanity. A second count against him, a violation of the laws or customs of war[9] was dismissed.[10] In pleading guilty Erdemovic added:

> Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: If you're sorry for them, stand up, line up with them and we will kill you too.' I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.[11]

The question before the court was the effect of this statement on Erdemovic's plea. Essentially, the question was whether this plea was invalid because it was equivocal.[12] Underlying this question, was whether a claim of duress is a valid defense to Mr. Erdemovic's crimes. If duress were a defense to such crimes, Mr. Erdemovic's plea would have been equivocal.

B. THE TRIAL CHAMBER'S HOLDING.

The Trial Chamber in this case found that there was no indication in the ICTY statute as to the availability of a defense of duress.[13] However, the chamber found that a review of post-World War Two international military case law indicates the availability of such a claim. They noted that generally there were three requirements to a defense of duress: (i) the presence of an immediate, danger of serious and irreparable damage; (ii) the absence of an adequate means of

---

[9] See ICTY statute supra note 3, at Article 3.
[10] Trial Chamber, supra note 1 at point 10.
[11] Id.
[12] Id. at point 14.
[13] Id. at point 16. Sienho Lee makes a somewhat convincing argument that makes a convincing argument that the Report of the Secretary General UN Doc. S/25704, paragraph 57 indicates that duress was intended as a complete defense to crimes against humanity. The report, which embodies the intent fo the drafters according to Yee, directs that, "[o]bedience to superior orders may, however, be considered a mitigating factor . . . with other defences such as coercion or lack of moral choice." "While not crystal clear," writes Yee, "this last sentence appears to recognize the possible existence of a defense of coercion or lack of moral choice." See Sienho Yee, The Erdemovic Sentencing Judgement: A Questionable Milestone of rhte Internatinal Criminal Tribunal for the Former Yugoslavia, 26 GA. J. INTL'L & COMP. L. 263, 287 (1997). The opinions of the Trial Chamber and the Appeals Chamber both cite this report extensively and do not come to this conclusion (note that Yee's article was written before the Appeals Chamber decision).

escape; and (iii) the remedy was not disproportionate to the evil.[14] The Trial chamber indicated that additional considerations was whether the defendant was deprived of moral choice, whether the defendant voluntarily participated in an enterprise, and what rank was held by the defendant.[15] the court concluded that, "while the complete defence based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application are particularly strict." The Court partially explained this strictness as a function of the severe nature of a crime against humanity:

> With regard to a crime against humanity, the Trial Chamber considers that the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole.[16]

Finally, the court found that although duress could be a defense to a crime against humanity whose underlying offense was murder, the defense had not provided adequate proof of duress. it therefore accepted Eredemovic's guilty plea.[17] Taking into account several mitigating circumstances (but not accepting duress as a mitigating circumstance for lack of proof), the Trial Chamber sentenced Erdemovic to 10 years imprisonment, with credit for time served.[18]

Two points should be mentioned regarding the Trial Chamber's decision. First, their statement on the seriousness of crimes against humanity is one that was cited by the majority of the Appeals Chamber. The validity of this argument is taken up at great length by the dissents in the appeal.[19] Second, the Trial Chamber made a clear error of law in their decision. Since the

---

[14] Trial Chamber, supra note 1 at point 17 citing 1996 report of the International Law Commission, p. 96. Note that these are the basic elements to duress which are assumed by the Appeals Chamber. Judge Cassese of the Appeals Chamber suggests an additional limitation that the defense of duress should not be available to a person who freely and knowingly chose to become a member of a unit intent on actions that would violate international humanitarian law. See infra p. 2, text accompanying footnote 34.
[15] Id.
[16] Id. at point 19.
[17] Id. at point 20.
[18] Id. "Disposition."
[19] See infra p. 2section "The Goal of Deterrence"

Trial Chamber found that duress is a defense to Erdemovic's crime, a trial should have been necessary in order to determine the validity of that claim. It was inappropriate for the Trial Chamber to dismiss this claim in a sentencing judgment, without having a full trial on the facts. On Appeal, both the majority opinion of Judges McDonald and Vohrah at point 38, and the dissenting opinion of Judge Stephen at point 18, point out this error of the Trial Chamber.

C. APPEALS CHAMBER DECISION.

The Appeals Chamber in Erdemovic was sharply divided on the issue of duress. The original question faced by the Appeals Chamber on this issue was what source of law they would look to in order to discover if duress can be a defense to a crime against humanity whose underlying offense is murder. Base on Article 38 of the Statute of the International Court of Justice, the court noted that amongst other things it looks to international legal custom (Article 38(1)(B)) and "general principles of law recognised by civilized nations" (Article 38(1)(C)). The opinion of Judges McDonald and Vohrah found that a vast majority of common law jurisdictions do not allow a duress defense to murder, while the vast majority of civil law jurisdictions do allow such a defense. In the absence of an international legal custom or a general principle of law, these Judges looked to public policy concerns in order to find that duress should not be a defense to a crime against humanity or war crime whose underlying offense was murder.[20] Judge Li agreed that duress cannot be a defense, although Judge Li so found based on what Judge Li perceived as clear precedent from post-World War Two allied military tribunals.[21] Judge Cassese dissented on this point, stating that since there is a clear general principle of law that admits duress as a defense, and there is no agreement on an exception for murder cases, the ICTY should accept the general rule, and not apply an exception

[20] McDonald and Vohrah, supra note 1 at points 55 and 72

which is not generally accepted. Judge Cassese also added strong arguments against Judges McDonald and Vohrah's policy arguments.[22] Finally, Judge Stephen agreed with Judge Cassese's finding that a murder exception to the duress rule had not been generally accepted. Judge Stephen's opinion continues with a general attack on the murder exception to the duress defense. Judge Stephen also argues that the precedents for a murder exception are not applicable because in the precedent cases a person chose between his life over someone else's life, whereas Erdemovic was faced with a choice between the deaths of himself and the Muslim victims, or just the death of the Muslim victims.[23] The description below of each of these four decisions is not meant to be exhaustive. I describe below only the parts of the opinions that contain the most significant thoughts of the writers, and the thoughts that will likely repeat themselves in future cases before international war crimes tribunals. For purposes of simplicity, I will attempt to consolidate all of the discussions on any given argument to one of the subsections below. Thus, the discussion of each opinion will be limited to the positive arguments that that opinion makes in favor of its conclusion. Where an opinion presents a counter-argument to another opinion. That counter argument will be presented in response to the main argument. Additionally, every attempt will be made to consolidate consistent arguments presented in more than one opinion into one section.

1. The Majority Opinions.

a. Judges McDonald and Vohrah on Legal Precedent.

Three members of the Appeals Chamber who found that duress could not be a complete defense to a crime against humanity or a war crime whose underlying offense was murder. Two

---

[21] Li, dissenting, supra note 1 at points 4-12
[22] Cassese, dissenting, supra note 1.
[23] Stephen, dissenting, supra note 1.

of those three members did so largely on the basis of policy considerations. Judges McDonald and Vohrah concluded that there was no customary international law on the matter;[24] and that a general principal of law indicating the availability (or lack thereof) of a duress defense to a murder charge could not be found.[25] The Judges came to this conclusion by considering whether it could be generally said that duress removes the *mens rea*, the criminal intent from a murder. Based on British precedent, the Judges found that a person who "chooses" between dying and killing others is, in fact, making a choice. Even under duress, the argument goes, there is still a calculated decision to do wrong, which can be deemed a "criminal mind."[26] Given this criminal intent, a general rule of law could only be found in a notion of excuse. There would have to be a generally accepted notion that the defendant's actions were justified. This conclusion was impossible, since the common law stance against duress as an excuse to murder believes that a person, "ought rather to die himself than kill an innocent."[27]

The preference for death over murder will be discussed *infra* p. 15, in relation to the dissenting opinions view of proportionality in a duress claim. Regarding the *mens rea* argument, Judge Stephen argues that even given a conscious choice to kill under duress, one can argue that there was no "moral choice" involved, and thus no criminally culpable thought.[28] Indeed, it is difficult to say that one acting under duress truly has an evil intent.[29]

b. The Goal of Deterrence.

Lacking a consistent rule, Judges McDonald and Vohrah purported to avoid a "contest between common law and civil law" by:

---

[24] McDonald and Vohrah, supra note 1 at point 55.
[25] Id. at point 72.
[26] Id. at point 69.
[27] Id. at point 72. quoting Lord Hale, *Hale's Please of the Crown*, (1800) vol. 1, p. 51.
[28] Stephen, dissenting, supra note 1 at point 27 and 60.

> . . . bearing in mind the specific context in which the International Tribunal was established, the types of crimes over which it has jurisdiction, and the fact that the International Tribunal's mandate is expressed in the Statute as being in relation to "serious violations of international humanitarian law". [30]

This statement is perhaps the most alarming statement in the entirety of the Erdemovic decision. The judges imply that the rules of law should be effected by the severity of the crime which the defendant is accused. If anything, criminal defenses should be enhanced in the face of serious crimes which might elicit the passions of the jurist. Regarding a similar line of argument in the Trial Chamber decision in Erdemovic, Sienho Yee properly opined:

> One is hard pressed to explain why the nature and scope of jurisdiction has anything to do with substantive law relating to the defenses, although the defenses may be related to the substantive crimes. The law does not appear to permit a court to eliminate a defense simply because its jurisdiction is to adjudicate serious crimes.[31]

Judges McDonald and Vohrah are correct that they are charged with the onerous task of adjudicating cases involving "serious violations of international humanitarian law." This task however, must be fulfilled within the context of law and justice, rather than blindly seeking a cathartic conviction or an unjust conviction which serves a goal of deterrence.

A primary concern of Judges McDonald and Vohrah was that allowing a defense of duress might allow a person to confer immunity on his or her agents for their actions. The leader could confer impunity on those agents by applying duress to cause them to commit murder.[32] Again in this discussion the judges explained why they felt law must give way in the face of serious dangers:

> . . . the law should not be the product or slave of logic or intellectual hair-splitting, but must serve broader normative purposes in light of its social, political and economic role. . . . We are concerned that, in relation to the most heinous crimes

[29] Id. at point 47.
[30] McDonald and Vohrah, supra note 1 at point 72.
[31] Yee, supra note 13 at p. 293.
[32] McDonald and Vohrah, supra note 1 at point 74.

> 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 . . . Concerns about the harm which could arise from admitting duress as a defence to murder were sufficient to persuade a majority of the House of Lords and the Privy Council to categorically deny the defence in the national context . . . Are they now insufficient to persuade us to similarly reject duress as a complete defence in our application of laws designed to take account of humanitarian concerns in the arena of brutal war.[33]

In his dissent, Judge Cassese suggests that the defense of duress should not be available to a person who freely and knowingly chose to become a member of a unit intent on actions that would violate international humanitarian law.[34] This seems to be a sensible restriction. It would mean that only a truly "innocent" person could claim a duress defense. Judges McDonald and Vohrah were not satisfied by this restriction: "Might not this very initial involvement with, and adherence to, the gang be due to terrorism?"[35] This argument is not valid. If, indeed, initial involvement with the group was due to duress, that involvement should not create criminal culpability.

The opinion by Judges McDonald and Vohrah is clearly very concerned with their role in deterring the serious crimes which are within the ICTY's jurisdiction.[36] They do so at the expense of serious considerations of justice. They defend their reference to policy concerns by arguing that the law should not develop, "wholly divorced from considerations of social and economic policy."[37] Judge Cassese assails this opinion. Judge Cassese argues that such an inquiry is "extraneous to the task of the Tribunal." Instead, the Tribunal should refrain from

---

[33] Id. at point 75.
[34] See Cassese, dissenting, supra note 1 at point 17 and footnote 12.
[35] McDonald and Vohrah, supra note 1 at point 73.
[36] This point will become even more clear in discussing Judges McDonald and Vohrah's rejection of Judge the dissent's main argument, infra p.2-2, text accompanying notes 55-57.
[37] Id. at point 78.

"meta-legal analysis."[38] This of course references a classic debate as to the roles of the courts in creating and interpreting law. To my mind, however, the more important question is the kinds of policy concerns which convinced Judges McDonald and Vohrah. If legitimate duress was applied to Drazen Erdemovic, then he arguable is not responsible for his actions. In that case, it would be difficult to explain why an interest in deterrence should deny access to the defense of duress. It is illogical to allow an interest in deterrence to be a consideration when determining what actions are criminally culpable.

To be sure, the opinion of Judges McDonald and Vohrah was sensitive to the potential injustice involved with ignoring a claim of duress. But rather than accepting duress as a complete defense, they preferred to limit its application to the realm of mitigating circumstances. They describe mitigation as "a clear, simple and uniform approach."[39] This approach is not an acceptable substitute for a complete defense. In fact, it is quite unlikely that duress would be allowed as complete mitigation for people already convicted of a crime against humanity, even if they were convicted only because the duress defense was not available. Additionally, this rule would be of further concern were future laws concerning these crimes to require a mandatory sentence. Finally, Judge Cassese points out a philosophical difficulty with the mitigation approach. The purpose of criminal law is to punish criminal behavior. No matter the extent of mitigation, a criminal conviction indicates that criminal actions have occurred.[40] Courts should simply not be in the business of convicting people who should not be culpable for their actions.

---

[38] See Cassese, dissenting, supra note 1 at point 11.
[39] McDonald and Vohrah, supra note 1, text preceding point 85.
[40] See Cassese, dissenting, supra note 1 at point 48.

c. Judge Li on International Precedent.

Judge Li's dissenting opinion[41] is convinced of the presence of a clear precedent from post-World War Two allied military tribunals which prohibits the application of a duress defense to a war crime or crime against humanity whose underlying offense is murder.[42] In defending this exception, Judge Li echoes the deterrence sentiment found in the opinion of Judges McDonald and Vohrah:

> Admission of duress as a complete defence or justification in the massacre of innocent persons is tantamount to both encouraging the subordinate under duress to kill such persons with impunity instead of deterring him from committing such a horrendous crime, and also helping the superior in his attempt to kill them. Such an anti-human policy of law the international community can never tolerate, and this International Tribunal can never adopt.[43]

I believe this explanation to be inadequate. The need for "justice" does not require convicting a person who is not legally or morally culpable. Allowing a defense for someone who is but a mechanism of murder is far from anti-human. Furthermore, this argument seems to assume that denying the duress defense would make it more difficult for a superior officer to apply duress on their subordinates. This position is illogical. Faced with certain and immediate death, an officer is unlikely to disobey an order simply because the duress defense will not be available in the future. A person who would resolve to follow the order in order to avoid death or serious bodily injury would simply not concern him or herself with the criminal consequences of that action. Further, threats constituting duress often include the threat of killing ones family. This is a threat which cannot be matched by the threat of future criminal prosecution.

---

[41] Judge Li dissents in the finding that Erdemovic's plea was not informed. Judge Li holds, however, that duress is not a complete defense to Erdemovic's crimes.
[42] Li, dissenting, supra note 1 at points 4-5
[43] Id. at point 8.

2. The Dissenting Opinions

a. Judges Cassese and Stephen on Precedent.

Judges Cassese and Stephen, each writing separately, hold that duress could, in certain situations, be a defense to murder committed as the underlying offense to a crime against humanity or war crime. Judges Cassese and Stephen agree with Judges McDonald and Vohrah that international law and generally accepted principles of law admit a defense of duress. They also agree that there is no general acceptance of an exclusion of the duress defense. However, Judges Cassese and Stephen argue that in the absence of an accepted exception, the general rule should prevail, thus allowing - at least in theory - a duress defense to Erdemovic's crimes.[44] This disagreement presents a fairly interesting question of legal philosophy. There is a valid argument on the part of this dissent which would support the notion that a general rule is independent from its exceptions. On the other hand, one can question whether a general rule ever existed as to the availability of duress in a murder case.

b. Proportionality of Offense and Duress.

Besides the above philosophical question, the dissenting opinions of Judges Cassese and Stephen raise important questions about the crime of murder as it impacts the requirements for a duress defense. One of the generally accepted requirements of a duress claim is that:

> [T]he crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils[.][45]

Judges Cassese and Stephen argue that the analysis of this requirement give rise to a distinction between Drazen Erdemovic's actions and those cases that have given rise to the murder

---

[44] See Caseese, dissenting, supra note 1 at point 11 ("In logic, if no exception to a general rule be proved, then the general rule prevails.); Stephen, dissenting, supra note 1 at points 25-26.

exception to the duress rule in common law jurisdictions. The common law cases that found a duress defense to be unavailable in cases of murder did in cases where a person had to chose between that person's own death, or the death of the other. Erdemovic had no such choice. Erdemovic was faced with a choice between the death of 1,200 Muslims or the death of 1,200 Muslims and Erdemovic.[46] This distinction bares both on two issues. First, it bares on the question of whether the crimes Mr. Erdemovic was accused of are excepted from the general availability of a duress claim. Second, the recognition of a qualitative difference between "A or B" and "A or A and B" is significant in determining whether a person's actions were "disproportionate" to the threatened evil.

Judges Cassese and Stephen stress that the net effect of Erdemovic's following his orders was the survival of Erdemovic, and not the death of the Muslim victims. Although in most cases the proportionality requirement for a duress defense will not be satisfied, Judges Cassese and Stephen argue that this is one of the unique situations where the requirement was satisfied (or alternatively was inapplicable), thus separating this case from all precedent cases on the availability of duress to a person accused of murder.[47] In the opinion of these judges, requiring Mr. Erdemovic to lay down his life for a "lost cause" would require Erdemovic to, "forfeit his life for no benefit to anyone and no effect whatsoever apart from setting a heroic example for mankind (which the law cannot demand him to set)."[48] These dissenting opinions point out that there may be times where a soldier could do more to avoid the crimes that are being committed. For instance, in some cases a soldier's refusal to follow orders may inspire others to do the same,

---

[45] See Caseese, dissenting, supra note 1 at point 9.
[46] See Stephen, dissenting, supra note 1 at points 25; Caseese, dissenting, supra note 1 at point 44.
[47] Caseese, dissenting, supra note 1 at points 42-44; Stephen, dissenting, supra note 1 at points 19, 51.
[48] Caseese, dissenting, supra note 1 at point 44; see also Stephen, dissenting, supra note 1 at point 51 ("'it is the blueprint for saintliness, or rather heroism, theory' which prevails in the English law relating to duress," (citations omitted).

thus avoiding the catastrophe. Judge Cassese notes that this question (which seems to bare on the second requirement of duress, that there be no other adequate means of avoiding the crime) is a question of fact which should be decided at trial.[49] Judge Stephen indicates that there is no indication that any further refusal by Erdemovic would have changed the situation.[50] It is worth noting that faced with another similar situation, Erdemovic was able to refuse to follow orders, and gained enough support from others so that the murder of 500 Muslims was avoided.[51]

Judges McDonand and Vohrah reject the dissents' "utilitarian" approach where human life is involved. They argue that there is no appropriate method of balancing harms when human life is involved.[52] These judges echo their concern for deterrence of these serious crimes: "we give notice in no uncertain terms that those who kill persons will not be able to take advantage of duress as a defense."[53] In so doing, they issued a decision which was based not, "in terms of a utilitarian approach," but, "[r]ather . . . on the proposition that it is unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defence to a crime in which he killed one or more innocent persons."[54]

Judges Cassese and Stephen reject the absolutist notion of the majority, instead concluding that the law can only punish people for deviations from what society might reasonably expect from its members.[55] In essence, the judges found that society could not expect its members to become martyrs. Both judges float several examples in order to emphasize why it

---

[49] Caseese, dissenting, supra note 1 at point 42.
[50] Stephen, dissenting, supra note 1 at point 19.
[51] Supra p. 2, text accompanying note 7.

[52] See McDonald and Vohrah, supra note 1 at point 81. Although the concern for the great value of human life is correct, the argument of Judges McDonald and Vohrah is misplaced. Here, the calculation of proportionality need not assign an absolute value of life, since all Muslim lives would have been lost no matter what Erdemovic's actions were. This is a case of a loss occurring either to A or to both A and B. The extent of each loss is irrelevant to the relative evil of these two outcomes. Stated algebraically, 2x/x (where x is the value of a certain loss) will always be 2. This is true whether x is a loss of money, or the loss of a life.
[53] McDonald and Vohrah, supra note 1 at point 80.

is unrealistic to expect people to sacrifice their lives for no gain. One of Judge Cassese's hypothetical examples is:

> A driver of a van unwittingly transporting victims to a place of execution, upon arrival is told by the executioners he must shoot one of the victims or he himself will be shot. This, of course, is done in order to assure his silence since he will then be implicated in the unlawful killing. The victims who are at the execution site will certainly die in any event. Can society reasonably expect the driver in these circumstances to sacrifice his life? In such situations it may be too demanding to require of the person under duress that they do not perpetrate the offence.[56]

Judge Stephen refers to a real-life situation:

> [T]wo British mountaineers, Yates and Simpson, roped together. Simpson falls over a cliff edge and, hanging in space, is for an hour supported by the ever-weakening Yates who at last, finding himself also about to slide over the edge, cuts the rope. Again, there is no question of the making of a choice between one or another of two lives; it was a matter, rather, of the life of one or of both, the initial fall having, in effect, determined the choice. In fact the fallen mountaineer survived, landing on an unperceived ice bridge below, but had he died it would, according to the present state of the common law authorities, have been murder on the part of Yates.[57]

Judge Cassese points out that though the examples he provides seem far fetched, the history of the atrocities in Yugoslavia give many disparate examples of evil. Therefore, the ICTY in Judge Cassse's opinion should not reject duress as a matter of law. Instead, each case should be judges based on the common criteria - including proportionality. In Erdemovic's case, as in the examples cited by Judges Cassese and Stephen, there was no net evil that resulted from Erdemovic's following his orders.

---

[54] Id. at point 84.
[55] Caseese, dissenting, supra note 1 at point 47.
[56] Id.
[57] Stephen, dissenting, supra note 1 at point 56. Judge Stepehn note, at point 58 that this technically is an example of "necessity" rather than "duress." These principles underlying "necessity" are the same as those underlying "duress."

The response of Judges McDonald and Vohrah to this argument by the dissents is confounding. Judges McDonald and Vohrah argue that society's reasonable expectations cannot be the standard of law in Erdemovic's case because:

> [I]t is equally unrealistic to expect a reasonable person to sacrifice his own life or the lives of loved ones in a duress situation even if by this sacrifice, the lives of the victims would be saved. Either duress should be admitted as a defence to killing . . . or not admitted as a defence to murder at all. . . .
> Thus, our 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.[58]

To the extent that their criticism is correct, the result of this argument should be the admissibility of duress as a defense for the person who commits a murder in order to protect a loved one if the fact-finder finds that a reasonable person could not be expected to do otherwise. The presence of other cases where duress may be appropriate should not be a reason to find that a duress defense is inappropriate for all cases. Instead, each of these cases indicates that there are specific times where a duress defense to murder is appropriate.[59] Given that truth, the defense should not be rejected as a matter of law.

Theodor Meron aptly described the differing opinions of the majority and dissent on this matter, and provided a similar criticism of the approach of Judges McDonald and Vohrah:

> The absolutist-utilitarian controversy was brilliantly illuminated in the appeals chamber of the International Criminal Tribunal for the former Yugoslavia in a recent exchange between President Cassese and Judges McDonald and Vohrah . . . . [t]he utilitarian argument voiced by Cassese was that, because the massacre would have proceeded in any event, Erdemovic's refusal to participate in the killings, which would have led to the sacrifice of his life, would have benefited no one and would have simply added one more victim. The law, Cassese argued, could not require Erdemovic to forfeit his life, which, apart from setting a heroic example, would be to no avail. The absolutist argument echoed by McDonald and Vohrah rejected any balancing of harms and rested on the categorical prohibition

[58] McDonald and Vohrah, supra note 1 at point 83.
[59] The argument that a defense to duress should be rejected because of the potential for other legitimate claims of duress will be revisited in reference to Judge Li's decision, infra p. 2, text accompanying note 61.

> of killing innocent people, even under duress. In addition, however, to the absolutist prohibition of killing innocent people even when the killing results from duress, McDonald and Vohrah invoked the policy consideration of deterring future offenders, thus themselves drawing on a utilitarian argument. Nevertheless, if Cassese's focus was on the facts of Erdemovic's case, theirs was on the broader impact of the sentence. Under the McDonald-Vohrah view, Jews in Nazi concentration camps compelled to assist in operating the crematoria would have been denied the defense of duress. Would this be just? [60] (Citations omitted).

This passage accurately describes the schism between the majority and the dissent. Judges McDonald and Vohrah took greater concern with the policy impact of their decision, rather than on the justice involved in this case, and the potential injustice which might result in other cases. I note again, however, that their interest in deterrence is misplaced. It is hard to see how future criminal repercussions would effect a person who is in truth acting under an immediate threat of death. This is more true because often the threat of death extends to family members. No court of law would threaten the lives of a perpetrator's family because the perpetrator failed to disobey orders and in so doing committed murder. The court's deterrence power cannot match the ability of the evil-doer to induce duress.

Judge Li, the third judge on the Appeals Chamber who refused to allow a duress defense to murder also voiced a concern for Judges Cassese and Stephen's notion that a person may be excused from their actions because the evil would have occurred regardless of the individuals actions. Judge Li referred to this notion as "absurd" because it would allow all members of a criminal group to have an excuse, because the evil could have been performed by the rest of the group given any one individual's nonparticipation.[61] While Judge Li's objection is a correct statement of a legal possibility, it is not sensitive to the facts that must be found in order to apply a defense of duress. In order to prove duress, a person must prove (i) the presence of an immediate, danger of serious and irreparable damage; (ii) the absence of an adequate means of

[60] Theodor Meron, *Crimes and Accountability in Shakespeare*, 92 AM. J. INT'L L. 1, 18 (1998).

escape; (iii) the remedy was not disproportionate to the evil.[62] It is difficult to see how each member of a group to refuse an order and to be seriously threatened, without there being a means of escape. Surely the collective group cannot have been directly threatened with death and still have gone through with the offense. At some point, those who are being threatened would outnumber the number of people making the threat. In any event, Judge Li's argument should be rejected in the same way that a similar argument of Judges McDonald and Vohrah was rejected, supra, page 19, text accompanying note 59. Were each person to prove that their actions were done under threat of death or serious injury, and that their own martyrdom could not have avoided the principle crime, then in truth all those persons should be allowed to defend themselves on the grounds of duress. The fact that a greater number of people may be subject to a certain defense is not a legitimate reason to reject the defense.

D. ERDEMOVIC TRIAL CHAMBER II.

For reasons not related to the issue of duress, Erdemovic's case was remitted to the Trial Chamber,[63] affording Erdemovic the opportunity to replead before a different tribunal than the one that originally heard Erdemovic's case.[64] Several of the results of that proceeding bare mention in this paper. Erdemovic plead guilty again, this time to the "lesser" offense of a violation of Article 3 of the ICTY Statute, "a violation of the laws or customs of war."[65] This plea was pursuant to a plea agreement in which Erdemovic agreed that the factual allegations of

---

[61] Li, dissenting, supra note 1 at points 11
[62] Trial Chamber, supra note 1 at point 17 citing 1996 report of the International Law Commission, p. 96.
[63] Four members of the Appeals Chamber agreed that Drazen Erdemovic's plea was not informed. Appeals Chamber Judgment, supra note 1 at point 20. Hence, the plea was remitted to the trial chamber, for further hearings before a different tribunal. Id. at Disposition point 5.
In an unrelated issue, four members of the Appeals Chamber agreed that Drazen Erdemovic's plea was not informed. Appeals Chamber Judgment, supra note 1 at point 20. Hence, the plea was remitted to the trial chamber, for further hearings before a different tribunal. Id. at Disposition point 5.

[64] Appeals Chamber Judgment, supra note 1 at disposition point 5.

the Prosecutor were true, and the Prosecutor agreed that Erdemovic acted pursuant to superior orders coupled with realistic threats of death. The Prosecutor granted that there was, in fact duress in this case.[66] Following the Appeals Chamber's directions, the Trial Chamber treated this duress only as a mitigating circumstance on Erdemovic's behalf.[67] Due to this and other mitigating circumstances, Erdemovic was sentenced to five years imprisonment, with credit for time served.[68]

III. CONCLUSION

Olivia Swaak-Goldman described that Appeals Chamber decision in Erdemovic as "a treasure trove of international law."[69] This is quite apt a description. In this paper, I have concentrated on the pronouncements of the Appeals Chamber on the issue of duress. The opinions in this case reveals ideas and attitudes that give us some indications regarding the future course of jurisprudence in international criminal courts. The Judges' discussions of policy considerations reveal attitudes of the members of the court which could effect their decisions on any number of decisions of fact and law. The judges discussions on the laws of duress and proportionality will be more limited in its impact on future duress jurisprudence. The Erdemovic case certainly has value as precedent. But it's greater value is in its ability to demonstrate the thoughts and concerns that will be common to most judges on international war crimes courts. In that light, it is worth reviewing some of the major reasons advanced by both the majority and the dissent in this case.

---

[65] Trial Chamber II, supra note 1 at point 1.
[66] Id. at point 13, 17, 18.
[67] Id. at point 17.
[68] Id. at point 23.
[69] Olivia Swaak-Goldman, Prosecutor v. Erdemovic, Judgment. Case No. IT-96-22-A. International Criminal Tribunal for the Former Yugoslavia, Appeals Of Chamber, October 77, 1997, 92 AM. J. INTL'L L. 282, 287 (1997).

A. POLICY CONCERNS - IS DETERRENCE A VALID REASON FOR A DECISION OF LAW?

The majority opinions cited policy as one a reason for not allowing a defense of duress for a crime against humanity or war crime whose underlying offense is murder. Although some of the Judges may have objected to the reference to policy in this legal decision, they all seem to have touched upon policy concerns in one way or another. The classical debate as to whether policy should be considered when making decisions of law will no doubt come up in future decisions of war crimes tribunals. What role judges should have in establishing policy is a question worthy of constant debate.

Of more concern in this case is the nature of the policy argument made by the opinion of Judges McDonald and Vohrah and to a lesser extent the opinion of Judge Li. These opinions cited the tribunal's responsibility to punish and deter the most serious of crimes. Their reasoning, however, was flawed. Faced with the question of whether Mr. Erdemovic's actions, if performed under duress constituted a crime, the court argued that the answer should be in the affirmative because of the seriousness of the crime that Mr. Erdemovic had committed.[70] This logic is alarming. Each of the opinions in the majority on this issue argued that Erdemovic's duress defense should not be allowed because in the future others might legitimately have a valid claim.[71] That other people may also be free of criminal culpability should not be a reason to insist that Erdemovic is criminally culpable.

The reasoning of the majority indicates an attitude that ascribes greater value to a conviction than to a principled acquittal. This perceived value structure has already been a source of criticism of international criminal tribunals. The attitude will likely effect any decision of law that such tribunals come to. How will this feeling effect a decision that a court makes

[70] See e.g. supra p. 2, text accompanying note 30.

regarding other questions of the definition of crimes? Should they liberally construe all statutes in whatever manner as can be done in order to find a legal basis for conviction? How, for instance, will the court approach a claim of duress for a genocide whose underlying offense is less than murder? In all cases, I would hope that judges value application of reasoned law over questionable convictions.

B. THE DURESS DEFENSE - HOW WILL FUTURE TRIBUNALS APPLY THE REQUIREMENT OF PROPORTIONALITY?

Relevant particularly to the future of the duress defense, the Erdemovic court debated heavily the issue of proportionality of the crime to the threats constituting duress. The dissents of Judges Cassese and Stephen took note that Drazen Erdemovic claims to have had no ability to avoid the atrocity to which he was a party. All Mr. Erdemovic could do was lay down his life in vain, or participate in the atrocity. Judges Cassese and Stephen found that this fact distinguished Mr. Erdemovic's case from the common law exception to the duress defense in cases of murder (an exception that these judges did not necessarily accept as valid). They also found that these facts indicated that the requirement of proportionality did not apply to Erdemovic's case.[72] They also stressed that society could not reasonably expect a person to become a heroic martyr.[73] The dissent, on the other hand, argued against this relative stance, instead arguing for an absolute moral postulate that murder can never be excused.[74]

Peter Krug concludes that since the Appeals Chamber limited its discussion to cases of murder, one can conclude that duress will be available for crimes against humanity and war

[71] See supra p. 2, text accompanying note 59; p. 2, text accompanying note 61.
[72] See supra, p. 2, section titled "Proportionality of Offense and Duress."
[73] See supra, p.2-2, text accompanying notes 55-57.
[74] See supra, p.2, text accompanying notes 52-54

crimes whose underlying offense is anything less than murder.[75] This conclusion may not necessarily be correct. Though the inquiry in this case was limited to a case involving murder, the Trial Chamber urged that with respect to crimes against humanity, "the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole."[76] To this observation Judges McDonald and Vohrah added:

> Crimes against humanity are particularly odious forms of misbehaviour and in addition form part of a widespread and systematic practice or policy. Because of their heinousness and magnitude they constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location.[77]

It would not be impossible to foresee a situation where other crimes might seem so heinous that a court might find duress to be an inappropriate defense on the grounds that any duress could not excuse such an act. In discussing the opinion of the Trial Chamber, Judges McDonald and Vohrah indicated that they could not, "conceive of any 'remedy' which could be taken on the part of an accused that could been deemed proportionate to a crime directed at the whole of humanity."[78] The argument that offenses less than murder might still be denied a duress defense may be stronger if a person attempts a duress defense to a charge of genocide, which is a greater crime. This issue did not come before the ICTY in this case. In any event, the analysis of proportionality in this case indicates that there is a lot of room for disagreement as to what forms of duress might excuse what types of actions.

---

[75] Peter Krug, Note, The Emerging Mental Incapacity Defense In International Criminal Law: Some Initial Questions of Implementation, 94 AM. J. INTL. L. 317, 318 note 6 and accompanying text (2000).
[76] Trial Chamber I, supra note 1 at point 19.
[77] McDonald and Vohrah, supra note 1 at point 21.
[78] McDonald and Vohrah, supra note 1 at point 37.

1. DURESS UNDER THE ROME STATUTE.

Unlike the statutes of the ICTY and ICTR, the Rome Statute explicitly accepts a duress defense. It also does not explicitly deny the duress claim to those who are accused of a violation whose underlying offense is murder. In Article, the statute provides:

> 1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
> . . .
> (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
> (i) Made by other persons; or
> (ii) Constituted by other circumstances beyond that person's control.[79]

The final provision of subsection (d) seems particularly relevant to the opinions of the judges in Erdemovic. The Rome statute requires that the person under duress not "intend to cause greater harm than the one sought to be avoided." On the one hand, the blanket duress provision in subsection (d) seems to agree with the dissent in Erdemovic. However, one could argue that the offense of murder will always "cause greater harm" than the one sought to be avoided, thus supporting the majority opinion.[80] There are some counter-arguments to this reading. First, at what point does a person under duress actually intend to cause harm? One could argue that this intent will rarely exist, as the person under duress has no moral choice.[81] This argument may not be terribly strong. Since this subsection addresses duress, the word "intend" should be construed narrowly as referring to whatever crime the person has agreed to commit, albeit an agreement

---

[79] See Rome Statute supra note 3 at Article 31.
[80] In rare cases a person may be threatened with the death of multiple people if that person doesn't kill one person. In that case, the "absolute moral postulate" of the majority would still not allow a defense, but the text of the Rome Statute would seem to allow such a defense.
[81] See supra p. 2, text accompanying footnote 29.

under duress. Another argument may be with the phrase "greater harm." This provision does not provide whether the calculation of greater harm should be done on an objective test, or based on the reasonable subjective analysis of the accused. Under the first reading, the court would weigh the crimes committed by the accused against the court's estimation as to the negative utility of the actions that would have been taken against the accused person had the accused refused to commit the crime. Under the second reading, a court would have to ask whether the accused reasonably felt that the crime committed was not as bad as what would happen to the accused. This would comply with the arguments of Judges Cassese and Stephen that criminal law could not ask for more than society could reasonably expect.[82] Between these two readings, the former reading seems more accurate. Finally, it should be noted that the statute requires that the accused not "intend to cause" a certain harm. The word "cause" seems to agree with the argument of Judges Cassese and Stephen that a person is excused if the harm would have come about despite the person's refusal. On the other hand, one may argue that the word "cause" should be read in a manner similar to my reading of "intend" discussed above. In that case, the word "cause" would be read as meaning that the accused may not be the mechanism towards a greater harm.

Though the Rome Statute accepts a defense of duress, it can be argued that its final provision denies the defense of duress to most offenses involving murder. In the face of such ambiguities, we can expect future jurists to refer to similar considerations to those discussed in Erdemovic. The Utilitarian model of the dissent would thus clash with the absolutist model of the majority. In this case the majority would be arguing the postulate that there are no evils greater than murder, so that murder could not be eligible for the duress defense of the Rome

[82] See supra, p.2-2, text accompanying notes 55-57.

Statute. This is a position for which Judges McDonald and Vohrah did indicate approval.[83] One can also see this question refracted through the lens of the policy concerns that were discussed in this section of conclusions.

C. PARTING THOUGHTS

The decision of the ICTY Appeals Chamber in Drazen Erdemovic's case reveals some fascinating questions of law and philosophy. Though I disagree with many of the conclusions of the case, the facility with which the ideas are argued is worth noting. The Erdemovic case required reference to a great corpus of case law, as well as reference to issues of legal philosophy and considerations of policy. The case is indeed a "treasure trove of international law."[84] It has value both as precedent as well as in providing an idea as to the concerns of judges on international courts.

[83] See McDonald and Vohrah, supra note 1 at point 37 ("We cannot, with respect, conceive of any "remedy" which could be taken on the part of an accused that could been deemed proportionate to a crime directed at the whole of humanity").
[84] See Swaak-Goldman, supra, note 69 at p. 287.