

The Availability of the Common Law Defence of Duress to Principals Charged with Murder: An Analysis of the Conflicting Appellate Decisions in *R v Willis (TAW)* and *R v Aravena*

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ABSTRACT

The topic of whether an accused charged as a party to murder can access the common law defence of duress has been a controversial subject in Canada. Unlike in Britain where the House of Lords in *R v Howe* categorically decided to deny the common law defence to all parties to the offence of murder, the law in Canada has been more hospitable to offenders charged with murder. Aiders and abettors and those charged under the common intention provisions of the *Criminal Code of Canada* are given access to the defence. The question of whether a principal to murder has access to the common law defence of duress has not yet been decided by the Supreme Court of Canada. In *R v Aravena*, the Court of Appeal for Ontario was inclined to the view that the defence be extended to principals to murder to give effect to the Charter principle of moral involuntariness. However, in a subsequent decision, *R v Willis (TAW)*, the Court of Appeal for Manitoba refused to follow *Aravena*, finding that the denial of the common law defence of duress to principals to murder, as provided for in s. 17 of the *Criminal Code*, was constitutional, based on a proper understanding and application of the principle of moral involuntariness. The Supreme Court of Canada refused leave from the decisions in both *Aravena* and *Willis*, leaving the law of duress confused and unsettled as between these two appellate decisions. In this article, it will be argued that there are five reasons to prefer the holding in *Aravena* to the holding in *Willis*.

I. INTRODUCTION

S. 17 of the *Criminal Code of Canada*¹ creates a defence of duress as an excuse² to the commission of most criminal offences where a crime is committed by an accused in response to threats of immediate death or bodily harm made against the accused.³ This is subject to certain conditions being met, but the section expressly prohibits “persons” from relying on the defence for certain-named offences (considered to be too serious, from a policy standpoint, to be afforded protection under the defence),⁴ not least the crime of murder,⁵ regardless of the specific circumstances in which the duress arises:

A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).⁶

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¹ *Criminal Code*, RSC 1985, c C-46, s 17 [*Criminal Code*].

² As Professor Mewett explains: “Duress is an excuse and the reason why it is an excuse lies not in the fact that there is no intention but in the fact that there is no responsibility in spite of the intention.” See Alan W Mewett, “The Shifting Basis of Criminal Law” 6 *Crim LQ* 468 (1964).

³ Threats against an accused’s property are not enough to trigger the statutory defence of duress. Nor are they enough to invoke the duress defence at common law. This was confirmed in *R v Ruzic*, 2001 SCC 24 [*Ruzic*]. In that case, the Supreme Court confirmed that the common law defence of duress requires that “the threat must be of death or serious physical harm to the accused or to a family member” (*ibid* at para 69).

⁴ See Stephen Borins, “The Defence of Duress” (1982) 24 *Crim LQ* 191 at 197.

⁵ Murder has always been exempted from the statutory duress defence in Canada: *R v Aravena*, 2015 ONCA 250 at para 28 [*Aravena*].

⁶ *Criminal Code*, *supra* note 1.

However, there is also a common law defence of duress to the commission of criminal offences which applies to all criminal offences and to all criminal offenders, except to principals to murder perhaps,⁷ including to the offenders designated as being excluded from the duress defence by s. 17 of the *Criminal Code*.⁸ The common law defence exists by virtue of s. 8(3) of the *Criminal Code*. That section reads:

Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.⁹

In *Aravena*, the Court of Appeal for Ontario held, albeit in *obiter*, that the common law defence of duress was likely available to an accused who is charged as a principal to murder. In the absence of a compelling justification being raised by the Crown to justify the exclusion, denial of the duress defence was a violation of the *Charter's* principle of moral involuntariness, protected by s. 7 of the *Charter*. In *Willis*, the Court of Appeal for Manitoba refused to follow *Aravena's obiter* comments, denying the duress defence to an accused charged as a principal to murder in that case accordingly.¹⁰ The Supreme Court of Canada refused leave to appeal from both the decisions in *Aravena*¹¹ and *Willis*,¹² leaving the state of the

⁷ See *R v Willis (TAW)*, 2016 MBCA 113 [*Willis*] and the Court's discussion of "Hale's Rule" beginning at para 28; *Contra, obiter* comments of the Court in *Aravena*, *supra* note 5 at para 86. But see *R v Ryan* 2013 SCC 3 at para 83 [*Ryan*] where the Supreme Court of Canada states that it is "unclear" whether the common law defence of duress applies to principals of crime and does not rule it out. As with Canadian courts, the English authorities have struggled with whether to extend the common law defence of duress to parties charged with murder. In the House of Lords's most recent decision on the common law defence of duress, both principals and aiders and abettors are denied access to the defence. See *R v Hasan*, [2005] UKHL 22 at para 21, [2005] 2 AC 467 (Eng), as cited in *Willis*, *supra* note 7 at para 31.

⁸ *Borins*, *supra* note 4 at 19.

⁹ *Criminal Code*, *supra* note 1.

¹⁰ *Supra* note 7 at para 186. That said, the Court found that the defence of duress would have been unavailing to the appellant in any case, since, even if the duress defence was available to principals to murder, the Crown had proved there was no air of reality to the defence since a reasonable person in the position of the appellant, would have contacted the police for protection in response to the threats that had been made against the appellant and his family previously.

¹¹ *Aravena*, *supra* note 5.

¹² *Willis*, *supra* note 7.

law on the availability of the common law defence of duress to principals to murder confused and unsettled as between these two appellate decisions.

In this article, I argue that the approach endorsed in the *obiter* comments of the Court of Appeal for Ontario in *Aravena*, stating that the common law defence of duress is available to a principal charged with murder, is more consonant with the Supreme Court's trilogy of decisions on duress in *Hibbert*, *Ruzic*, and *Ryan*. Where the contours of the defence are to be determined and guided by the principle of moral involuntariness emanating from s. 7 of the *Charter*. There are five reasons to prefer the holding in *Aravena* to the holding in *Willis*:

1. *Aravena* does not use the principle of the sanctity of life, or the norm of not killing innocent people, to subordinate the value of the accused's life to the victim's life in its analysis of the principle of moral involuntariness.
2. *Aravena* does not conflate the principle of moral involuntariness with the principle of moral blameworthiness.
3. The Court in *Willis*'s view that an accused, in a kill or be killed situation, will always have a legal alternative to murder, such as by availing themselves of a safe avenue of escape by contacting the police for protection, is fallacious and demonstrably false.
4. *Aravena* does not subordinate the *Charter* principle of moral involuntariness to the concept of Parliamentary supremacy or historical legitimacy.
5. *Aravena* does not allow the view of the English authorities on the unavailability of the common law defence of duress to parties charged with the offence of murder to detract from the binding Supreme Court of Canada authority on duress.

This article is divided into nine parts. Part II considers the Supreme Court of Canada's decision in *Paquette v R*, restricting the scope of the offences designated as being excluded from the duress defence by s. 17 of the *Criminal Code* to the principals to offences only.¹³ Parts III, IV, and V, respectively, consider the Supreme Court's three most recent decisions on duress in *Hibbert*, *Ruzic*, and *Ryan*. Part VI considers the Court of Appeal for Ontario's decision in *Aravena*, holding that the common law defence of duress is likely available to principals to murder notwithstanding the terms of s. 17 of the *Criminal Code*. Part VII considers the Court of Appeal for Manitoba's decision in *Willis*, holding that the common law defence of

¹³ *Paquette v R*, [1977] 2 SCR 189, 70 DLR (3d) 129 [*Paquette*].

duress is not available to principals to murder. Part VIII considers my five reasons for why the holding in *Aravena* should be preferred to the holding in *Willis*. Although my conclusion in Part IX reiterates the argument that the Court's decision in *Willis* be rejected in preference for the approach endorsed by the Court in *Aravena*, alternative approaches to the use and availability of the defence of duress in Canadian criminal law will be reviewed to address a general concern implicated in all the judicial decisions considered herein. That is, that the defence of duress not be made too readily available to excuse the otherwise criminal conduct of an accused.

II. *PAQUETTE*

In *Paquette*,¹⁴ the Supreme Court held that s. 17 of the *Criminal Code*, by its own terms, applies only to principals¹⁵ to crime but not to persons who are made a party to an offence in a different way, such as by common intention, or by aiding or abetting.¹⁶ Accordingly, the defence was re-

¹⁴ *Ibid.*

¹⁵ S. 21(1)(a) of the *Criminal Code*, *supra* note 1, defines a principal offender as a person “who actually commits the offence”, rather than merely aids or abets in the commission of the offence. While “Canadian criminal law does not distinguish between the principal offender and parties to an offence in determining criminal liability” (*R v Briscoe*, 2010 SCC 13 at para 13), it does make this distinction for the purpose of determining accessibility to the common law defence of duress. Indeed, while aiders and abettors of all offences have access to the common law defence of duress, as per the Supreme Court of Canada's decision in *Paquette*, *supra* note 13, the same cannot be said of principal offenders to certain offences who are denied access to the duress defence by virtue of s. 17 of the *Criminal Code*. See e.g. *Willis*, *supra* note 7.

¹⁶ In Britain, the same technical distinction was made by the House of Lords in *Northern Ireland v Lynch*, [1975] AC 653 [*Lynch*] where access to the duress defence was provided to an accused who acted as a principal to murder in the second degree (as an aider and abettor) rather than in the first, where the defence was unavailable as a matter of law (see *Abbott v R* [1977] AC 755). The decision in *Lynch* was repudiated by the House of Lords in *R v Howe*, where the House found the distinction between principals and aiders and abettors to be untenable, stating that the duress defence was not available to an accused charged as a party to murder, regardless of their level of participation or degree of culpability: Ian Dennis, “Developments in Duress” (1987) 51 J Crim L 463. This remains the English view of the law to this day and is in stark contrast to the received view in Canada where aiders and abettors are given access to the common law duress defence for all crimes, including the offences designated as

opened to all offences for these three categories of parties to an offence, including those offences designated as being excluded from the duress defence by s. 17 of the *Criminal Code*. The defence remained closed to the principals to the offences designated as being excluded from the duress defence by s. 17.¹⁷ Thus, the dispositive question becomes: can the offender be classified as a party to the offence as an aider, abettor, or by common intention – rather than as a principal offender – to fall within the scope of the common law defence of duress in order to possibly be excused of murder?¹⁸

In *Paquette*, during the course of a robbery at the accused's former place of employment, an innocent bystander was killed by a bullet fired from a firearm operated by the accused's colleague, Simard. The robbery had been committed by Simard and Clermont (another associate of the accused), together with the accused. The accused was not present when the robbery occurred or when the shooting happened. Simard and Clermont were unable to get into the accused's vehicle following the commission of the crimes, despite two attempts to do so, meaning that the accused was unable to drive them away from the scene of the robbery and murder.¹⁹

being excluded from the duress defence by s. 17 of the *Criminal Code*. And where some courts have chosen to extend the duress defence to principals to murder despite the murder exclusion for principals contained in s. 17: see, for example, *R v Sheridan* [2010] OJ No 4884, 224 CRR (2d) 308 [Sheridan].

¹⁷ While the accused in *Paquette* was made a party to the offence of murder under the common intention provisions contained in s. 21(2) of the *Criminal Code*, the principle established by the Supreme Court of Canada in *Paquette* has been read by courts, including the Supreme Court of Canada, to extend to aiders and abettors as well: *Aravena*, *supra* note 5 at para 24; *Willis*, *supra* note 7 at paras 25, 30. A party to an offence is guilty of committing that offence (e.g. murder), rather than a separate offence connected with the crime such as accessory after the fact. See *Criminal Code*, *supra* note 1, s 23; *R v Hibbert* [1995] 2 SCR 973 at para 26, 99 CCC (3d) 193 [Hibbert].

¹⁸ Edward Claxton, "Paquette v. The Queen" (1977) 15:2 Osgoode Hall LJ 436 at 437-438; *Willis*, *supra* note 7 at para 178. The critical, determinative, and, in some cases, unfair and arbitrary nature of using the distinction between principals and aiders/abettors/offenders by common intention to determine the availability of the common law defence of duress could be ameliorated if the Supreme Court of Canada were to interpret s. 17 as being in breach of s. 7 of the *Charter's* principle of moral involuntariness in not allowing the principal offenders of 22 crimes access to the duress defence. See e.g. *Sheridan*, *supra* note 16; Peter Rosenthal, "Duress in the Criminal Law" (1990) 32:199 Crim LQ 199 at 217-220.

¹⁹ *Paquette*, *supra* note 13 at 191.

The accused had driven Clermont and Simard (both of whom were armed with rifles) to the Pop Shoppe under threat of death by Clermont. He had initially refused to carry out the transport, but later agreed to conduct it after Clermont drew a gun on him and threatened to kill him. Later, he stated that he was threatened with “revenge” if he did not wait for Clermont and Simard after the robbery was completed to drive them away from the scene of the crime. He further claimed that he had been threatened with death if he “squealed” on his colleagues, and that after the crimes had been committed, he had told his girlfriend that his participation was “compelled.” Finally, there was evidence that he had refused to allow his two accomplices (Simard and Clermont) to re-enter his vehicle after they had left the store, further signifying his unwillingness to help his accomplices escape from the crimes they had committed.²⁰

The accused was charged as a party to non-capital murder pursuant to s. 21(2) of the *Criminal Code*. That section reads:

Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.²¹

Because he had not committed the non-capital murder (or acted as an aider or abettor in the murder) but had merely formed an intention in common with Simard and Clermont to commit “an unlawful purpose” [the robbery] that he “knew, or ought to have known,” could have [non-capital murder] as a “probable consequence” of carrying out that unlawful purpose, he had to be charged as a party to murder under s. 21(2) of the *Criminal Code*. He contested this murder charge based on the defence of duress. The Supreme Court held that s. 17’s use of the specific words “a person who commits an offence,” instead of the wording “a person who is a party to an offence,”²² meant that the section could have no applicability

²⁰ *Ibid.* In terms of the evidence in support of duress, the accused did not testify at trial. The aforementioned evidence came from three statements that he made prior to trial: namely, a written statement and an oral statement made to police; and an oral statement made to his girlfriend the day after the robbery occurred (*ibid.*).

²¹ *Criminal Code*, *supra* note 1, s 21(2).

²² In *Aravena*, *supra* note 5 at para 24, the Court of Appeal for Ontario, per Doherty and Pardu JJ A, asserted that they found, both from a policy standpoint and based on the actual wording of s. 17 of the *Criminal Code*, that the reasons given by the Supreme Court in *Paquette* for its narrow reading of s. 17, were “far from compelling”. That

to aiders, abettors, and those offenders made a party to an offence by common intention. “In my opinion s. 17 codifies the law as to duress as an excuse for the actual commission of a crime, but it does not, by its terms, go beyond that.”²³ In the result, the defence of duress was available to the accused, since, unlike Simard and Clermont, he was not a principal to the offence of non-capital murder, but had merely formed an intention in common with these men to commit a robbery (the unlawful purpose) and to assist them therein, leading to the murder (the probable consequence of the unlawful purpose).

III. *HIBBERT*

In *Hibbert*, the Supreme Court affirmed the common law principle it had established in *Paquette*, holding that the exclusions from the duress defence enumerated in s. 17 of the *Criminal Code* applied only to principals to offences and had no applicability to parties to an offence by aiding, abetting, or by common intention:²⁴

Accordingly it remains open to persons who are liable as parties to offences to invoke the common law defence of duress, which remains in existence by virtue of s. 8(3) of the Code (which preserves those common law defences not expressly altered or eliminated by Parliament). . . The holding in *Paquette* that the common law defence of duress is available to persons liable as parties is clear and unambiguous, and has stood as the law in Canada for almost twenty years.²⁵

The Supreme Court studied the relationship between the defence of duress and the other excuses and justifications recognized in the criminal law²⁶ and found the defences of duress and necessity to be so similar that the theoretical underpinnings and underlying rationale of the two defences had to be the same:

said, the Court did not refuse to follow *Paquette* or suggest a return to the prior law as set out in the Supreme Court’s decision in *R v Carker*, [1967] SCR 114, [1967] 2 CCC 190 [*Carker*], where it was held that all parties to an offence, regardless of whether they were aiders, abettors, or principals, were denied access to the duress defence for all the crimes listed in s. 17 of the *Criminal Code*.

²³ *Paquette*, *supra* note 13 at 194.

²⁴ *Hibbert*, *supra* note 16 at paras 19–20.

²⁵ *Ibid.* Agreement with this interpretation of *Hibbert* can be found in *Aravena*, *supra* note 5 at para 35.

²⁶ *Ibid* at paras 47–54.

As I noted earlier, the common law defences of necessity and duress apply to essentially similar factual situations. Indeed, to repeat Lord Simon of Glaisdale's observation, "[d]uress is...merely a particular application of the doctrine of "necessity"". In my view, the similarities between the two defences are so great that consistency and logic requires that they be understood as based on the same juristic principles. Indeed, to do otherwise would be to promote incoherence and anomaly in the criminal law. In the case of necessity, the Court has already considered the various alternative theoretical positions available (in *Perka*, *supra*), and has expounded a conceptualization of the defence of necessity as an excuse, based on the idea of normative involuntariness. In my opinion, the need for consistency and coherence in the law dictates that the common law defence of duress also be based on this juridical foundation. If the defence is viewed in this light, the answers to the questions posed in the present appeal can be seen to follow readily from the reasons of Dickson J. in *Perka*.²⁷

The principle of moral involuntariness was found to animate and unify both the defences of duress and necessity. The centrality of the principle of moral involuntariness to determining the availability of the defence of duress was established by the Supreme Court in this case.

In *Hibbert*, the accused fortuitously bumped into Bailey, who was a drug dealer and a person known to him. Bailey told him he was armed with a handgun and ordered the accused to take him to Cohen's apartment (a mutual acquaintance of theirs). When he refused, Bailey punched him in the face numerous times. Because the accused feared that Bailey might take his life if he did not cooperate, he drove to a telephone booth as ordered by Bailey and placed a telephone call to Cohen, asking him to meet him in the lobby of his apartment building in twenty minutes. When the accused and Bailey arrived at the building, the accused used the building's intercom outside of the lobby to advise Cohen to "come down," at which point Cohen opened the front door to allow the accused into the lobby of the building. Unbeknownst to Cohen, Bailey walked into the lobby with the accused, armed with a handgun. When Cohen appeared, he was grabbed by Bailey. After some discussion between them, Bailey pushed Cohen away and shot him. The evidence was conflicting as to what the accused did during this exchange: the accused testified that he had repeatedly implored Bailey not to shoot Cohen, while Cohen (who survived the shooting) testified that the accused had said nothing and had failed to intervene in the conflict. After the shooting, the accused drove Bailey away from the scene of the crime. The next morning,

²⁷ *Ibid* at para 54.

the accused turned himself into the police in connection with the incident.²⁸

For this crime, the accused was charged with attempted murder under the *Criminal Code* and was made a party to that offence under s. 21(1)(b) of the *Criminal Code*. Since he had aided Bailey in carrying out the offence in a number of respects, including in transporting Bailey to Cohen's residence and in helping him lure Cohen down to the lobby of the building so that he could be shot by Bailey.

In resolving the duress issue, the Supreme Court decided to extend the principle from *Paquette* to the accused, making the duress defence available to offenders charged as an aider under s. 21(1)(b) of the *Criminal Code*. While s. 21(1)(c) dealing with abettors was not before the Court, the Court's statements in *Hibbert* support extending the allowance for accessing the duress defence, established in *Paquette*, to abettors under s. 21(1)(c) of the *Criminal Code* as well:

In *Paquette v. the Queen*, however, this Court determined that s. 17 of the *Code* does not constitute an exhaustive codification of the law of duress. Rather, the Court held that s. 17 applies only to persons who commit offences as principals. Accordingly, it remains open to persons who are liable as parties to offences to invoke the common law defence of duress.²⁹

IV. *RUZIC*

In *Ruzic*, the Supreme Court found the “presence and immediacy requirements” contained in s. 17 of the *Criminal Code* to be unconstitutional, severing those requirements from the section accordingly. Specifically, those requirements violated s. 7 of the *Charter* in a manner that could not be saved by s. 1 of the *Charter* because they had the “potential of convicting persons who have not acted voluntarily.” This was a violation of the principle of moral involuntariness which the Supreme Court found to be enshrined in s. 7 of the *Charter*. The stipulation in s. 17 that the threatened harm be directed at the accused, rather than a third party, before an accused could qualify for the duress defence, was also found to be constitutionally infirm since it, too, could result in the conviction of a person whose actions were morally

²⁸ *Ibid* at paras 2–11.

²⁹ *Ibid* at para 19.

involuntary.³⁰ Not surprisingly, the constitutional defects found by the Supreme Court to be present in s. 17 of the *Criminal Code*, were prompted by a consideration of the specific circumstances that the accused had been facing in the case:

- The threat of harm that had been made against the accused was not made to have an immediate effect; the threat was to be carried out at some point in the future [no immediacy].
- The threatener was not present when the crimes were committed [no presence].
- The threat of harm, while conveyed to the accused, was directed at the accused's mother and not at the accused herself [no threat to accused].

The rule from *Paquette* allowing aiders, abettors, and those persons who commit an offence by common intention unrestricted access to the common law defence of duress was not before the Supreme Court in *Ruzic*. The offences for which the accused stood charged were not offences included in the list of the 22 offences excluded from the duress defence in s. 17. So, the constitutionality of these exclusions was not before the Court in this case. Still, the Supreme Court's *obiter* comments in *Ruzic* on *Paquette* reaffirmed the rule established by the Court in that case, making the common law defence of duress available to aiders, abettors, and offenders made a party to an offence by common intention:

It [the common law defence of duress] was never completely superseded by the provision of the *Criminal Code* [my addition]. The Court held in *Paquette* and *Hibbert*, *supra*, that the common law defence remained available, notwithstanding s. 17, to parties to an offence (as opposed to persons who committed an offence as principals).³¹

The Supreme Court endorsed Chief Justice Lamer's observation from *Hibbert*, that the "law relating to duress has been plagued, nonetheless, with some uncertainties and inconsistencies since the beginning of its

³⁰ That said, the Supreme Court noted that not all restrictions on, or removals of, criminal defences by Parliament under its criminal law power will breach s. 7 of the *Charter*. The Court cited the instance of removing a defence for a crime where the availability of the defence is antithetical to the very wrong that the criminal offence aims to proscribe such as an intoxication defence in the context of a drinking and driving offence: *Ruzic*, *supra* note 3 at para 23.

³¹ *Ruzic*, *supra* note 3 at para 56.

development.”³² The Court found some incoherence in the law of duress to be “understandable” and desirable since the rules on duress have to consider three discrete and divergent interests:

- [T]he perspective and rights of the threatened party [the accused].
- [T]he rights of third parties, not least the intended victims [the victim].
- [T]he interest of society in the preservation of the public order and in the proper upholding of the law [society].³³

The accused’s interests will often be opposed to the state’s interest in the preservation of the public order since the accused’s conduct, even if the result of compulsion, still breaches the criminal law and still endangers public safety and the public order. The situation is most serious, of course, when the crime is murder, since that offence is the most serious crime known to Canadian law and most seriously threatens the preservation of public order and the just upholding of the law. Likewise, the victim’s interest in not being harmed or killed will usually be at odds with the accused’s interest in protecting themselves from harm or death.

In *Ruzic*, the accused landed at Pearson Airport in Toronto and was found to be in possession of two kilograms of heroin, which was strapped to her body, together with a false Austrian passport. The accused argued that a circumstance of duress had caused her to commit the crimes. Specifically, the accused explained that while she was in Belgrade, Serbia, living with her mother in an apartment, a third-party male who she believed to be a member of an organized crime group had approached her and threatened to harm her mother if she did not agree to transport the heroin from Belgrade to Canada. Accordingly, she said she had committed the crimes to avoid the harm that might befall her mother if she did not do so. Because the accused believed that the police in Belgrade were

³² See generally Kent Roach, “The Duress Mess” (2013) 60 *Crim LQ* 159 [Editorial]. This has been especially true of the rules on the admissibility of the common law defence of duress to parties to murder, where today we are still awaiting the final word from the Supreme Court of Canada on whether the defence is available to principals to murder (as opposed to just aidors and abettors) to resolve the contradictory appellate decisions in *Aravena* and *Willis*. Not surprisingly, other common law jurisdictions, such as Britain, have experienced similar challenges. See S J Bone & L A Rutherford, “Murder under Duress: Awaiting the Final Word” (1986) 50 *J Crim L* 257; Ada Kewley, “Murder and the Availability of the Defence of Duress in the Criminal Law” (1993) 57 *J Crim L* 298.

³³ *Ruzic*, *supra* note 3 at para 58.

corrupt, she did not seek the assistance of police, nor did she tell anyone about the occurrences for fear that her and her mother would be harmed.³⁴

Because the accused's situation did not meet the immediacy and presence requirements of s. 17 of the *Criminal Code*, or the requirement that the threat of harm be made against the accused's person rather than a third party's, the accused challenged the constitutionality of these three requirements based on the principle of moral involuntariness under s. 7 of the *Charter*.³⁵ At the Supreme Court, this challenge was successful and the accused was permitted access to the duress defence, resulting in the accused's acquittal. Thus, the duress defence contained in s. 17 was re-opened to the accused even though the threat of harm made against her could not be carried out immediately; the threatener making the threat of death or bodily harm was not physically present with the accused when the crime was committed; and the threat of injury was directed at the accused's mother, rather than the accused herself.³⁶

V. RYAN

In *Ryan*,³⁷ the Supreme Court did not have to consider whether to apply the rule from *Paquette* to give the accused access to the duress defence, since the crime in issue – counselling the commission of a crime not committed – was not an offence designated as being excluded from the duress defence by s. 17 of the *Criminal Code*. Still, the Supreme Court's

³⁴ *Ibid* at paras 1-7.

³⁵ *Ibid* at paras 9-10.

³⁶ *Cariker*, *supra* note 21, is instructive of how the previous stringent requirements contained in s. 17 could result in the conviction of morally involuntary conduct because of the unfair denial of the duress defence. There, the accused committed the offence of mischief in wilfully damaging public property, in connection with a prison riot. He claimed duress because other inmates had made threats to kill him or seriously harm him if he did not participate in the criminal acts. Because he was not threatened with "immediate death or bodily harm" (the inmates who had made the threats were locked up in separate jail cells and could not carry them out), and because the threateners were not present with him in his jail cell when he committed the offence, he was disqualified from relying on the defence.

³⁷ *Supra* note 7.

obiter comments in this case reaffirmed the principle established by the Court in *Paquette*.³⁸

In *Ryan*, the Supreme Court was presented with a novel fact scenario in which a battered wife was seeking to rely on the duress defence with respect to the charge of counselling the commission of her husband's murder not committed, contrary to s. 464(a) of the *Criminal Code*. The accused was charged with this offence after she hired a hit man to kill her abusive husband because he had previously, and repeatedly, threatened her and her daughter with harm and death. The man hired to commit the murder was an undercover RCMP officer posing as a "hit man" and the murder was never carried out.³⁹ The party/principal distinction from *Paquette* was unimportant for two reasons. First, the accused had acted as a principal offender within the meaning of s. 21(1)(a) (i.e., she had committed the offence herself). She was not an aider, abettor, or an offender who had committed the offence by common intention. Second, her crime was not an offence that was designated as being excluded from the duress defence by s. 17 of the *Criminal Code*.

That said, the accused had a more fundamental problem, which was whether the defence of duress was available to her at all. Given that the traditionally required elements of duress were missing: the accused had not committed the crime in reply to a specific threat made against her by a third party. Instead, she was seeking to have her husband killed by a hitman to preserve the life and safety of herself and her daughter because she feared, based on his pattern of threatening and violent behaviour, that he would harm them. In short, the accused was trying to pre-empt the culmination of her husband's threats and violent behaviours, which she believed (perhaps not unreasonably) could soon lead to serious bodily harm, or death, to herself and her daughter.

The Supreme Court clarified that there is a different set of triggering facts for the defence of duress than for the defence of self-defence. For duress to apply, the accused's actions must arise from a threat of death or bodily harm such that the accused's actions can be said to be morally involuntary. The accused's conduct did not fall within that definition (even if it could be said that her actions arose out of sense of urgency and were "morally involuntary" in that sense). According to the Supreme

³⁸ *Ibid* at para 42.

³⁹ *Criminal Code*, *supra* note 1, s 464(a).

Court, where an accused is threatened outside of the foregoing circumstances with death or bodily harm, the accused's only recourse in law is to the defence of self-defence since duress will not be available to them.⁴⁰

The Supreme Court continued to stress the fundamental importance of the *Charter's* principle of moral involuntariness to understanding and delineating the defence of duress:

- [T]he principle of moral involuntariness represents the “rationale underlying duress.”
- [T]he principle of moral involuntariness is a principle of fundamental justice, protected by s. 7 of the *Charter*.
- [T]he elements of the substantive legal test for duress are heavily influenced by the principle of moral involuntariness.
- [U]nder the principle of moral involuntariness, the accused's criminal act is still considered to be wrong and is not equal to moral blamelessness; instead, it is conduct that is entitled to be excused by the criminal law.
- [T]he principle of moral involuntariness is an organizing principle of the criminal law; only the voluntary actions of an accused should be punished by the criminal law; not the actions committed by an accused where they had no “realistic choice” but to commit the crime they did due to the duress they faced.
- [T]he statutory duress defence should continue to be interpreted in accordance with the *Charter* principle of moral involuntariness and other *Charter* values.⁴¹

VI. *ARAVENA*

In *Aravena*, the Court of Appeal for Ontario overruled the trial judge in the court below, who had found in a pre-trial ruling that the common law defence of duress did not apply to the murder charges facing any of the appellants, regardless of whether they were offenders by aiding, abetting, or by common intention rather than being perpetrators of the crimes.⁴² Accordingly, the trial judge did not have to address the

⁴⁰ *Supra* note 7 at para 29.

⁴¹ *Ryan*, *supra* note 7 at paras 23, 40–44.

⁴² *Aravena*, *supra* note 5 at para 13. That said, the trial judge did find that duress was available to the appellants on the included charge of manslaughter because manslaughter was not an offence designated as being excluded from the defence by s. 17 of the *Criminal Code*.

constitutionality of the murder exemption contained in s. 17 of the *Criminal Code*.⁴³ The trial judge's "absolutist position" on the unavailability of the duress defence to offenders charged with murder was well expressed in the learned judge's instruction to the jury at trial, in relation to the threat allegedly made against the appellant, Aravena, by the appellant, Kellestine:

Duress is not available as a matter of law to a charge of murder, and for other legal reasons I need not get into, it is entirely irrelevant to this case. In a nutshell, it is not open to anyone to say to an innocent victim "you will die so that I can live."⁴⁴

On appeal, the Court of Appeal, per Justices Doherty and Pardu, disagreed with the trial judge's position on the unavailability of the duress defence to parties charged with murder. They affirmed and applied the rule from *Paquette*, stating that the common law defence of duress is available to parties to an offence by aiding, abetting, or by common intention, including on a charge of murder.⁴⁵ Since all the appellants raising a duress defence were aiders and abettors, as per the rule in *Paquette*, the common law defence of duress was available to them.

In *Aravena*, six criminal associates – the appellants Kellestine, Mushey, Sandham, Mather, Aravena, and Gardiner – were charged with eight counts of first-degree murder in connection with the deaths of eight members of the Toronto Bandidos motorcycle gang who were shot and killed on a farm property owned by the appellant, Kellestine, in Shedden, Ontario.⁴⁶ As a dissident member of the Toronto chapter, Kellestine had orchestrated the murders to "pull the patches" from the remaining members of the Toronto gang, as the American Bandidos were displeased with the Toronto chapter. Kellestine had solicited the assistance of the Winnipeg members of the group to carry out the task. Kellestine, together with the appellants Mushey and Sandham, were alleged to be the shooters

⁴³ *Ibid* at para 29.

⁴⁴ *Ibid* at para 16.

⁴⁵ *Ibid* at para 85. While the Court opined that they found the justification for the rule established in *Paquette* to be less than convincing, the Court did not retreat from the rule. See discussion at *supra* note 21.

⁴⁶ *Ibid* at para 4. Another man, M.H., also participated in the murders but provided evidence as a witness for the Crown at trial in exchange for immunity to prosecution and, therefore, unlike the other named-appellants, was not convicted of any crime at trial in connection with the murders.

and were convicted by a jury following trial of all eight counts of first-degree murder.

The remaining appellants (Aravena, Gardiner, and Mather) were alleged to be aiders and abettors to the shootings. They acted as lookouts while the murders were allegedly being committed by Kellestine, Mushey, and Sandham and assisted these men with the cleanup of the crime scene following the killings. Mather and Aravena were convicted of manslaughter with respect to the first homicide and convicted of first-degree murder with respect to the remaining homicides. Gardiner was convicted of manslaughter on the first two homicides and convicted of first-degree murder for the remaining homicides. All men - except Sandham, who decided to abandon his appeal - appealed their convictions for murder and manslaughter to the Court of Appeal for Ontario.⁴⁷ At trial, only the appellant Aravena chose to testify and make a serious attempt to develop the defence of duress for consideration by the jury in relation to the manslaughter charges against him that were before the court. Aravena testified that immediately following the second murder for which he was present, Kellestine expressly threatened to kill him and his family if he (Aravena) "talked."⁴⁸

Five grounds of appeal were advanced by the appellants. The only ground that concerns us was raised by the appellants Aravena, Mather and Gardiner, namely that the trial judge had erred in concluding that as a matter of law, duress is not available to perpetrators or aiders and abettors to murder, and that this error had caused these appellants to be significantly prejudiced at trial.⁴⁹ The Crown argued that the three appellants who had raised duress on appeal had had an opportunity to advance the defence during the course of the trial on the manslaughter charges and that to the extent they did not, or the defence failed, this indicated that duress would have been similarly unsuccessful on the murder charges. Even if the trial judge's pre-trial ruling denying duress as a defence to murder, as it applies to both principals and aiders and abettors, was made in error. Hence, the issue of the unavailability of the duress defence was a moot point, and no miscarriage of justice or substantial wrong had occurred.⁵⁰

⁴⁷ *Ibid* at paras 1-2.

⁴⁸ *Ibid* at paras 87-95.

⁴⁹ *Ibid* at paras 12-13.

⁵⁰ *Ibid* at paras 17-23.

The three appellants raising duress as an issue on appeal (Aravena, Mather, and Gardiner), were alleged to be aiders and abettors and were not charged as principals under s. 21(1)(a) of the *Criminal Code*. Accordingly, the rule from *Paquette* allowing aiders and abettors access to the common law defence of duress applied and the defence was available to these appellants. With respect to Aravena, the only aider and abettor who had presented evidence of duress at trial, the trial judge had found that the express threat made by Kellestine to Aravena following the second shooting was for the sole purpose of ensuring Aravena's silence about that murder and was not a threat meant to compel Aravena to assist Kellestine in any future crime. Still, based on the totality of the evidence, the trial judge was prepared to accept Aravena's claim that he had operated under an "implied threat of death," thereafter, if he did not do as he was told by Kellestine. However, the trial judge concluded that there was no air of reality to the duress defence because the criminal association exclusion applied, preventing Aravena's reliance on this defence to manslaughter. These were all correct determinations, according to the Court of Appeal, who found the criminal organization exclusion to be conducive with the principle of moral involuntariness. Since accused persons who voluntarily and knowingly put themselves in a position where they know that there is a risk that they may be forced, by threat of bodily harm or death, to commit a crime, should not be able to enjoy the protection of the duress defence. Aravena had willingly assisted Kellestine with the second murder, and there was no credibility to the claim that he did not know, following the completion of this murder, that he could be compelled by Kellestine to assist him in future crimes when he had personally been involved in aiding Kellestine with the completion of the second murder.⁵¹ In the result, there was no air of reality to duress on any of the charges facing Aravena, Mather, and Gardiner and their appeals on this ground were dismissed.⁵²

However, in *obiter*, the Court proceeded to address an important question left unresolved by the Supreme Court in *Ryan*. That is, whether the "murder exemption" to the duress defence for principals to murder, contained in s. 17 of the *Criminal Code*, was unconstitutional. In answering this inquiry, the Court stated that the following five areas had

⁵¹ *Ibid* at paras 94-114.

⁵² *Ibid* at para 115. The appellants' other four grounds of appeal were similarly dismissed. See *ibid* at paras 116-46.

to be considered: basic criminal law principles, the juridical rationale underlying the duress defence, the elements of the duress defence, the fundamental principles contained in the *Charter*, and the common law authorities from other jurisdictions.⁵³ The Court laid out three foundational premises on which their analysis would proceed. First, the duress defence to be developed and presented by the Court was the defence “as described and defined” by the Supreme Court in *Hibbert*, *Ruzic*, and *Ryan*, with special regard to be given to the Supreme Court’s admonition in *Ruzic* that the defence be kept within strict bounds in light of the various competing interests at stake. Second, it would be assumed that the accused advancing the duress defence has the full *mens rea* of an aider and abettor to murder. Third, based on this analysis, either duress was a full defence to murder leading to an acquittal for this offence or was not a defence to murder at all.⁵⁴

With respect to the basic criminal law principles, the Court stated that a fundamental principle of the criminal law is voluntariness. Where an accused’s conduct is not voluntary, the accused’s actions are not punishable by the criminal law, as per the requirements of s. 7 of the *Charter*. Voluntariness is not limited to physical voluntariness and includes a consideration of whether the accused’s actions were compelled because of external circumstances or threats.⁵⁵ With respect to the juridical rationale underlying the duress defence, the Court referred approvingly to the following passage of Justice Dickson from the Supreme Court’s decision in *R v Perka*:

[On] a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts whether of self-preservation, or of altruism, overwhelmingly impel disobedience.⁵⁶

Based on the Supreme Court’s decisions in *Hibbert*, *Ruzic*, and *Perka*, the Court recognized that both moral involuntariness and physical involuntariness are principles of fundamental justice. Resting on an “[A]cceptance of individual autonomy and choice as the essential

⁵³ *Ibid* at para 41.

⁵⁴ *Ibid* at paras 42-44.

⁵⁵ *Ibid* at paras 46-48.

⁵⁶ *R v Perka*, [1984] 2 SCR 232 at 248, 2 RCS 232, as cited in *Aravena*, *supra* note 5 at para 48.

preconditions to the imposition of criminal liability.”⁵⁷ Moral condemnation of an accused’s actions by society because of an accused’s failure to “rise to the occasion” – was not to be the touchstone of the assessment of criminal liability by the courts. The Court was keen to distinguish between “moral involuntariness” and “moral blameworthiness”; these two concepts were not always mutually inclusive or exclusive. An accused’s conduct could be entitled to exoneration because their actions were morally involuntary (in the sense of not being the product of individual autonomy) but, at the same time, still be viewed as morally blameworthy (in the sense of not representing conduct that would be viewed as morally righteous).⁵⁸ However, the test of moral involuntariness does not depend solely on a subjective assessment of the accused’s perception as to whether “he or she had no realistic choice to act as he or she did,” but also on an objective evaluation of the accused’s beliefs and perceptions.⁵⁹ In the objective portion of the assessment, as per *Ruzic*, there was to be consideration of a wide variety of relevant societal interests and concerns, including the need to ensure social order and protect the lives of innocent victims who are harmed by accused because of threats they face from other persons.⁶⁰

The elements of the duress defence were to be wholly animated and defined with reference to the principle of moral involuntariness. This principle required that duress be kept within strict bounds. This was reflected in the elements of the duress defence, as defined by the Supreme Court in *Ruzic* and *Ryan*:

- [I]n the no safe avenue of escape criterion.
- [I]n the close temporal connection required between the threat and the harm threatened.
- [I]n the proportionality criterion: that is, the requirement that the harm threatened against the accused be equal to or greater than the harm caused in reply to the threat; and the additional requirement: that the accused’s decision to inflict harm be consistent with what a reasonable person in similar circumstances would have done.
- [I]n the criminal association exclusion: the idea that an accused who by view of their membership in a criminal organization voluntarily assumes the risk

⁵⁷ *Aravena*, *supra* note 5 at para 52.

⁵⁸ *Ibid* at paras 50–53.

⁵⁹ *Ibid* at paras 47–53

⁶⁰ *Ibid* at para 54.

of being compelled by threats to participate in criminal conduct is disqualified from relying on the excuse of duress.⁶¹

With respect to the fundamental principles contained in the *Charter*, moral involuntariness was a “reflection of the central importance of individual autonomy and choice in the imposition of criminal liability.” As it had “in shaping the elements of the common law defence of duress,” the principle of moral involuntariness was to be the central criterion in assessing whether any criminal offence, including murder, should be excluded from the scope of the common law defence of duress.⁶² In order for the Crown to justify their position that parties of murder are excluded from the duress defence, they had to show one of two things. First, that the exclusion of murder from the duress defence is consistent with the principle of moral involuntariness or, second, that the exclusion of murder was a reasonable limit on the principle of moral involuntariness.⁶³

The first test was impossible to meet because in a kill or be killed scenario, while it might never be “justified” for an accused to take the life of an innocent third party as the lesser of two evils, the accused’s criminal conduct might still be deserving of being “excused” based on a proportionality analysis informed by the principle of moral involuntariness. First, the resultant harms – that is, the death of the accused or the innocent third-party victim – might be of “comparable gravity”. So it might not always be wrong for the accused to succumb to the death threat and murder an innocent third person, depending on the circumstances they are facing. The Court gives the helpful example of a parent presented with a choice between taking the life of an innocent third party and the killing of their own child, where both the alleged victims are equally innocent and the harms of comparable worth.⁶⁴ Second, the criminal law is designed for the ordinary man, “not a community of saints or heroes,” based on the standards of conduct that ordinary men and women could be expected to observe. The Court gives the helpful example of an accused who had no pre-existing relationship with the Bandidos and no connection to the meeting at Kellistine’s farm, who just happened to come on to the property on the night of the crimes for an innocent purpose. Assume that person was taken prisoner by

⁶¹ *Ibid* at paras 55–61.

⁶² *Ibid* at paras 61–62.

⁶³ *Ibid* at para 62.

⁶⁴ *Ibid* at paras 68–73.

Kellistine's associates, and who was then ordered by Kellistine (under threat of death) to assist in some of the murders after having observed Kellestine murder two of the victims after they were removed from the barn where they were being held captive against their will. In these circumstances, the accused could hardly be said to have acted in a morally voluntary way and should be able to rely on the duress defence to exonerate themselves from liability.⁶⁵

The Court rejected the trial judge's view that the proportionality requirement for duress could never be met in favour of an accused for the crime of murder since the proportionality test was grounded in the victim's right to life (under s. 7 of the *Charter*) and not in the principle of moral involuntariness. Acceptance of the trial judge's position would breach the fundamental principles of the *Charter* and the criminal law, where voluntariness of an accused's actions is the touchstone of criminal liability. While the victim's right to life was an important consideration in determining whether an accused's conduct was proportional and not to be discounted in the proportionality analysis, the controlling factor was to be whether the accused "had no realistic choice" but to have committed the act(s) they did. None of this was to say that duress was an easy defence to prove and would not be kept within strict bounds under the principle of moral involuntariness. Indeed, the Court stated that to excuse murder, the threat being relied upon by the accused under the duress defence would likely have to be a threat of "immediate death"; nothing short of that would be enough to meet the proportionality requirement.⁶⁶

In addressing whether the murder exclusion was a reasonable limit on the principle of moral involuntariness, the Court addressed the English authorities relied on by the trial judge in the court below. These authorities – save and except the majority judgment in *Lynch*⁶⁷ – have unequivocally excluded murder from the common law defence of duress for two reasons. First, access to the defence of duress would embolden criminal organizations to use threatened intermediaries "as a means of conducting their criminal activity." Second, the victim's life is intrinsically more valuable than any possible right of the accused. The first justification for the exclusion, even if the policy argument could be sustained, was not sufficient to override the constitutional protections afforded an accused

⁶⁵ *Ibid* at paras 62–66.

⁶⁶ *Ibid* at paras 70–73.

⁶⁷ *Supra* note 15.

under the principle of moral involuntariness. The second justification for the exclusion, reflected a conception of duress as a justification, not an excuse. This was inconsistent with the received view on the proper conceptualization to be given to the duress defence in Canadian criminal law, where duress is treated as an excuse rather than a justification. The question to be asked is not whether a greater good was accomplished by the accused's actions justifying their criminal conduct but rather, whether the accused had any realistic choice but to have acted in the manner they did. To do otherwise was to place more importance on the life of the victim than the life of the accused, where both lives might be equally innocent, in vindicating the principle of the sanctity of life:⁶⁸

An individual told to "kill or be killed" cannot make a decision that will fully vindicate the right to life, especially if the choice is between the lives of two equally innocent third parties. Whatever the threatened person decides, an innocent life may well be lost. A per se rule which excludes the defence of duress in all murder cases does not give the highest priority to the sanctity of life, but rather, arbitrarily, gives the highest priority to one of the lives placed in jeopardy.⁶⁹

Accordingly, the Court was inclined to afford the common law defence of duress to offenders charged with actually committing murder as principals, for constitutional reasons:

The constitutionality of the murder exception to the duress defence in s. 17 of the Criminal Code is not before the Court. However, it follows from this analysis that, subject to any argument the Crown might advance justifying the exception as it applies to perpetrators under s. 1 of the Charter, the exception must be found unconstitutional.⁷⁰

VII. *WILLIS*

In *Willis*, the Court of Appeal for Manitoba, per Justice Mainella, broke with the Court of Appeal for Ontario in *Aravena*, finding that while the common law defence of duress was available to aiders and abettors of murder, as per the Supreme Court's ruling in *Paquette*, it was not available to principals to murder. It followed that the murder exclusion contained in s. 17 of the *Criminal Code* was not a violation of the principles of fundamental justice protected by s. 7 of the *Charter*.

⁶⁸ *Aravena*, *supra* note 5 at paras 74-83.

⁶⁹ *Ibid* at para 83.

⁷⁰ *Ibid* at para 86.

In *Willis*, the appellant had accumulated a drug debt to a criminal organization of which he was a member as a result of being caught by police in possession of a shipment of cocaine which was seized by police. Faced with threats from this organization, the appellant killed Kaila Tran (a woman he hardly knew) in an attempt to clear the debt,⁷¹ since the organization wanted Ms. Tran dead for an unrelated reason. The appellant stabbed Ms. Tran 30 times in the course of killing her. Unfortunately, the appellant's drug debt to the organization was not forgiven on the basis of the commission of the murder. The appellant justified the murder explaining to police: "[i]t was like my life or her life." The problem was that the appellant was not a party to the offence of murder by aiding, abetting, or by common intention – so the allowance made in *Paquette* giving an accused access to the common law defence of duress was not available to him. This, by necessity, required the appellant to challenge the constitutionality of the murder exclusion for principals contained in s. 17 of the *Criminal Code* in order to gain access to the duress defence, which he did at trial, albeit unsuccessfully. The accused was convicted of murder in the first degree, without eligibility for parole for 25 years. The question of whether the accused had access to the duress defence was a very consequential issue since if the defence was available to him, and was made out by him, he could avoid liability for the murder altogether, avoiding a sentence of life imprisonment without eligibility for parole for 25 years.⁷²

The Court recognized that the common law defence of duress was available to "parties" to an offence by aiding, abetting, or common intention – as opposed to principals – as per the Supreme Court's holding in *Paquette* and that the Court was bound by that precedent:

The legal distinction between principals and parties as to the defence of duress is, subject to Parliament amending section 17 of the Code, for the Supreme Court of Canada to vary.⁷³

⁷¹ There was evidence before the trial court that the accused had told the friend who had allegedly aided and abetted him in the murder of Ms. Tran, that the murder had not erased his drug debt owed to the criminal organization. See *Willis*, *supra* note 7 at para 21.

⁷² *Ibid* at paras 1–21. The accused advanced two further grounds of appeal before the Court, neither of which are relevant to this study.

⁷³ *Ibid* at para 33.

But that distinction was of no assistance to the appellant because he had actually committed the murder as a principal. Not surprisingly, the appellant argued that s. 17's denial of the common law defence of duress to principals to murder was contrary to s. 7 of the *Charter*. First, the law allows for morally involuntary acts of an accused to be punished by the criminal law. Second, the law is overbroad.⁷⁴

The Court stated that in order to dispose of the constitutional issues raised by the appellant in the appeal, consideration had to be given to the *Charter* principles of moral involuntariness and overbreadth and to the interpretation that had to be given to s. 17 of the *Criminal Code* by virtue of the Supreme Court's decision in *Paquette*.⁷⁵ Two fundamental premises were to govern the Court's analysis throughout. First, consideration of the proportionality requirement in the moral involuntariness analysis, had to be undertaken differently for the murder exclusion (applying to principals) than for the other offences designated as being excluded from the duress defence by s. 17. This was because the commission of murder under duress involves the loss of an innocent person's life, while the commission of the other crimes does not. Second, the use of hypotheticals, while useful to distinguish involuntary conduct from voluntary conduct, should be reasonable and not fantastical.⁷⁶

In reviewing the history and background of the defence of duress in the criminal law, the Court reviewed Hale's writings and found that where an accused is faced with a kill or be killed situation, the accused has two ways to conduct themselves in a lawful manner. First, they can sacrifice themselves or, second, they can act in their own defence and of their person and kill the assailant who is compelling them to commit the murder under the threat of death. Based on this conception, no accused may lawfully take the life of an innocent victim under duress and avoid criminal liability at the same time.⁷⁷ The Court considered the English Draft Penal Code and found that the first draft of the Code in 1878 did not include duress as an exculpatory defence at all. Indeed, where the elements of duress were made out, the accused was only entitled to a mitigation in their punishment. The Code, which was ultimately passed by the English Parliament, did include a duress defence, but it was severely

⁷⁴ *Ibid* at paras 21-33.

⁷⁵ *Ibid* at para 33.

⁷⁶ *Ibid* at paras 37-39.

⁷⁷ *Ibid* at paras 45-56.

restricted in accordance with Hale's Rule.⁷⁸ The Court pointed out that after Canada was formed, the first version of the *Criminal Code*⁷⁹ passed by Canada's Parliament in 1892 contained a murder exclusion on the duress defence that mirrored the English Code and that has stood the test of time.⁸⁰

Based on its survey of other common law jurisdictions outside of Canada, the Court found that Hale's Rule continues to predominate in the majority of common law jurisdictions and, to the extent that the rule has been modified, this has usually been accomplished through legislative change rather than tinkering by the courts.⁸¹ Based on *Perka*, *Ruzic*, and *Ryan*, the Court identified two questions that needed to be answered in deciding whether or not the murder exclusion contained in s. 17 of the *Criminal Code* violates the principle of moral involuntariness protected by s. 7 of the *Charter*. First, does removal of the duress defence deny a person of "any realistic choice" as to whether to break the law? Second, even if it does, was the injury done disproportionate to the benefit obtained?⁸²

With respect to the first inquiry, the Court rejected the appellant's argument that, based on the fact scenario cited by the Supreme Court in *Ruzic*, that the Supreme Court had found the exclusions from the duress defence contained in s. 17 to be in breach of the *Charter* principle of moral involuntariness.⁸³ The hypothetical example given by the Supreme Court in *Ruzic* reads as follows:

Consider next the situation of someone who gives the accused a knife and orders her to stab the victim or else be killed herself. Unlike the first scenario, moral involuntariness is not a matter of physical dimension. The accused here retains conscious control over her bodily movements. Yet, like the first actor, her will is overborne, this time by the threats of another. Her conduct is not, in a realistic way, freely chosen.⁸⁴

The Court found that if the Supreme Court had decided that the murder exclusion was unconstitutional, they would have "said so

⁷⁸ *Ibid* at paras 57–61. The defence was also made unavailable to accused who committed crimes under duress by reason of their association with a criminal association or conspiracy.

⁷⁹ 1892, SC 1892, c 29, as cited in *Willis*, *supra* note 7 at para 62.

⁸⁰ *Willis*, *supra* note 7 at para 67.

⁸¹ *Ibid* at paras 68–74.

⁸² *Ibid* at paras 111–13.

⁸³ *Ibid* at para 114.

⁸⁴ *Ruzic*, *supra* note 3 at 44, as cited in *Willis*, *supra* note 7 at para 114.

[explicitly] in *Ryan*,” instead of leaving the question undecided, which is what they did.⁸⁵ The Court found the hypothetical from *Ruzic* to be flawed because it does not represent a situation where the accused truly lacks “a realistic choice” as to whether to commit the crime. Assuming that negotiating a way out of the predicament, attempting an escape from the dilemma, or seeking the assistance of the authorities were not viable options, the accused could commit acts of aggression against the maker of the threats. In the form of self-defence, up to and including using deadly force against the threatener to prevent the consequences of the threat from being carried out. That is to say, acts of self-defence, if available, must be exercised by the accused against the maker of the threats, otherwise the accused’s acts are not morally involuntary, and the accused’s conduct does not entitle him to access the duress defence since compliance with the law must be shown to be “demonstrably impossible.”

According to the Court, rescue by police would always be an available recourse for an accused in lieu of taking an innocent life, including in the hard cases⁸⁶ (This reality is what explained Parliament’s decision in s. 17 of the *Criminal Code* to exclude murder from the duress defence).⁸⁷ This is because the police would do everything within their power to prevent the threatened murder from occurring in a killed or be killed situation, including in the reasonably foreseeable “typical hostage case.”⁸⁸ Even if this were not the case, the act of killing under duress might still not be

⁸⁵ *Willis*, *supra* note 7 at paras 114–15 [emphasis added]. Indeed, the Court underlines that the passage from *Ruzic* (see *Ruzic*, *supra* note 3 at para 44), when read in context, was simply the Supreme Court’s use of a hypothetical example to illustrate the difference between physical and moral involuntariness, to demonstrate the “unifying premise” between them as being “autonomy and choice.” See *Willis*, *supra* note 7 at paras 114–15.

⁸⁶ *Ibid* at para 122. The problem raised in *Ruzic*, that a threat made in a foreign location might not be neutralizable, by Canada or its international partners, because a foreign police force might be untrustworthy or corrupt, was speculative and not credible and was rejected by the Court, accordingly.

⁸⁷ *Ibid* at para 125.

⁸⁸ *Ibid* at paras 118–19. In the typical hostage scenario, a hostage would be held by an outlaw at an unknown location and the threatened party would be advised through some intermediary to murder another person or else the hostage would be killed. In order to prevent the death of the hostage, the threatened party would have to submit to the threat and commit the murder, since self-defence and negotiation would not be available to them. However, in present times, submission to the threat would not be necessary because advances in technology would likely allow the police to neutralize the threat before it was carried out.

acceptable for two other reasons. First, it would be based on the “faulty assumption that the amoral tyrant, who is prepared to compel the death of an innocent person, would also piously keep his or her promise and release the hostage from danger if the murder was committed.”⁸⁹ Second, it would be based on the “faulty assumption” that an accused would prefer self-preservation and committing murder to sacrificing their own life.⁹⁰ According to the Court, “realistic choices” were always available to an accused being threatened in a kill or be killed situation under the challenged law to avoid breaching the law against committing homicide. Namely, negotiation, escape, self-defence, or seeking the aid of law enforcement.⁹¹ Thus, the Court, per Justice Mainella, concluded, “I am satisfied that it is not inevitable that the challenged law would ever force a person to balance life against life due to an external human danger.”⁹²

In these circumstances, while there was no need for the Court to go on to the second inquiry in the moral involuntariness analysis, the Court decided to address the issue of proportionality for the sake of completeness. As per *Ruzic*, a variety of different interests arise in a kill or be killed situation that had to be considered in assessing whether the proportionality requirement was met. In considering these interests, the Court found itself to be in agreement with the trial judge, who found that the proportionality requirement could never be met where an accused murdered an innocent person under duress. The Court expressed four concerns with the Court’s decision in *Aravena*.⁹³ First, the English authorities’ support for the murder exclusion was based on the inviolable principle of the sanctity of life from Hale; these justifications were not based on a utilitarian rationale. The concept of the sanctity of life comes from moral principles and from a commonly accepted and deeply rooted belief in society that human life is inviolable, “that the law imposes a duty on everyone not to take innocent life based on an external danger.”⁹⁴ Second, the Court in *Aravena* misunderstood the English authorities in finding that they treated duress as a “justification” rather than as an “excuse.” Indeed, the Canadian and English positions were now unified in

⁸⁹ *Ibid* at para 121.

⁹⁰ *Ibid* at para 126.

⁹¹ *Ibid* at paras 127–32.

⁹² *Ibid* at para 133.

⁹³ *Ibid* at paras 133–39.

⁹⁴ *Ibid* at paras 140–48.

their view that duress was an excuse to a crime. And the only “unresolved question” was whether *Paquette* was still good law in Canada in light of the most recent English authorities prohibiting duress as a defence for all parties charged with murder.⁹⁵

A third concern was that by allowing access to the common law defence of duress for perpetrators of murder, the law would create uncertainty with respect to the common law defence of necessity. This is because, to date, no appellate court in Canada had deviated from the view of the law coming from *Dudley and Stephens* that the defence of necessity is not available to a participant in a murder to excuse their conduct. If necessity and duress were to continue to have to follow the same juristic approaches and rationales, the approach from *Aravena* giving perpetrators of murder access to the duress defence had to be rejected.⁹⁶ Fourth, in conducting the proportionality inquiry, the Court in *Aravena* put undue focus on the unfairness caused to an accused if they were to sacrifice themselves rather than submit to the threat of death and commit murder. While this was the most controversial aspect of Hale’s Rule, it was not relevant because an accused, in actuality, is never faced with this agonizing choice of having to balance life against life.⁹⁷

VIII. ANALYSIS: FIVE REASONS TO PREFER THE COURT OF APPEAL FOR ONTARIO’S HOLDING IN *ARAVENA*

In my view, there are five reasons to prefer the holding in *Aravena* – that s. 17’s removal of the duress defence from principals to murder is likely unconstitutional because it breaches the principle of moral involuntariness – over the holding in *Willis* finding contrariwise.

⁹⁵ *Ibid* at paras 149–50.

⁹⁶ *Ibid* at paras 150–53. For a persuasive case for extending the defence of necessity to murder and fusing the defences of duress and necessity together, see Birju Kotecha, “Necessity as a Defence to Murder: An Anglo-Canadian Perspective” (2014) 78 J Crim L 341.

⁹⁷ *Willis*, *supra* note 7 at para 165.

Reason #1: *Aravena* Does Not Subordinate the Accused's Right to Life to the Victim's Based on the Principle of the Sanctity of Life

There is no question that the effect of the Court's analysis of the availability of the duress defence to principals charged with murder in *Willis*, is to place more importance on the preservation of the victim's life than the accused's life, in a kill or be killed situation. The Court's conclusion that an accused will always have a legal alternative to killing an innocent victim under a threat of death, up to and including attacking the maker of the threat and using deadly force against them if necessary to neutralize the threat, is far from self-evident. And exercising these suggested recourses increases the risk of loss of the accused's life while not placing the innocent victim's life in any increased peril. The trouble, of course, is that if both the accused's life and innocent party's life are of comparable value under the principle of the sanctity of life, then the Court's intent to fashion an absolute rule against killing the victim, even under an immediate threat of death faced by the accused, is misplaced since that interpretation places all the risk of loss of life with the accused.

In *Willis*, the Court indicates that accused persons should never be given the right to decide "who lives and who dies" and should never commit murder because there is no guarantee that the threat of death made against them will be carried out, even if they fail to cooperate with the threatener's demands. The lack of certainty of consequence is true. But it is also true that if an accused fails to cooperate by not carrying out the act required to try to neutralize the threat and attempts to exercise any of the self-help options mentioned by the Court in *Willis*, their risk of death by the threatener goes up while the victim's risk of death correspondingly goes down or is eliminated. So, the Court's analysis of the issue does not eliminate the risk of the loss of life so much as shift the risk from the victim to the accused. In doing so, the Court is stating that the victim's life is intrinsically more deserving of protection than the accused's life, under the principle of the sanctity of life.

While the Court in *Willis* accuses the Court in *Aravena* of placing undue focus on the interests of the threatened party - which goes against the Court's statement in *Aravena* that the accused and victim's lives are of "comparable worth" - the Court in *Willis* seems to commit the same *faux-paus* in unduly prioritizing the victim's life over the accused's life. In any event, the approach in *Aravena* leaves the question open as to whether an

accused may murder under a threat of death where he has no “realistic choice” to do otherwise based on an analysis of the principle of moral involuntariness. The Court’s conclusion in *Willis* that “realistic choices” will always exist for an accused to avoid committing murder when faced with a threat of death is problematic, to say the least. This is because it assumes, *a priori*, without any analysis of the relevant circumstances and whether they caused the accused’s actions to be morally involuntary, that the murder of an innocent person under a threat of death is always the wrong choice for the accused. This moral judgment is far from self-evident, and the other recourses that may be available to the accused in a kill or be killed situation are not “risk neutral”; they place the accused’s life in more jeopardy, while the third-party victim’s life remains unaffected. Truth be told, the Court in *Willis*’s veneration of Hale’s views demonstrate that the Court would much sooner see an accused sacrifice their own life than to kill an innocent person irrespective of the circumstances, even if this is not pareto-optimal. On this view, it may be “impossible” for the accused to “stay alive and act lawfully at the same time.”⁹⁸

With respect, the Court in *Willis*’s desire to give preference to the protection of the victim’s life over the accused’s life – under the principle of the sanctity of life, in every case and in all circumstances, by *a priori* finding murder by an accused under threat of death to constitute a conduct that is not capable of being morally involuntary – is deeply flawed. This is because it is based on a faulty premise, that an accused’s will can never be overborne to commit murder no matter how trying the circumstances may be. However, this possibility was left open by the Supreme Court in *Ruzic* in their use of the hypothetical example of an accused being provided with a knife and being asked to kill an innocent person or to be killed themselves.

While the Court in *Willis* does not find this hypothetical scenario to be particularly compelling and raises several recourses that the accused may have in a kill or be killed scenario that do not require them to commit murder, the Court is not willing to acknowledge that the law cannot always do what is required to protect the life of the threatened person. This is because, sometimes, the situation may be “too acute” to allow the accused to exercise any of the suggested recourses, making the

⁹⁸ See Maximilian Kiener, “Duress as a Defence in a Case of Murder” (2017) 1:2 The Philosophical J Conflict and Violence at 190-93.

accused's choice to murder morally involuntary. Surely, the reasonable hypothetical example provided by the Court in *Aravena* represents the kind of acute circumstance where none of the legal recourses suggested by the Court in *Willis* would be available to an accused. For example, if the accused facing the threat of death were to act in self-defence against Kellistine or his associates to try and escape the farm and not commit murder against any of the victims, the accused's defensive tactics would likely fail, and they would be killed. The death would likely be in vain and would not be pareto-optimal, in the sense that the remaining victims would likely still be shot to death by Kellestine and his associates, irrespective of the accused's choice to refuse to commit murder and to act in self-defence instead. Surely, in these circumstances, the accused's choice to murder to preserve himself would be protected under the principle of moral involuntariness by way of the duress defence, and the accused would be acquitted of murder.

While the Supreme Court in *Ruzic* recognized that there are different interests at stake in a kill or be killed scenario, the Supreme Court did not endorse the principle that the victim's life is to be treated in an inherently superior way to that of the accused's life, even if this would bring greater coherence to the law of duress. Indeed, the different interests are mentioned by the Supreme Court in *Ruzic* not for the purpose of prioritizing one interest over another, but rather to show the challenges that courts face in defining the law of duress in a way that is cognizant and fair to all those interests. By making the victim's right to life an "absolute moral postulate,"⁹⁹ the Court in *Willis* essentially neuters the principle of moral involuntariness and strips the principle of its determinative power and legal effect as a principle of fundamental justice in defining the availability of the defence of duress in cases of murder. Because of its *a priori* conclusion that the principle of moral involuntariness could never be met by an accused in a kill or be killed scenario.

Reason #2: Moral Involuntariness is not Moral Blameworthiness

In largely vindicating Hale's views, the Court in *Willis* fuses law and morality in a way that is not in accord with the relevant Supreme Court

⁹⁹ This was the view subscribed to in the joint opinion of Judge McDonald and Judge Vohrah at the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Drazan Erdemovic*, Case No. IT-96-22-A, as cited in *Kiener*, *supra* note 97 at 188.

jurisprudence on the duress defence. Where the focus of the moral involuntariness analysis is supposed to be on whether the accused was left with any “realistic choice” but-to-commit the criminal acts they did under duress, without an evaluation as to whether the acts performed were morally just or the “lesser of the two evils.” The question to be asked is whether the accused’s will was overborne by the threats they faced, not whether the accused’s actions were correct or optimal from a “moral evaluative standpoint.”¹⁰⁰ In *Ruzic*, the Supreme Court established the principle of moral involuntariness as a principle of fundamental justice that was largely divorced from the principle of moral blameworthiness. Finding that the accused in that case was entitled to be acquitted because she had acted in a morally involuntary way in smuggling the narcotics into Canada from a foreign country, based on the threats that she had faced. The emphasis was to be on whether the accused could exercise a free choice, as an autonomous agent, not whether “that choice” was morally just.¹⁰¹

In *Willis*, the Court creates a *de facto* “presumptive rule” that accused who commit murder under duress must not have exercised other “realistic choices” that they had at the relevant times to avoid committing the murder, therefore making them guilty of murder. This circular reasoning is unsatisfactory and is divorced from any consideration of the circumstances in which the accused actually found themselves in and whether they could have overcome their will. This analysis is not conducive with the elements of the legal test for moral involuntariness put forward by the Supreme Court in its duress jurisprudence, where a lack of realistic choice by the accused might be found by a court in the context of a murder, “where one life is hanging in the balance of another.”

¹⁰⁰ Frances E. Chapman & Jason MacLean, Pulling the Patches of the Patchwork Defence of Duress: A Comment on R. v. Aravena, 62 Crim LQ 420 (2015) at 424-25. The commentator, Gomez, rejects the purported rationale of moral involuntariness as the reason why duress does not generate liability in the criminal law. According to him, “the reason why the actor escapes punishment in such cases is due to the fact that the conduct was performed for motives and dispositions that are deemed to be socially acceptable.” See Daniel Varona Gomez, “Duress and the Antcolony’s Ethic: Reflections on the Foundations of the Defense and Its Limits” (2008) 11 New Crim L Rev 615 at 631.

¹⁰¹ See generally Benjamin Berger, “Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences” (2006) 51 McGill LJ 99.

The Court in *Aravena* seems attuned to this possibility, concluding that nothing short of an immediate threat of death against an accused might excuse a murder. Whereas the Court in *Willis* rejects this possibility out of hand by notionally finding in the abstract that an accused will always have the choice to avail themselves of the assistance of police who have sophisticated techniques and who could be trusted to neutralize the threats by working with its international partners if necessary.

While it was valuable for the Court in *Willis* to have explored the many “realistic choices” that an accused might have in a kill or be killed scenario to avoid committing murder, the Court’s intent appears to be disingenuous. This is because the Court’s discussion was undertaken to demonstrate that an accused’s actions in the case of a murder committed under threat of death could never be morally involuntary rather than to emphasize that the analysis of the principle of moral involuntariness must be highly contextual and rigorous, of which there is no doubt.

This *a priori* determination by the Court in *Willis*, that an accused faced with a threat of death could never act in a morally involuntary way, results in the Court’s jettisoning of the principle of moral involuntariness in favour of the principle of moral blameworthiness. This approach is antithetical to the Supreme Court’s decision in *Ruzic* where only the principle of moral involuntariness was to be used to set the boundaries of the duress defence. Where no equivalency was drawn between moral involuntariness and a lack of moral blameworthiness.

Reason #3: The Court in *Willis*’s Conclusion that an Accused always has “a Realistic Choice” to Avoid Submitting to a Threat of Death is Fallacious and Demonstrably False

The Court in *Willis*’s conclusion that an accused, in a kill or be killed situation, will always be able to avail themselves of police assistance rather than to submit to a threat of death and kill an innocent victim, is fallacious and based on extremely wishful thinking. It confuses the mere possibility of something happening with an absolute certainty of it happening. If, as the Court surmises in *Willis*, it is never an absolute certainty that an accused who refuses to kill under threat of death will always be killed for such refusal, then it must also be true that an accused under threat of death will not always be able to be rescued by police, depending on the circumstances they find themselves in to avoid

committing murder. Indeed, the police often fail to act quickly, decisively, or effectively to respond to violent crimes or threats of violent crime in progress. The 2020 Nova Scotia Attacks are a testament to this. As well, the extent to which Canadian police can use their powers to act extra-territorially, or to influence foreign law enforcement authorities to act in the required ways to ward off the carrying out of threats facing an accused that might lead to serious harm of a person in foreign lands, is highly questionable. Could the Canadian authorities, today, really address the kind of threats facing the accused in *Ruzic* any more effectively than in the past? If the answer is “probably not,” then the Court’s conclusion in *Willis* that an accused must always act to allow for the possibility of rescue by police in the agonizing predicament of a kill or be killed situation falls flat. It is not self-evident that the Canadian police authorities can always sufficiently protect accused facing threats of harm or death from other persons in the context of the duress defence. Indeed, it is demonstrably false.

For example, in *R v CMB*,¹⁰² a Manitoba case not considered by the Court in *Willis*, the accused refused to give evidence at the trial of two men who were members of a criminal gang and who were accused of assaulting him, and was cited for contempt of court. At his show cause hearing, the accused pleaded duress, stating that he had refused to give evidence against these two men at their trial out of fear for his safety and the safety of his family. Prior to the trial, while the accused was out of the province in a witness protection program and after he had requested and received police protection, he was pushed into moving traffic by men he recognized as being associates of the men he was being asked by the Crown to testify against. The accused could have been killed or seriously hurt. Second, the accused’s parents had received threatening phone calls, labelling the accused as a “rat,” and Manitoba Justice had to install a security system in their house. Third, two weeks before the trial, gang associates of the two men were placed in the same institution as the accused, who was in prison on another charge. Based on the evidence before the Court, past attempts by the Crown and the police to protect the accused had failed despite the accused’s requests for protection. The Crown led no evidence to rebut the accused’s evidence that the authorities had proven they could not protect him and that he had no reasonable safe

¹⁰² 2010 MBQB 269.

avenue of escape from the threats he faced. Therefore, his choice not to testify against the two men charged with assaulting him was not a choice that had been freely made. In the result, the accused was acquitted of the offence of contempt by way of the duress defence.¹⁰³

Reason #4: *Aravena* does not subordinate the *Charter* Principle of Moral Involuntariness to the Concepts of Parliamentary Supremacy or Historical Legitimacy

In *Willis*, the Court searches for a way to give effect to Parliament's choice to exempt murder from the duress defence in s. 17 of the *Criminal Code*, finding that Parliament's choice must have been impelled by the moral principle that it is never right to kill an innocent person, not even under a threat of death. Based on this clear directive from Parliament, based on a long-venerated history, accused in a kill or be killed situation must exercise a recourse other than committing murder, since that option is not one that the law makes available to them. The problem, of course, is that no matter how venerated and lengthy the history of a legal rule, or genuine or noble the Parliamentary intent was in making it (or is in sustaining it), they do not foreclose the fundamental obligation of courts to scrutinize laws put before them based on *Charter* values and principles, including the principle of moral involuntariness. Indeed, it was confirmed in *Ruzic* that special deference was not owed to s. 17 of the *Criminal Code*, representing as it were, a statutory defence. The same points could be made about the Court in *Willis's* emphases on the distinctiveness and controversial nature of use of the duress defence in murder cases or the incoherence that could be caused between the common law defences of duress and necessity, as if those things help justify the murder exemption and concomitantly overcome the violations of the *Charter's* principle of moral involuntariness. As Schabas importantly observes, albeit in an article about the common law defence of necessity rather than duress:

“Higher social values” now exist in the Charter, which must take precedence over common law principles and the Criminal Code, and therefore it is the role of the courts to “second-guess” the Legislature and to assess the “relative merits” of

¹⁰³ For an example of a case where the Crown and police were found to have provided an accused in similar circumstances with an adequate degree of protection to disqualify the duress defence pleaded by the accused, see *R v Atkinson et al*, 2017 MBQB 98.

legislation and to make rulings overriding legislation when the Charter demands.¹⁰⁴

Reason #5: *Aravena* does not Allow the English Authorities to Blind the Court to the Binding Supreme Court Jurisprudence on Duress

The fifth reason why the Court's decision in *Aravena* should be preferred over the Court's decision in *Willis* is because in *Aravena*, the Court does not fall into the trap of giving too much weight to the English authorities' view on the availability of the common law duress defence to parties charged with murder. While it is true that the English authorities are now against extending the common law defence of duress to the charge of murder, and have shown a great consistency and veneration for Hale's Rule, it is worth remembering that these judicial decisions and principles are not binding on Canadian courts. Indeed, in *Hibbert*, *Ruzic*, and *Ryan*, the Supreme Court did not endorse Hale's Rule. Instead, the Supreme Court made the *Charter* principle of moral involuntariness the touchstone for the duress defence.

The principle of moral involuntariness is to define the contours, boundaries, and availabilities of the duress defence, not the principle of moral blameworthiness or some subsidiary principle to it, such as the "absolute moral principle" that it is never correct to kill an innocent person. The views of the English cases have not stopped the Supreme Court from continuing to affirm, or to show support for, the principle established in *Paquette* that distinguishes between principals and aiders and abettors – with aiders and abettors continuing to be given unrestricted access to the common law defence of duress in cases of murder. Nor have the English decisions prevented the Supreme Court from leaving the question of access to the duress defence for principals to murder, under the *Charter* principle of moral involuntariness, undecided, pending the hearing of an appeal raising this narrow issue. Indeed, in *Ryan*, the Supreme Court showed no inclination to depart from its ruling in *Paquette* based on the state of the English authorities at the time (which were against allowing aiders and abettors to murder access to the common law defence of duress) and left open the question of the constitutionality of the offences designated as being excluded from the duress defence by s. 17

¹⁰⁴ Paul B. Schabas, "Justification, Excuse and the Defence of Necessity: A Comment on *Perka v. the Queen*" (1985) 27 Crim LQ 278 at 282.

of the *Criminal Code*. It is worth remembering that the *Charter* and its principles of fundamental justice, including the principle of moral involuntariness, represent the supreme law of the land of Canada and that any law that is not consistent with this constitutional mandate can be struck down and made of no legal force or effect, even if this would be at odds with English authorities and principles.¹⁰⁵

IX. CONCLUSION

The foregoing discussion demonstrates that the Court of Appeal for Ontario's holding in *Aravena* – that s. 17's removal of the duress defence from principals to murder is likely unconstitutional because it breaches the principle of moral involuntariness – is to be preferred over the Court of Appeal for Manitoba's holding in *Willis* finding contrariwise. First, *Aravena* does not prioritize the victim's right to life over the accused's right to life under the principle of sanctity of life, based on the moral postulate that killing an innocent person is never justified, regardless of the circumstances. Second, *Aravena* does not conflate the principle of moral involuntariness with the principle of moral blameworthiness. Third, the categorical and unqualified proposition from *Willis* that an accused will always have the ability to call on the assistance of police (or to exercise another legal recourse) to extricate themselves from a kill or be killed scenario, without submitting to the threat of death and committing murder, is fallacious and demonstrably false. Fourth, *Aravena* does not subordinate the *Charter* principle of moral involuntariness to the concepts of Parliamentary supremacy or historical legitimacy. Fifth, *Aravena* dutifully follows the Supreme Court of Canada authorities in developing the common law defence of duress, rather than giving undue regard to the English authorities and, in particular, to their support for Hale's Rule, which finds no support in the Supreme Court's jurisprudence on the duress defence to date.

All that said, in all of the judicial decisions reviewed herein, a concern is underlined that the defence of duress not be made too readily available

¹⁰⁵ S. 52 of the *Constitution Act*, 1982, states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." See *Constitution Act*, 1982, s 52, being Schedule B of the Canada Act 1982 (UK), 1982, c 11.

to accused, since there is an important policy reason for not allowing this. Namely, that some criminal conduct that is sufficiently intentional and culpable might go unpunished by the criminal law. While making out the defence of duress on its merits is exceedingly difficult given the rigorous requirements enumerated by the Supreme Court in *Ryan* that need to be met, whether the defence is being advanced in its statutory or common law form,¹⁰⁶ there is a lingering sentiment that more needs to be done to prevent the abuse of the defence, or to keep the defence within strict bounds.¹⁰⁷ Upon my review of the authorities and literature on the defence of duress, and without limiting the generality of the foregoing, the following reform proposals have suggested themselves:

1. Restrict duress to mitigation of sentence only - that is, do not allow duress to excuse a crime regardless of the circumstances in which the duress arises.¹⁰⁸
2. Much like provocation, make duress to the charge of murder a partial defence (only), allowing for a murder offence to be reduced to manslaughter where duress is made out.¹⁰⁹
3. Make duress a reverse onus defence to murder - that is, once duress is shown to have an air of reality by the accused,¹¹⁰ also require the accused to

¹⁰⁶ *Ryan*, *supra* note 7 at para 81. Those requirements are as follows: (1) there must be an explicit or implicit threat of present or future death or bodily harm, which is made against either the accused or a third party; (2) the accused must reasonably believe that the threat will be executed; (3) an absence of a safe avenue of escape; (4) a close temporal connection between the threat and the harm threatened; (5) proportionality between the harm threatened and the harm caused by the accused; and (6) an absence of membership in a criminal conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy, or association.

¹⁰⁷ *Aravena*, *supra* note 5 at para 42.

¹⁰⁸ Claxton, *supra* note 17 at 442.

¹⁰⁹ See generally *Aravena*, *supra* note 5 at para 45; P H J Huxley, "The Defence of Duress in Criminal Law" (1977) 1 Trent LJ 57 at 59. For a superb discussion of the incongruity between allowing provocation as a partial defence to murder, but not duress, as a concession to human frailty, see Kenneth J Arenson, "The Paradox of Disallowing Duress as a Defence to Murder" (2014) 78 J Crim L 65.

¹¹⁰ According to Silver, the threshold of the current formulation of the "air of reality test" required to be met by an accused for a defence to be put into play is undeniably high and places a significant impediment on the ability of defences, such as the excuse of duress, to operate. See Lisa A Silver, "Poof into a Puff of Air - Where Have All the Defences Gone: The Air of Reality Test and the Defences of Justifications and Excuses" (2014) 61 Crim LQ 531. According to Luther, an accused can only challenge the removal of a defence, such as the denial of the duress defence, once the accused

prove its substantive elements beyond a reasonable doubt in order to receive an acquittal.

4. Add a “but-for” requirement to duress for the offence of murder: but-for the accused’s actions causing death, would the victim have died anyway by virtue of the circumstances or the actions of the threatening parties? If the answer is “yes,” the accused would be entitled to be exonerated under the defence. If the answer is “no,” duress would be unavailable to an accused, and they would face conviction and penalty accordingly.¹¹¹
5. Allow the applicability and availability of duress for principals to murder to be determined by courts on a case-by-case basis, rather than having the defence automatically excluded for principals.¹¹²
6. If possible, further tighten up the substantive elements of duress to ensure that only “truly morally involuntary actions” of an accused escape criminal liability. For example, the “lack of a realistic choice” making duress available to an accused, should only be found where there truly is “no safe avenue of escape.”
7. Leave the issue of remedying the potential for morally involuntary conduct of an accused to be punished, for the offences designated as being excluded from the duress defence by s. 17 of the *Criminal Code*, to prosecutorial or executive discretion.¹¹³

While it is beyond the scope of this paper to comment on any of the above reform proposals in depth, it does seem that some would fall prey to the *Charter’s* protection of the presumption of innocence, or its protection of the principle of moral involuntariness, much like the “presence, immediacy, and third-party requirements” in s. 17 of the *Criminal Code* did in *Ruzic*. Still, without some substantial tweaking to the terms of s. 17 of

shows that the defence has an air of reality to it and that it would have applied to the facts of the case but-for the law’s removal of it. See Glen Luther, “Of Standing and Factual Foundations: Understanding How an Accused Challenges the Constitutionality of Criminal Legislation” (2006) 51 *Crim LQ* 360 at 371.

¹¹¹ See Kiener, *supra* note 97 and his discussion of the duress defence in the context of the International Criminal Tribunal for the Former Yugoslavia’s decision in *Prosecutor v Dražan Erdemovic*, Case No. IT-96-22-A, for an example of the use of this modality. Curiously, this modality has been used by at least one other author to advocate for the recognition of a necessity defence to murder and a concomitant elimination of the duress defence to murder, “because it involves wrongfully transferring death from the killer to the victim, whereas necessity can be a defence of murder in circumstances where the victim was already going to die imminently anyway.” See Nathan Tamblyn, “Necessity and Murder” (2015) 79 *J Crim L* 46.

¹¹² Willis, *supra* note 7 at para 93.

¹¹³ *Ibid* at para 125.

the *Criminal Code* by Parliament, or s. 17's repeal, s. 17's constitutionality will continue to remain in peril and continue to be attacked by courts and legal commentators alike on the basis that by listing certain crimes and excluding those specific offences from the duress defence, irrespective of the circumstances in which the duress arises, that "morally involuntary" actions by accused who actually commit crimes (as principals) under compulsion will continue to remain improperly punishable and convictable by the criminal law, contrary to s. 7 of the *Charter*.