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THE DEFENCE OF SUPERIOR ORDERS (AND RELATED DEFENCES) IN AUSTRALIAN MILITARY LAW

Abstract

A soldier ordered by a commanding officer to commit acts which may be unlawful is in an invidious position. If they fail to obey the command, they are liable to be convicted of a serious crime. If they obey, but their actions are subsequently found to be unlawful, they are also liable to be convicted of a serious crime. Not surprisingly, the law has struggled to grapple with this conundrum, at times protecting the obedient soldier, at other times punishing them. The relevant provision of the *Rome Statute of the International Criminal Court* ('*Rome Statute*'), focusing on whether the order was 'manifestly unlawful', represents an uneasy compromise. This article charts the development of this concept in international law and its reception into Australian domestic law. It also critiques the doctrine for failing to reflect the realities of an obedience imperative within military ranks, its uncertain meaning and its embrace of negligence to effectively gauge criminality, before proposing improvements in this difficult area. The focus should be on a reasonable soldier, to take specific account of the peculiarities of a military environment, rather than a reasonable person. Specifically, this article proposes necessary clarification of the meaning of 'manifest illegality', with a specific list of factors to be considered. No other article of which the author is aware attempts such a list.

I Introduction

A paradox of military law relates to the position of a member of the defence force (whom I will refer to for convenience as a 'soldier') ordered to engage in activity that is, or may be, unlawful. The context in which such an order might be given will often be challenging, involving active combat, situations where time is of the essence, and situations of great peril. Soldiers will often be required to make decisions quickly, and with incomplete or misleading information available to them. A soldier faced with a potentially unlawful order is in an extremely difficult situation. As will be seen, failure to comply with an order of a superior officer is attended with heavy criminal sanction in Australian law. There is an essential

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expectation in this context that commands will be obeyed, and, for some, the quid pro quo of that obedience expectation provides legal impunity to the one who obeys.[1]

On the other hand, as the law now stands, if the soldier does as instructed, their conduct may amount to a war crime or other crime against international law, for which they may be held personally liable.[2] While international criminal law recognises possible criminal liability of superior officers for conduct of those whom they command, this is in addition to, not in lieu of, personal liability among those who committed the conduct in question.[3] Subordinate soldiers in this predicament who are subsequently charged with an offence may raise the defence commonly known as 'superior orders' in seeking to explain, excuse, and/or justify their act by the fact they were ordered by their superior officer to commit it.

It is also potentially implicated by the findings of the *Afghanistan Inquiry Report* prepared by the Inspector-General of the Australian Defence Force ('*Brereton Report*').[4] The *Brereton Report* 'found that there is credible information of 23 incidents in which one or more non-combatants or persons *hors-de-combat*[5] were unlawfully killed by or at the direction of members of the Special Operations Task Group', such as to suggest the war crime of murder may have been committed.[6] The

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1 APV Rogers, *Law on the Battlefield* (Manchester University Press, 1996) 143 who, after describing expectations of unquestioning obedience, adds '[i]n return for this unswerving obedience the soldier needs the protection of the law so that he does not afterwards risk his neck for having obeyed an order which later turns out to be unlawful'.

2 This stark choice was summarised by Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 303. Dicey stated:

> the position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.

Further complications may arise in that, if a subordinate obeys an order, for example to kill another, their actions would be judged by a civil jury. However, if the subordinate disobeys the order, their actions would be judged by a court-martial. It is James Stephen's opinion that the jury and the court martial may differ regarding what is 'reasonable necessity' and, ultimately, the lawfulness of such an order: James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) 205.

3 For further information on the theory of command responsibility, see: Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009); *Criminal Code Act 1995* (Cth) s 268.115.

4 Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (Report, 10 November 2020) ('*Brereton Report*').

5 The ICRC International Humanitarian Law Database — Customary International Humanitarian Law rule 47 defines hors de combat as: a person who (a) is in the power of an adverse party; (b) defenceless due to unconsciousness, illness or wounds; or (c) clearly expresses intent to surrender; provided they are non-hostile and do not attempt to escape: 'Rules', *International Humanitarian Law Databases* (Web Page) <https://ihl-databases.icrc.org/en/customary-ihl/v1>.

6 *Brereton Report* (n 4) 28–9.

Brereton Report also found evidence that junior soldiers may have been ordered by patrol commanders to shoot a prisoner to 'achieve the soldier's first kill', a practice known as 'blooding'.[7] The *Brereton Report* suggested these incidents were contrary to Law of Armed Conflict.[8]

The *Brereton Report* suggested why soldiers have complied with these orders:

> Subordinates complied for a number of reasons. First, to a junior Special Air Service Regiment trooper, the patrol commander is a 'demigod', and one who can make or break the career of a trooper, who is trained to obey and to implement their superior commander's intent. Secondly, to such a trooper, who has invested a great deal in gaining entry into Special Air Service Regiment, the prospect of being characterised as a 'lemon' and not doing what was expected of them was a terrible one, which could jeopardise everything for which they had worked.[9]

This extract reflects a strong culture of obedience within defence ranks, and the difficult, if not impossible, choices faced by a junior soldier when ordered to do something illegal.

This article is structured as follows. Part II considers the historical development of the law relating to the defence of superior orders internationally, and its current status in Australian and international law. One complication is that the use of the phrase 'defence of superior orders' can suggest there is one discrete defence. The reality is that, in this area of law, there are three possible defences applicable where a soldier obeys an order and thereby commits a crime. The first is the defence of superior orders strictly so-called. The other defences are duress and mistake (of fact or law). Each defence is separately recognised in relevant international instruments, which will be the subject of further discussion. The difficulty is that, depending on the factual scenario, any, or several of these defences might be applicable.[10] There are some exceptional circumstances where a version of the defence is not available, but others may still be relied upon.[11] To keep the discussion manageable, this article will focus primarily on the defence of superior orders per se, on the assumption that it is a discrete defence on its own, primarily because it is recognised as a distinct

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7 Ibid 29.

8 Ibid.

9 Ibid 31 (emphasis omitted).

10 David Daube, *The Defense of Superior Orders in Roman Law* (Clarendon Press, 1956) 6–7: '[d]uress plays a part in many cases of superior orders, so much so that it is difficult to keep apart this problem … Similarly … he who follows superior orders commonly acts from error …'. This leads some to conclude that there is no defence of superior orders per se; rather it is manifestation of a mistake or duress defence: Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Oxford University Press, 2012) 88.

11 For example, the defence of superior orders cannot apply to genocide or crimes against humanity.

defence in international law and Australian law. However, the reality is that in many of these factual situations, other defences like duress and mistake of fact or law may also apply. For example, the fact that an inferior officer was ordered to do something by a superior officer may have placed the inferior officer under 'duress'. In acting out the order, which turned out to be unlawful, the ordered soldier may have been acting in a situation recognised by the law as a 'mistake'. The defence of superior orders may also arise in such a situation. It is thus necessary to discuss each defence, but keeping in line with the scope of this article, discussion of duress and mistake will be brief.

Of course, there is a theme uniting these defences, this being 'exonerating conditions'.[12] In the context where a soldier has prima facie committed an offence, and raises a defence, this raises the issue of *culpability.* This concept has significant historical support. David Daube notes both Auctor and Cicero ascribe the defence of superior orders to the issue of exoneration.[13] Auctor notes the doctrine relates to shifting of *culpa*, or *causa*,[14] important principles of Roman law. This is referred to in *De Regulis* where it is stated 'he causes loss who orders it to be caused; but he is without blame, culpa, who is under the necessity of obeying'.[15] Culpability is fundamental to criminal liability.[16] The High Court of Australia ('High Court') has acknowledged this, favouring 'closer correlation between moral culpability and legal responsibility'.[17]

In the defence of superior orders case, the soldier argues they are not culpable, because they were following directions of a superior, and this should exonerate them from criminality because it would not be reasonable to convict them, as they simply complied with their legal obligations to obey an order they did not believe

12 This is the essence of a defence in criminal law: Kenneth Campbell, 'Offence and Defence' in H Dennis (ed), *Criminal Law and Justice: Essays from the W G Hart Workshop* (Sweet and Maxwell, 1987) 73, 73.

13 Daube (n 10) 9.

14 As opposed to shifting the crime itself, favoured by Cicero: ibid 9–10.

15 Ibid 23.

16 'Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare the defendant's act was *culpable*. This is too fundamental to be compromised': American Law Institute, *Model Penal Code* (1962) § 2.05 cmt (1) (emphasis added) ('*Model Penal Code* (US)') ; *R v Martineau* [1990] 2 SCR 633, 645 (Lamer CJ, for Dickson CJ, Wilson Gonthier and Cory JJ). See also *Callaghan v The Queen* (1952) 87 CLR 115, 121 (Dixon CJ, Webb, Fullagar and Kitto JJ) ('*Callaghan*'): 'fault so blameworthy as to be punishable as a crime'.

17 *Wilson v The Queen* (1992) 174 CLR 313, 327 (Mason CJ, Toohey, Gaudron and McHugh JJ) ('*Wilson*'). See also *Miller v The Queen* (2016) 259 CLR 380, 419 (Gageler J) ('*Miller*'); *Clayton v The Queen* (2006) 231 ALR 500, 522 (Kirby J dissenting) ('*Clayton*').

was unlawful.[18] In the case of the duress defence, the soldier argues they are not culpable, because they effectively had no choice other than to do what they did.[19] It can be seen how this defence could overlap with the defence of superior orders, because the fact they 'effectively had no choice' might reflect that a superior had ordered them to do what they did, and they were liable to commit a crime if they refused, though it can clearly also arise in other factual scenarios. If a soldier effectively had no choice other than to do what they did, the argument is they are not culpable, and should not be convicted of an offence. Hypothetically, in the case of mistake of fact or law, the soldier argues they were mistaken as to the factual scenario, believing what they did was justified based on their mistake (e.g., a civilian was an enemy combatant). Alternatively, the soldier argues that they were mistaken as to the legal scenario, believing their superior had a legitimate basis for the order made, though it was subsequently determined they did not. Again, the argument is that the mistake the soldier admittedly made is of such magnitude as to affect their *culpability*. It exonerates what would otherwise be criminal activity.[20]

Part III will highlight deficiencies in existing law, including: recognition of the obedience imperative; weaknesses in the manifest illegality test; and use of negligence as a basis for determining criminality. Part IV suggests reforms that might better balance the competing interests, including greater acknowledgement of peculiarities unique to the military context. This would be manifested by focusing on the reasonable soldier, not the reasonable person. The court could utilise a list of specific factors in considering whether the illegality of an order would have been recognised by a reasonable soldier. The difficulty of regulating this area, given the myriad of scenarios, is acknowledged. Part V concludes the article.

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18 Lydia Ansermet argues the rationale for the defence of superior orders is that 'a defendant unable to ascertain the wrongfulness of his conduct was never *culpable* to begin with': Lydia Ansermet, 'Manifest Illegality and the ICC Superior Orders Defense: *Schuldtheorie* Mistake of Law Doctrine as an Article 33(1)(c) Panacea' (2014) 47(5) *Vanderbilt Journal of Transnational Law* 1425, 1460 (emphasis added).

19 Brian Myers, 'The Right to Kill or the Obligation to Die: The Status of the Defence of Duress following New Zealand's Implementation of the Rome Statute of the International Criminal Court' (2005) 2(2) *New Zealand Yearbook of International Law* 127, 161: 'The fundamental issue lies with whether we believe that an accused that acts under duress is morally blameworthy. If … duress eliminates free choice … it must follow that the accused is not deserving of any criminal conviction'.

20 George P Fletcher, *Rethinking Criminal Law* (Little Brown, 1978) 736–7; Kumaralingam Amirthalingam, 'Ignorance of Law, Criminal Culpability and Moral Innocence: Striking a Balance Between Blame and Excuse' [2002] (July) *Singapore Journal of Legal Studies* 302, 309: 'By evaluating the mistake in terms of its effect on moral blameworthiness … a defence of reasonable mistake or ignorance of law can be justified'.

II Historical Development

A *Period until the End of World War II ('WWII')*

From earliest days, doubt surrounded the legal position of a subordinate directed to implement 'unlawful' commands. At various times, three different positions have been taken. The first is that the individual subordinate soldier has no personal responsibility for such acts (sometimes referred to as *respondeat superior*).[21] A second is the soldier individual is fully personally responsible for such acts (sometimes referred to as *absolute liability*).[22] A middle position acknowledges the possibility the subordinate *could* be personally liable for implementation of such orders, but permits circumstances where a defence is available (for example *non-manifest illegality*).[23] This can operate so the subordinate has no liability at all (ie superior orders acts as a complete defence), or that superior orders are relevant in mitigation of penalty.[24]

In *Keighly v Bell*,[25] Willes J stated:

> a soldier, acting honestly in the discharge of his duty — that is, acting in obedience to the orders of his commanding officers — is not liable for what he does, unless it be shown that the orders were such as were obviously illegal.[26]

In *R v Smith*,[27] the court stated:

> it is monstrous to suppose that a soldier would be protected if he carried out any act that he was ordered to by his superior officer, where the order was grossly illegal. … The second proposition made is that a soldier is only bound to obey lawful orders, and will be responsible if he obeys an order not strictly legal.

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21 The term *respondeat superior* means 'let the master answer', and finds application in vicarious liability, where an employer is sometimes liable for the acts of an employee that cause loss to third parties. However, parallels in a non-military context are inexact. While vicarious liability sometimes makes an employer liable for what an employee did, it does not generally absolve the employee of personal responsibility for what occurred: Lewis Klar, 'Vicarious Liability' in Carolyn Sappideen and Prue Vines (eds), *Fleming's the Law of Torts* (Lawbook, 10th ed, 2011) 438. This contrasts with the way *respondeat superior* has been applied to the military, which *did* absolve subordinates of personal responsibility: Dinstein (n 10) 8.

22 Dinstein (n 10) 8.

23 Ibid.

24 Ibid 8–9.

25 (1866) 4 F & F 763; 176 ER 781.

26 Ibid 800 [805]. See also Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Steven and Sons, 1887) 80.

27 (1900) 10 CTR 773 (Supreme Court).

> That is an extreme proposition which the Court cannot accept … especially in time of war immediate obedience … is required …
>
> I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying the commands of his superior officer, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier will be protected by the orders of his superior officer.[28]

This concept of 'manifest illegality' would assume importance in subsequent cases.

Despite these precedents, the view developed in international law that it was a good defence for a soldier accused of wrongdoing to demonstrate that they acted pursuant to superior orders. Lassa Oppenheim concluded, '[i]f members of the armed forces commit violations *by order* of their Government, they are not war criminals and may not be punished by the enemy'.[29] Oppenheim wrote a chapter of the *British Manual of Military Law* (1914 and 1917 editions) reflecting this position.[30] In the early 1940s, scholarly opinion was divided about the superior orders defence. Some argued it 'repugnant' to make soldiers personally liable for carrying out orders, because they could not be expected to know international law, and if they refused to obey orders, they risked death.[31] Hans Kelsen argued military discipline risked being undermined if subordinates were expected to question the legality of superior commands.[32] However, others argued the defence of superior orders should be considered, but only as a mitigating factor in sentencing.[33] Oppenheim's book, *International Law, A Treatise: Disputes, War and Neutrality* edited by Hersch Lauterpacht, stated the fact that an officer committed a war crime pursuant to superior orders should not absolve individuals of responsibility.[34] A revised version of article 443 of the *British Manual of Military Law* reflected this position.[35]

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28 Ibid 776.

29 Lassa Francis Oppenheim, *International Law, A Treatise: War and Neutrality* (Longmans, Green, 2nd ed, 1912) vol 2, 310 (emphasis in original).

30 United Kingdom War Office, *British Manual of Military Law* (HM Stationary Officer, 6th ed, 1914) ch 4, art 443.

31 Clyde Eagleton, 'Punishment of War Crimes by the United Nations' (1943) 37(3) *American Journal of International Law* 495, 497.

32 Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31(5) *California Law Review* 530, 556–8.

33 Charles Cheney Hyde, 'Punishment of War Criminals' (1934) 37(1) *Proceedings of the American Society of International Law* 49.

34 Lassa Francis Oppenheim, *International Law, A Treatise: Disputes, War and Neutrality* (Longmans, Green, 6th ed, 1944) 453–4.

35 Jackson Maogoto, 'The Superior Orders Defence: A Game of Musical Chairs and the Jury is Still Out' (2007) 10 *Flinders Journal of Law Reform* 1, 9.

B *Nuremberg Trials*

World War II ('WWII') forced international law to reconsider the defence. The Nuremberg trials involved many leaders within the Nazi regime who raised the defence of superior orders. Article 8 of the articles drawn up for the trials recognised a possible superior orders defence in mitigation of penalty.[36] This places it close to *absolute liability* of subordinates above. The exceptional nature of these trials and the 'most egregious' level of offending concerned is noteworthy.[37] There was significant concern that these individuals should not avoid punishment by claiming they were obeying Hitler's orders.[38] The Nuremberg Military Tribunal ('Tribunal') stated the appropriate test in determining liability of the subordinates was whether 'moral choice was in fact possible'.[39] This choice may be impossible where the subordinate was faced with the choice of being killed or carrying out orders. This principle was applied in *Einsatzgruppen*. The Tribunal held the accused had moral choice, and they were convicted of murder. The Tribunal conflated the superior orders defence with duress, although there is no necessary correlation.[40] The *Einsatzgruppen* judgment related to individuals who executed Nazi opposers.[41] The defendants argued that they were forced, by the threat of their death, to follow orders.[42] These claims were rejected, based on insufficient evidence. There was little evidence those charged had tried to resist orders, they were 'reasoning agents', and the defence of superior orders was unavailable where orders given were 'obviously illegal'.[43]

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36 *Text of the Nürnberg Principles Adopted by the International Law Commission*, UN Doc A/CN.4/L.2 (1950).

37 Mark J Osiel, *Obeying Orders: Atrocity, Military Discipline & the Law of War* (Transaction Publishers, 2002) 42, 83 ('*Obeying Orders*').

38 See Mark WS Hobel, '"So Vast an Area of Legal Irresponsibility"? The Superior Orders Defense and Good Faith Reliance on Advice of Counsel' (2011) 111(3) *Columbia Law Review* 574, 585.

39 *Text of the Nürnberg Principles Adopted by the International Law Commission*, UN Doc A/CN.4/L.2 (1950) principle IV; *France v Goring* [1946] 22 IMT 203. There is debate whether 'moral choice' test complements, or is antagonistic towards, art 8. For a view that it differs from art 8 see Sunita Patel, 'Superior Orders and Detainee Abuse in Iraq' (2007–2008) 5 *New Zealand Yearbook of International Law* 91, 97. For a contrary view see Dinstein (n 10) 150. The 'moral choice' test relates to culpability, not merely sentencing: Sienho Yee, 'The *Erdemovic* Sentencing Judgment: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia' (1997) 26(2) *Georgia Journal of International and Comparative Law* 263, 288.

40 See Andrew Bowers, 'A Concession to Humanity in the Killing of Innocents: Validating the Defences of Duress and Superior Orders in International Law' [2003] (15) *Windsor Review of Legal and Social Issues* 31, 42–6.

41 *Einsatzgruppen Case (United States v Ohlendorf) (Judgment)* (Nuremberg Military Tribunal, Case No 9, 1950) VI 411.

42 Ibid 470, 480.

43 Ibid 470.

Subsequently in the *Hostages Case*, it was determined a subordinate would only be liable where they were either aware of the unlawfulness of orders or should reasonably have been so aware.[44]

C *Subsequently*

In the case of *Kinder*, where the defendant complied with a superior order to kill a Korean civilian, a defence of superior orders failed, because a person of 'ordinary sense and understanding' would have realised the order was unlawful.[45] The United States Air Force Board of Review again emphasised soldiers were reasoning agents who could discern lawful commands from flagrantly unlawful ones.[46] It took into account the soldier's age, education and military experience.[47] A similar approach was adopted in *Calley*, who claimed a superior ordered him to kill unarmed South Vietnamese civilians.[48] On appeal, a majority (Darden CJ dissenting) rejected the argument a lower standard ought to be used by considering whether someone of the 'commonest understanding' would realise the order was illegal.[49] This would take into account the defendant's age, rank, education, training and military experience.[50] Chief Justice Darden expressed concern about convicting an individual of a serious criminal offence based on negligence standards, particularly where obedience to commands was culturally fundamental.[51]

Rule 916(d) of the *Manual for Courts-Martial United States* provides a defence of superior orders, unless the member knew the orders were unlawful or a person of ordinary sense and understanding would have so known.[52] Article 90 of the *Uniform Code of Military Justice* states someone who wilfully refuses to obey a lawful order of a superior commissioned officer shall be punished by death (if during war).[53]

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44 *Hostages Case (United States v Wilhelm List) (Judgment)* (Nuremberg Military Tribunal, Case No 7, 1950) XI 1230, 1271 ('*Hostages Case*').

45 *United States v Kinder*, 14 CMR 742, 777–8 (United States Air Force Board of Review, 1954) ('*Kinder*').

46 Ibid 776.

47 Ibid 774.

48 *United States v Calley*, 46 CMR 1131, 1184 (United States Army Court of Military Review, 1973) ('*Calley CMR*').

49 *United States v Calley*, 22 USCMA 534, 542 (United States Court of Military Appeals, 1973) ('*Calley USCMA*').

50 Ibid.

51 Chief Justice Darden concluded the defence of superior orders 'ought not to be restricted by the concept of a fictional reasonable man so that, regardless of his personal characteristics, an accused judged after the fact may find himself punished for either obedience or disobedience, depending on whether the evidence will support the finding of simple negligence on his part': ibid 545–6. The objective standard has been criticised: Patel (n 39) 119.

52 Joint Service Committee on Military Justice, *Manual for Courts-Martial United States* (2019) pt IV, r 916(d).

53 10 USC § 890 (1950).

Section 2.10 of the *Model Penal Code* (US) provides a defence based on execution of a superior's orders, provided the subordinate was unaware of the illegality.[54] It makes no reference to reasonable persons. Section 2.09 provides a duress defence, including to murder.[55] The *British Military Manual of Military Law* adopts the concept of 'manifestly illegal'.[56]

The *Statute of the International Criminal Tribunal for the Former Yugoslavia* ('*ICTY Statute*') provides the defence of superior orders mitigates punishment, but does not absolve guilt, for criminal behaviour.[57] The defence does not apply if the accused knew or had reason to know orders were unlawful.[58] In *Prosecutor v Erdemovic* ('*Erdemovic*'), the accused pleaded guilty to killing of at least 70 Muslim civilians during the civil war.[59] He claimed he initially refused to kill, but was told that if he did not, he would be murdered.[60] He believed his wife and child would be victimised.[61] Erdemovic knew the orders were illegal and initially refused to carry them out.[62] The contention on appeal was that he had no real choice but to fulfil the illegal orders.[63] Members of the International Criminal Tribunal for the Former Yugoslavia ('International Criminal Tribunal') determined the superior orders defence could be utilised with a duress or mistake defence.[64] A majority adopted the common law position that duress was not a defence to murder,[65] while civil law jurisdictions permit duress to apply.[66] The International Criminal Tribunal took into account Erdemovic's age (23), that he was a low-ranking officer who had chosen to serve in

54 *Model Penal Code* (US) (n 16) § 2.10.

55 Ibid.

56 United Kingdom Defence Ministry, *British Manual of Military Law* (HM Stationary Officer, 12th ed, 1972) 23.156.

57 SC Res 827, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN Doc S/RES/1877 (7 July 2009) art 7(4) ('*ICTY Statute*').

58 *Prosecutor v Erdemovic (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22, 7 October 1997) [15], [50] (Judge Cassese, dissenting on other grounds) ('*Erdemovic Appeal*').

59 Ibid [8].

60 Ibid.

61 Ibid.

62 Ibid.

63 Ibid [12].

64 Ibid [15] (Judge Cassese), [59] (Judge Stephen) (both dissenting on other grounds).

65 Ibid [75], [88] (Judges McDonald and Vohrah). See also: at [12] (Judge Li). Relevant authorities from the United Kingdom include: *DPP for Northern Ireland v Lynch* [1975] AC 653 ('*Lynch*'); *Abbot v The Queen* [1977] AC 755 ('*Abbot*'); *R v Howe* [1987] AC 417 ('*Howe*'); *R v Gotts* [1992] 2 AC 412 ('*Gotts*'). In the related context of the defence of 'necessity', see *R v Dudley* [1884] 14 QBD 273 ('*Dudley*').

66 *Erdemovic Appeal* (n 58) [59] (Judges McDonald and Vohrah). See Suzannah Linton, 'Case Analysis: Reviewing the Case of Dražen Erdemović: Unchartered Waters at the International Criminal Tribunal for the Former Yugoslavia' (1999) 12(1) *Leiden Journal International Law* 251, 258.

a unit because he believed it was not involved in combat, the fact he harboured no animosity towards other ethnicities, his plea of guilty to the offence, his willingness to assist authorities, and the fact he was remorseful.[67] He was jailed for five years.[68]

D *Rome Statute*

The *Rome Statute of the International Criminal Court* ('*Rome Statute*') re-established a superior orders defence, broader than Nuremberg Articles or the *ICTY Statute*.[69] This was a return to the situation prior to WWII.[70] Article 33 states the fact a crime was committed by a person pursuant to a superior order does not generally relieve the person from criminal responsibility, unless:

> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>
> (b) The person did not know that the order was unlawful; and
>
> (c) The order was not manifestly unlawful.[71]

Element (b) represents an exception to the general principle that ignorance of the law does not excuse illegal conduct. These requirements are cumulative, meaning for the defence to apply all three elements must exist. The requirement that the act not be 'manifestly unlawful' is not defined, and open to interpretation.[72] The defence of superior orders cannot apply to genocide or crimes against humanity.[73]

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67 *Prosecutor v Erdemovic (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-22-T, 5 March 1998) 13–16 ('*Erdemovic Trial*').

68 Ibid 22 [23].

69 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 28 ('*Rome Statute*'); Massimo Scaliotti, 'Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility — Part I' (2001) 1(1–2) *International Criminal Law Review* 111, 139.

70 For the position of various delegations see Scaliotti (n 69) 135–42.

71 *Rome Statute* (n 69) art 33.

72 Carmel O'Sullivan, *Killing on Command: The Defence of Superior Orders in Modern Combat* (Palgrave Macmillan, 2016) 52.

73 The division between genocide, crimes against humanity, and war crimes, has been criticised on the basis there is often similarity in gravity of the harm to victims: Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck, 2nd ed, 2008) Margin No. 30 [587]. Ziv Bohrer notes some junior officers may be unaware activity amounts to either genocide or a crime against humanity, and it is not fair to bar them from the superior orders defence in some situations: Ziv Bohrer, 'The Superior Orders Defense: A Principal-Agent Analysis' (2012) 41(1) *Georgia Journal of International and Comparative Law* 1, 71.

It is unclear where the burden of proof lies for art 33,[74] and whether it is legal or evidentiary. The way the defence is expressed, in its departure from general rules of liability, suggests the defendant bears at least an evidentiary onus.[75] Arguably the statute is silent as to whether the superior's command was 'avoidable'.[76] There is uncertainty regarding whether this is a mistake of law or fact defence.[77] As a result, it has been criticised.[78]

Further possible defences in this context include art 31(1)(d), regarding actions committed under duress of imminent death or serious injury, where the person acts reasonably and necessarily to avoid the threat.[79] This could apply where the injury intended is not worse than the harm sought to be avoided. This utilitarian requirement has been criticised.[80] This is difficult to apply in a situation like *Erdemovic*, where the accused admitted they killed at least 70, but claimed if they had refused to do so, they would have been killed. In such scenario, art 31(1)(d) would probably not apply as a defence, because it could not be said the intent of the accused in killing was 'less worse' than the danger sought to be avoided. This Article does not specifically exclude murder, which is a point of difference from *Erdemovic*, and the common law.

Article 32(1) provides a defence of mistake of fact, and art 32(2) likewise provides for a defence of mistake of law, if the mistake relates to the mental element required for the crime, or the situation discussed in art 33.[81] Article 30 defines the mental element in terms of intent and knowledge.[82] Intent is defined as where, in relation to conduct, they intend to do the act; and in relation to consequence, means for it to occur or knows it will likely occur.[83] Knowledge means awareness of the existence of certain circumstances.[84]

74 Patel (n 39) 103.

75 Scaliotti (n 69) 125.

76 Ansermet (n 18) 1452.

77 Stanley Yeo argues it is a mistake of law defence: Stanley Yeo, 'Mistakenly Obeying Unlawful Superior Orders' (1993) 5(1) *Bond Law Review* 1, 2. Jeanne Bakker argues it is a mistake of fact defence: Jeanne L Bakker, 'The Defense of Obedience to Superior Orders: The Mens Rea Requirement' (1989) 17(1) *American Journal of Criminal Law* 55, 68–9.

78 See, eg, Dinstein (n 10) xx–xxii.

79 *Rome Statute* (n 69) art 31(1)(d). See generally Bowers (n 40) 37–42.

80 Scaliotti (n 69) 156.

81 *Rome Statute* (n 69) art 32(1)–(2).

82 Ibid art 30.

83 Ibid.

84 Ibid.

E *Australian Law*

The Australian *Manual of Military Law* previously recognised a superior orders defence.[85] Now, s 14 of the *Defence Force Discipline Act 1982* (Cth) provides that a person is not liable to conviction of a service offence because of an act or omission that 'was in execution of the law' or 'was in obedience to' a 'lawful order' or 'an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful'.[86] This is similar to the standard 'manifest illegality', as applied by international tribunals.[87] It casts an *evidentiary* onus upon an accused.[88]

Several provisions impose criminal liability upon members of the defence force who fail to carry out a superior's orders. Section 15F establishes an offence for soldier to not use 'utmost exertions' to implement a superior's orders (carrying a maximum penalty of 15 years' imprisonment).[89] A defence of reasonable excuse applies, but carries a legal onus — the soldier must prove the excuse on the balance of probabilities.[90]

Section 27 states a soldier commits an offence if they disobey a lawful command (carrying a maximum penalty of two years' imprisonment).[91] No defence of reasonable excuse exists. The command must be lawful.[92] A similar provision exists regarding lawful direction by a person in command of a ship, aircraft or vehicle and

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85 '[M]embers of the armed forces who commit … violations of the recognized rules of warfare as are ordered by their Government or by their commander are not war criminals': Australian Military Board, *Manual of Military Law* (1941) art 443. This was referred to by Toohey J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 683.

86 *Defence Force Discipline Act 1982* (Cth) s 14.

87 This provision does not expressly utilise the concept of 'manifest illegality', but a reading of the Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 36 [134(h)], 35 [131(b)] suggests the contrary. It states eight factors to be taken into account in interpreting s 14. One is that '[t]here is a requirement to maintain consistency with international law and any commitments of Australia to international conventions where the defence of obedience to superior orders is relevant': 37 [134(h)]. It also refers approvingly to British service law that a member cannot be convicted for obeying a superior order 'unless the order was clearly unlawful': 35 [131(b)]. This suggests Parliament intended this provision to have a similar meaning to the concept of 'manifest illegality' that had by then been accepted in international law.

88 *Defence Force Discipline Act 1982* (Cth) s 10: *Criminal Code Act 1995* (Cth) s 13.3.

89 *Defence Force Discipline Act 1982* (Cth) s 15F(1).

90 Ibid s 15F(2).

91 Ibid s 27(1).

92 Ibid s 27(1)(a).

pertains to when the person ordered does not comply.[93] A defence of reasonable excuse applies, carrying a *legal* onus.[94]

Division 268 of the *Criminal Code Act 1995* (Cth) implements the *Rome Statute*.[95] Section 268.116 provides a defence of superior orders.[96] It does not apply to genocide or crimes against humanity.[97] It potentially applies to war crimes.[98] The defence is available if:

(a) the war crime was committed pursuant to a superior's order;

(b) the person was under legal obligation to obey;

(c) they did not know the order was unlawful;[99] and

(d) it was not manifestly unlawful.[100]

Consider (c) and (d) in relation to the *Brereton Report*. Firstly, the report alleges an individual murdered another in circumstances amounting to a war crime, and they placed material on the deceased's body to make it appear they were an armed enemy combatant.[101] Of course, if the person were such combatant, the killing would not be a war crime. The suggestion is the person was *not* an enemy combatant, but the soldier who conducted the killing 'staged' the scene to make it look like it.[102] These allegations have not been tested but, if proven true, are an example where the defence of superior orders could not apply. This is because the soldier's

93 Ibid s 28(1).

94 Ibid s 28(3). It is an offence for a defence force member to fail to comply with a lawful general order, unless they can show they neither knew of, nor could reasonably have known of, the existence of the order: s 29.

95 *Criminal Code Act 1995* (Cth) div 268; Justice Paul Brereton, 'The International Law of Armed Conflict: The Australian Application' (2021) 27 *James Cook University Law Review* 1, 25.

96 Ibid s 268.116.

97 See ibid s 268.116(1). 'Crimes against humanity', which includes the concept of 'other inhumane acts', is broad and uncertain: Brad Copelin, 'Defending the Indefensible: The Defence of Superior Orders for War Crimes' (2009) 6(1) *Australian Army Journal* 37, 42.

98 *Criminal Code Act 1995* (Cth) s 268.116(3).

99 Clearly from this wording Parliament does not intend guilty knowledge to be an element of crimes for which s 268.116 could operate as a defence, because, if it did, requirement (c) would be superfluous. The *Criminal Code Act 1995* (Cth) s 5.2 defines the fault element of intent to mean intention to engage in conduct, intention with respect to circumstances that are believed to exist or believed will exist, and intention as to result. Knowledge of unlawfulness is unnecessary.

100 *Criminal Code Act 1995* (Cth) s 268.116(3).

101 *Brereton Report* (n 4) 73.

102 Ibid.

behaviour, in staging the scene to make the deceased appear to be a combatant, suggests knowledge their actions were illegal. Even if the soldier argued they were ordered by superiors to 'stage' the victim as a combatant, proving element (d) would be difficult. The *Brereton Report* suggests possible improper behaviour in the use of unapproved ammunition by soldiers.[103] However, if ordered by a superior, it is doubtful it would be a war crime, depending on the interpretation of s 268.57 of the *Criminal Code Act 1995* (Cth).[104] This may be an example of an order not manifestly unlawful.

The accused bears an evidentiary burden regarding the above elements. They must produce some evidence that each element exists, but not on the balance of probabilities. The command responsibility doctrine, where superior officers may sometimes be held liable for misdeeds of subordinates, appears in s 268.115 of the *Criminal Code Act 1995* (Cth).[105] This does not necessarily impact on subordinate liability, since both commander and subordinate may face legal liability over one event.

Division 268 does not specifically implement *Rome Statute* provisions on duress and mistake of law. This may be because it deals with many situations, including international law and other criminal offences, and the fact the *Criminal Code Act 1995* (Cth) already generally provided for these defences, prior to the insertion of div 268.[106] Section 10.2 of the *Criminal Code 1995* (Cth) provides a general defence of duress. This applies where a person reasonably believes: (a) a threat will be carried out if they do not commit the offence; (b) there is no reasonable way the threat can be dissipated; and (c) the conduct is a reasonable response to the threat.[107] Mistake of fact, not law, is a legislated defence.[108] It may sometimes overlap with a defence of superior orders.[109] Duress and mistake defences are not, as s 268.116 is, limited to war crimes.[110] The defences do not exclude application to alleged murder.[111]

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103 Ibid 107.

104 *Criminal Code Act 1995* (Cth) s 268.57. This section creates a war crime of using particular kinds of bullets.

105 Ibid s 268.115; Anthony Gray, 'The Command Responsibility Doctrine in Australian Military Law' (2022) 45(3) *University of New South Wales Law Journal* 1251.

106 The general position in the *Criminal Code Act 1995* (Cth) is that, where a defence is raised, the accused bears an evidentiary onus, not legal onus, unless otherwise specified: s 13(3).

107 *Criminal Code Act 1995* (Cth) ss 10.2(2)(a)–(c).

108 Ibid ss 9.1, 9.3.

109 Ibid s 268.116.

110 Of course, both the duress and mistake of fact defence require reasonableness, and this will effectively limit their application to genocide and crimes against humanity.

111 See also *Defence Act 1903* (Cth) pt IIIAAA regarding callouts and superior orders.

Some criminal codes provide a defence of superior orders,[112] but it is not recognised at common law.[113] There is recognition of a duress defence in jurisdictions with criminal codes,[114] and at common law.[115] In summary, Australian law reflects competing principles in international law in requiring soldiers obey orders, but also expecting them (sometimes) to reject unlawful orders.

F *Summary*

The historical record embraces all three theories on the legal position of subordinate officers ordered by superiors to commit unlawful acts. As discussed, they are that the subordinates bear no personal responsibility for actions committed pursuant to the order of a superior, that the subordinate is fully personally responsible for acts committed to such order, and that the subordinate could be personally liable if they carried out orders that were manifestly unlawful. The earliest relevant case law suggests the subordinate soldier is personally liable for carrying out clearly illegal orders. In the early 20th century, soldiers enjoyed immunity from prosecution. The World Wars resulted in pressure to hold those responsible for criminal actions to account. The Nuremberg Articles indicated almost absolute liability of subordinates, with the 'defence' of superior orders only permitting penalty mitigation. The tribunal equated this 'defence' with the concept of duress, unduly narrowing its scope. The *ICTY Statute* was interpreted similarly in *Erdemovic*. Subsequent case law suggested a softening of this position, permitting a defence (going to culpability not just sentence mitigation) where the illegality of the relevant orders was not 'manifest'. Questions subsequently arose regarding application of this test. Some authorities considered whether soldiers knew the illegality of certain actions.[116] This could require evidence of actual knowledge. However, courts favoured a negligence 'should have known' standard.[117] Relatedly, different views appeared

112 *Criminal Code Act 1899* (Qld) s 31(1)(b) provides for a complete defence of compliance with orders that a person is bound by law to obey unless the illegality of the orders is manifest. See also *Criminal Code Act 1924* (Tas) s 38; *Criminal Code Act 1913* (WA) s 31(1)(b).

113 *A v Hayden [No 2]* (1984) 156 CLR 532, 540 (Gibbs CJ), 550 (Mason J), 562 (Murphy J), 581–2 (Brennan J), 593 (Deane J); *White v Director of Military Prosecutions* (2007) 231 CLR 570, 592 (Gummow, Hayne and Crennan JJ) ('*White*').

114 *Criminal Code Act 1899* (Qld) ss 31(1)(c)–(d); *Criminal Code Act 1924* (Tas) s 20; *Criminal Code Act 1913* (WA) ss 32, 23A.

115 *R v Brown* [1968] SASR 467 ('*Brown*'); *R v Smyth* [1963] VR 737 ('*Smyth*').

116 *Model Penal Code* (US) (n 16) § 2.10.

117 *Hostages Case* (n 44) 1271; *Kinder* (n 45) 777–8; *Calley USCMA* (n 49) 1184. Confusingly, some passages within the same judgment appear to refer to both: consider this passage from the *High Command Case (United States v Wilhelm von Leeb) (Judgment)* (Nuremberg Military Tribunals, 1949) XII 74 ('*High Command Case*') stating that a field commander

> cannot be charged under International Law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under International Law. Such a commander

regarding whether an objective test, focusing on what a 'reasonable person' would have known, was preferred, or whether a subjective test, focusing on the individual soldier and their characteristics, should be favoured.[118] The relevance of whether the subordinate could have avoided the orders was also raised.[119] The *Rome Statute* softened the Nuremberg position and the *ICTY* approach, at least where the order was not 'manifestly illegal'. It separated the defence of superior orders from other defences, including duress, further departing from the Nuremberg applications. However, it framed duress narrowly, applying a utilitarian lens, and remained silent on its ambit regarding the crime of murder. Australia largely adopted the *Rome Statute*, including the defence of superior orders based on 'manifest illegality'.

III Critique of Current Law

A *Defence of Superior Orders Inadequately Recognises the Special Need for Obedience within the Military*

One criticism of the current law is that it does not fully take into account the unique features of military culture. By failing to adequately take these elements into account, possibly because of a desire to apply civil law principles to the military,[120] the law places soldiers in an unreasonable, if not impossible, situation. One such aspect is the need for strict obedience to superiors within the military as a condition of its functionality.

The need for a disciplined military was recognised in *Grant v Gould*, where Lord Loughborough stated, 'there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a mutiny act'.[121] Then Chief Justice of the United States Supreme Court John Marshall recognised obedience within the

> cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance.

The first sentence in this sentence refers to whether an order is 'obviously criminal', suggesting a negligence, ought to have known standard. However, the third sentence apparently contradicts this, stating that the obedient solider is effectively only liable if he has specific knowledge as to the illegality of the orders.

118 *Kinder* (n 45).

119 *High Command Case* (n 117) 27.

120 See Matthew Groves, 'The Civilianisation of Australian Military Law' (2005) 28(2) *University of New South Wales Law Journal* 364.

121 (1792) 2 H BL 69; 126 ER 434, [99] 450.

military as 'indispensably necessary'.[122] Similar sentiments have been expressed by the Canadian Supreme Court.[123]

The High Court has reflected on the particularities of military environments, including systems of hierarchical command;[124] as well as the need for efficiency, good order, and discipline.[125] The High Court recognised soldiers must act with 'due despatch and decisiveness', and that this will be aided where their legal position is clear.[126] Six members noted in *Haskins v Commonwealth*:

> Obedience to lawful command is at the heart of a disciplined and effective defence force. To allow an action … to be brought … against another where that other was acting in obedience to orders … implementing disciplinary decisions that, on their face, were lawful orders would be deeply disruptive of what is a necessary and defining characteristic of the defence force. It would be destructive of discipline because to hold that an action lies would necessarily entail that a subordinate to whom an apparently lawful order was directed must either question and disobey the order, or take the risk of incurring … liability.[127]

The *Law of Land Warfare* partly acknowledges this, stating obedience to lawful orders is expected among military ranks, and it is often unrealistic to expect subordinates to consider the legality of orders given.[128] It acknowledges laws of war are 'controversial'.[129] It may be unrealistic to expect soldiers to disobey superior

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122 See, eg: *Little v Barreme*, 6 US 170, 179 (1804) (Marshall CJ). See also *Martin v Mott*, 25 US 19, 30 (1827) (Story J). It has been stated that:

> The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid … the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

Calley USCMA (n 49) 543.

123 See, eg: *R v Finta* [1994] 1 SCR 701, 777, 828–9 ('*Finta*'). See also Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 125.

124 See, eg: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 562 (Brennan and Toohey JJ) ('*Re Tracey*'); *White* (n 113) 588 (Gleeson CJ); *Private R v Cowen* (2020) 271 CLR 316, 392 [193]–[194] (Edelman J).

125 *Re Tracey* (n 124) 538 (Mason CJ, Wilson and Dawson JJ).

126 *Groves v Commonwealth* (1982) 150 CLR 113, 133 (Stephen, Mason, Aickin and Wilson JJ).

127 (2011) 244 CLR 22, 47–8 [67] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). To like effect 'this is in reality the only way in which a military unit can effectively operate': *Finta* (n 123) 828.

128 Department of the Army, *The Law of Land Welfare* (FM 27-10, 18 July 1956) para 509(b).

129 Ibid.

orders, because their training leads them to obey unquestioningly.[130] The fact this continues to be a strong influence on the behaviour of soldiers is reflected in the *Brereton Report* which explained allegedly criminal behaviour of some soldiers in Afghanistan in reference to the culture of obedience.[131]

O'Sullivan documents how military training encourages unquestioning obedience, including being separated from civilians, deliberate disorientation, and inculcating values of team loyalty.[132] Their training involves rote learning, to allow them to respond quickly to challenging situations.[133] What soldiers see in training and in combat may dehumanise and desensitise them to brutality. While arguably necessary to make them effective, it can reduce capacity to question the legality of orders.[134] It can also be dangerous for a subordinate to refuse to carry out superior orders.[135] The subordinate may not be in a good position to assess the lawfulness of an order, because they may have limited information. For example, they may not be aware of atrocities elsewhere, or be aware of the 'bigger picture' of particular battles.[136]

Other scholars have reflected on the difficult situation of combat, and that a person's mental faculties may be impeded during such situations, leading them to make

130 Copelin (n 97) 39 who, after acknowledging current army recruitment training regimes convey ADF members need not follow illegal orders, states:

> This appears to directly contradict the basic principles of military discipline. The aim and purpose of all forms of discipline, even the most basic foot drill, is 'to instil instinctive obedience and reaction to words of command'. Essentially, soldiers are trained to do what they are told, when they are told, instinctively, without questioning the command.

This is acknowledged in Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth). Discussing the defence of superior orders in s 14, the Explanatory Memorandum notes that relevant to its interpretation is 'maintenance of military discipline and effectiveness requires unhesitating compliance with orders': 36 [134(a)].

131 *Brereton Report* (n 4) 31.

132 O'Sullivan (n 72) 80–1.

133 Ibid 84–5.

134 Ibid chs 4–5; Sara Mackmin, 'Why Do Professional Soldiers Commit Acts of Personal Violence that Contravene the Law of Armed Conflict?' (2007) 7(1) *Defence Studies* 65; Peter Rowe, 'Military Misconduct during International Armed Operations: 'Bad Apples' or Systemic Failure?' (2008) 13(2) *Journal of Conflict and Security Law* 165. There are some claims training is changing, and recruits may have increased awareness about possible illegality of superior orders: Rhonda M Wheate and Nial J Wheate, 'Lawful Dissent and the Modern Australian Defence Force' [2003] (160) *Australian Defence Force Journal* 20, 22.

135 Mark J Osiel, 'Obeying Orders: Atrocity, Military Discipline and the Law of War' (1998) 86(5) *California Law Review* 939, 967 ('Atrocity, Military Discipline and the Law of War'); Osiel, *Obeying Orders* (n 37) 64–5.

136 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 967.

sub-optimal decisions.[137] In this context, it is difficult to expect subordinates to determine whether an order they are being given is unlawful, and disobey it.

Thus, any legal test in this context must take into account the peculiar dynamics within military that explains the readiness of soldiers to follow orders without question. O'Sullivan suggests that the standard to be applied to a test of 'manifestly unlawful' should be that of a reasonable soldier, not a reasonable person.[138] This takes account of the special features of the military environment in its assessment of 'reasonableness'. O'Sullivan also states how military culture makes it less likely a soldier will disobey a superior's orders, so the application of a reasonable person standard in terms of disobedience is unfair.[139]

In Part IV, I outline how the law might best account for these unusual features.

B *'Manifest Unlawfulness' in the Context of the Defence of Superior Orders is Problematic*

This test is vague.[140] It is not defined in the *Rome Statute*, and liable to interpretations. It 'lacks any discernible judicial direction'.[141] At least two aspects create uncertainty: (1) the meaning of 'manifest unlawfulness'; and (2) the practical ability of a subordinate to know whether an order is unlawful. A commonly cited explanation of 'manifest unlawfulness' is one that

> should fly like a black flag above a given order, as a warning reading 'Prohibited!' Not mere formal illegality, hidden or half-hidden, not the kind of illegality discernible only to the eyes of legal experts, but a flagrant and manifest breach of the law, certain and necessary illegality appearing on the face of the order itself; the clearly criminal character of the order or of the acts ordered, an illegality clearly visible and repulsive to heart, provided the eye is not blind and the heart is not stony and corrupt — that is the extent of 'manifest illegality' required to

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137 Richard A Gabriel, *No More Heroes: Madness and Psychiatry in War* (Hill & Wang, 1987) 142; Osiel, *Obeying Orders* (n 37) 53. Osiel adds 'law's promise to prevent atrocity becomes chimeral if it refuses to confront the psychological reality and the moral reorientation of the battlefield': 162–3.

138 O'Sullivan (n 72) 75–6.

139 Ibid 166:

> the law's presumption that the reasonable person will identify and disobey an illegal order does not match the behaviour of the average person in practice. The soldier is even more likely to obey than the average person. Accordingly, soldiers are more prone to obedience than the law recognises.

the legal standard of 'reasonableness' is based upon the presumption that the reasonable person will identify and disobey a clearly illegal order. There is a disparity between the legal ideology and behaviour in practice and this disparity is substantially more pronounced for the reasonable soldier: at 173–4.

140 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 969–70; Osiel, *Obeying Orders* (n 37) 71–2.

141 Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210, 224.

> release a soldier from a duty of obedience and make him criminally responsible for the acts.[142]

This passage reflects two points of uncertainty. First, it is not clear in international law whether the soldier must know the order is illegal (suggested by the above test) to establish manifest illegality, or whether it is sufficient they *ought* to have known it (suggested by *Finta*, *Calley* and *Kinder*). The *Rome Statute* expressly distinguishes whether a person knows of the illegality from questions of manifest illegality.[143]

Elsewhere, courts interpreting manifest illegality have generally settled upon an objective standard familiar in non-criminal law — whether a reasonable person would have been aware of the illegality.[144] It reflects difficulties that would otherwise exist with a purely subjective view. It is difficult to prove what another person knew. Thus, courts have permitted an inference that a person knew, where an 'ordinary person' would have known.[145] I will discuss the difficulties with the use of negligence here presently. For now, the point is that courts have reached conflicting positions on whether it is necessary the accused know of the illegality, or whether it is sufficient they ought to have known.

Second, reference to 'average person' is unclear — is this an average *person* or an average *soldier*?[146] What, if any, relevance does the particular soldier's characteristics have, in deciding? Some argued that the subjective characteristics of the soldier, including experience, training, rank and age are relevant.[147]

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142 *Attorney-General of the Government of Israel v Eichmann*, 36 ILR 275, 277 (Supreme Court of Israel, 1962), cited in Samuel White (n 141) 225; *Finta* (n 123) 834 (Cory J for Gonthier and Major JJ, Lamer CJ agreeing at 818): 'one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable'.

143 *Rome Statute* (n 69) art 33(1)(b)–(c).

144 *The Queen v Brocklebank* (1996) CMAC 383, 51–2 (Weiler JA).

145 Dinstein (n 10) 29: 'the law contrives an objective test which will facilitate the task of ascertaining his subjective knowledge'.

146 Samuel White (n 141) 225.

147 Monu Bedi, 'Entrapped: A Reconceptualization of the Obedience to Orders Defense' (2014) 98(6) *Minnesota Law Review* 2103, 2129. Yeo (n 77) 17 suggested the following factors should be taken into account:

(a) the relative ranks of the superior and the recipient of the order;
(b) the age; rank, experience, intelligence and training of the subordinate;
(c) whether the subordinate had good grounds to consider the order lawful, and whether he or she might consider that the superior had such grounds of which he or she was unaware;
(d) whether the subordinate had time to clarify in his or her own mind, given the circumstances, whether the order was unlawful; and
(e) whether there was a situation of emergency at the time when the order was given.

The majority in *Finta* (n 123) 838 referred to rank as relevant. Paul Eden rejected an objective test in such circumstances: Paul Eden, 'Criminal Liability and the Defence of Superior Orders' (1991) 108(4) *South African Law Journal* 640, 653–4.

Mark Osiel argued that the 'manifest unlawfulness' test might have unintended consequences.[148] Sometimes subordinates must be able to assess a given situation carefully, including understanding likely consequences of actions, in determining their legality.[149] However, the manifest illegality doctrine discourages subordinates from undertaking this enquiry, encouraging them to simply obey orders lawful on their face.[150]

It is argued that 'discoverability' of illegality is relevant — whether a person in the subordinate's position would have been put on notice to investigate possible illegality, how easy it would have been for them to have discovered it, and their awareness of its likely harm to others.[151] Whether the situation was emergency or routine might be relevant.[152] However, the law does not currently expressly refer to such factors, so courts might utilise them or not.

It is unclear whether all orders to commit war crimes are 'manifestly unlawful', or whether behaviour needs to reach levels of gross immorality.[153] Some argued whether something is a war crime is sometimes contentious.[154] One example is s 268.57 of the *Criminal Code Act 1995* (Cth), involving the use of prohibited bullets (maximum 25 years' imprisonment).[155] Another relates to s 268.58, 'outrage to personal dignity' (maximum 17 years' imprisonment).[156] Section 268.35 creates a crime of attacking civilians not directly involved in hostilities (maximum imprisonment for life).[157] Section 268.40 creates a war crime of killing or injuring a person *hors de combat* within international law.[158] Section 268.38 creates a war crime of launching an attack which will knowingly cause incidental death or injury to civilians, where they know that will be 'excessive' given the 'concrete and direct military advantage' expected.[159]

148 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 971.

149 Ibid.

150 Ibid.

151 Ansermet (n 18) 1458–9.

152 Bohrer (n 73) 53.

153 See ibid 15.

154 See, eg, Martha Minow, 'Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence' (2007) 52(1) *McGill Law Journal* 1, 9: 'Sorting out lawful military orders from unlawful ones is difficult under the best of circumstances.' See also Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 978: 'Many key issues in the law of armed conflict remain unclear, as all students of the subject acknowledge.' Cf the dissenting opinion of La Forest J (L'Heureux-Dube and McLachlin JJ agreeing at 876) in *Finta* (n 123) 730.

155 *Criminal Code Act 1995* (Cth) s 268.57.

156 Ibid s 268.58.

157 Ibid s 268.35.

158 Ibid s 268.40.

159 Ibid s 268.38.

Subordinates may be unclear whether bullets are prohibited,[160] and whether activity will outrage a victim's personal dignity.[161] A soldier may not know whether targets are civilians, or whether a person falls within the *hors de combat* definition. *Protocol I* of the *Geneva Conventions* refers, inter alia, to whether a person has 'clearly expressed an intention to surrender' or is 'incapable of defending himself [or herself]'.[162] Given an international conflict and language differences, it may be unclear whether a person expressed intention to surrender. A soldier may not know whether a person can defend themselves, whether they are *hors de combat*, and thus whether killing them would amount to a war crime. A soldier may not have information to determine whether incidental death/injury to civilians will outweigh expected military advantage or know the latter.

The asymmetrical nature of modern warfare exacerbates this.[163] Sometimes, activities that might otherwise be war crimes might be 'reprisals',[164] about which the subordinate may be unaware.[165] Soldiers are often not well trained in the obedience to orders defence, and the standards that courts use to assess their conduct.[166] Alternative tests are available.[167] Arguments about the uncertain nature of 'manifest illegality' are reinforced in empirical work involving military recruits. Individuals were asked how they would define an unlawful order. Of those surveyed, 27% said they would refer to their personal views of immorality and humanity; 30% said they would do so based on common sense, experience and instinct.[168] Such yardsticks are subjective, and a questionable basis of determining criminality of acts. In summary,

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160 Charles Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied' (1999) 81(836) *International Review of the Red Cross* 785, 792–3.

161 *McCall v McDowell*, 15 F Cas 1235, 1241 (1867):

> Between an order plainly legal and one palpably otherwise — particularly in time of war — there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions of which it cannot be expected that the inferior is informed or advised.

162 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 41(2).

163 O'Sullivan (n 72) 63.

164 See: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, r 145; Andrew D Mitchell, 'Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law' (2001) 170(1) *Military Law Review* 155.

165 Bakker (n 77) 68–9.

166 Bedi (n 147) 2139–40.

167 For example, Osiel, *Obeying Orders* (n 37) 136 suggested a test whether the defendant's error regarding legality of the orders given to them was reasonable, all relevant facts considered. He suggested that the test is whether 'a reasonable soldier … would have recognised as unlawful': at 326. Osiel suggested a multi-factor test is useful, but does not nominate the factors: at 360.

168 Wheate and Wheate (n 134) 24.

uncertainty attends interpretation of 'manifest illegality'. When the consequences of rule breach here include significant penalty, this is unsatisfactory.

C *Use of Negligence to Determine Criminal Liability Problematic*

Under current laws, soldiers can be convicted of a criminal offence, with no defence, for following a superior's order, where the soldier's action is criminal, even if they did not know such, if the court concludes they ought to have known. The laws include: *Defence Force Discipline Act 1982* (Cth) s 14; *Criminal Code Act 1995* (Cth) s 268.116; and *Defence Act 1903* (Cth) s 51Z. These laws all provide defences to what otherwise would be criminal behaviour, where the soldier 'could not reasonably be expected to know' the illegality (*Defence Force Disciplinary Act 1982* (Cth)) or order was not 'manifestly unlawful' (*Defence Act 1903* (Cth) and *Criminal Code Act 1995* (Cth)). Similarly in international law, courts have accepted negligence standards in interpreting 'manifestly unlawful' — whether the soldier ought to have known the order was illegal. Satisfaction of this test renders a soldier guilty of serious crimes, those requiring intent. Osiel confirmed that

> evidence concerning unreasonableness is used circumstantially to ascertain the accused's actual knowledge of what he was doing. From what others would have known, an inference is drawn as to what the accused himself knew or intended. In this way, evidence of unreasonableness supports a *mens rea* of knowing or intentional wrongdoing. It thereby permits conviction for murder … evidence of what a reasonable person would think can impugn the credibility of the defendant's professed mistake. In cases such as those involving rape, torture, murder and armed robbery, the unreasonableness of the soldier's mistake has been so egregious as to eliminate any credible claim that he was mistaken at all. Hence, finding the defendant's act manifestly illegal establishes a conclusive presumption of the defendant's awareness of the unlawfulness of his orders.[169]

It is problematic to impose criminal punishment on a person who was (merely) negligent. Negligence is a non-criminal law concept, used to determine whether a defendant should compensate a plaintiff for loss/injury the former allegedly caused the latter. It is for purposes of compensation, not punishment. Admittedly, the soldier committed the act with intent; they knew the act they were committing. However, they argue they were unaware of its illegality. Effectively, the law is removing a defence to what would otherwise be criminal,[170] if the accused was negligent. The law effectively applies a non-criminal concept to determine criminal liability. The folly of this was noted by Darden CJ in *Calley*.[171] His Honour favoured a liberal interpretation of defence of superior orders; rather than whether the soldier ought to have known of the order's illegality (negligence standard).[172] His Honour favoured

169 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 977–8 (emphasis in original) (citations omitted).

170 Of course, unless another recognised defence in criminal law applies.

171 *Calley USCMA* (n 49).

172 Ibid 546.

a test based on the 'apparent and palpable to the commonest understanding' of the illegality.[173] The precise formulation settled upon matters less than evident concern simple negligence standards in this context. He argued that his test

> recognizes that the essential ingredient of discipline in any armed force is obedience to orders and that this obedience is so important it should not be penalized unless the order would be recognized as illegal, not by what some hypothetical reasonable soldier would have known, but also by 'those persons at the lowest end of the scale of intelligence and experience in the services.' This is the real purpose in permitting superior orders to be a defense, and it ought not to be restricted by the concept of a fictional reasonable man so that, regardless of his personal characteristics, an accused judged after the fact may find himself punished for either obedience or disobedience, depending on whether the evidence will support the finding of simple negligence on his part. … [T]he standard of a 'reasonable man' is used in other areas of military criminal law … But in none of these instances do we have the countervailing consideration of avoiding the subversion of obedience to discipline in combat …[174]

This passage evinces concern with the use of a negligence test to determine criminal liability, a concern that I share. Members of the High Court elsewhere have expressed concern with imposition of criminal punishment for negligence.[175]

Arguably, something higher than a finding that the soldier 'should have known' the order was illegal is necessary — perhaps 'criminal negligence'. There is an Australian precedent for reading into a statute apparently creating criminal liability for negligence a requirement of 'criminal negligence'. A unanimous High Court in *Callaghan v The Queen*[176] read into the definition of a crime apparently based on lack of reasonable care that the conduct the subject of charge must be 'so blameworthy as to be punishable as a crime',[177] higher than the blameworthiness required for civil liability, on the basis that the civil/criminal distinction must be maintained. I agree.

As discussed, it is orthodox in criminal law that a person should be held to account in criminal law only where they are culpable, and only to that extent.[178] This explains defences like insanity, self-defence and compulsion, reflecting criminal law should not punish a person who, respectively, lacks the mental element required to commit a crime, or effectively had no choice other than to do what they did.

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173 Ibid.

174 Ibid 546.

175 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 535–6 (Gibbs CJ, Mason J agreeing at 546).

176 (1952) 87 CLR 115.

177 Ibid 121 (Dixon CJ, Webb, Fullagar and Kitto JJ).

178 *Wilson* (n 17) 327 (Mason CJ, Toohey, Gaudron and McHugh JJ); *Miller* (n 17) 419 (Gageler J). The Canadian Supreme Court recognised it as a principle of fundamental justice.

As noted, culpability is relevant presently because there are questions over culpability of a subordinate who, though they are now said to have committed a crime in doing so, argue they were so directed by a superior, whose commands they had been trained to follow.[179] Arguably the culpability of a subordinate who, in so doing, commits a crime, is substantially less than one who committed this act independently. Further, arguably (possible) reduction in penalty in circumstances of the former situation does not fully reflect the significant difference in culpability of offenders in the situations.

In conclusion, the manifest illegality test should not embrace a negligence standard. Current law here is unsatisfactory because it does not take sufficient account of dynamics within the military, particularly the strength of obedience imperatives, uncertain because of the prime importance of the manifest illegality test, and unfair because it can mean imposition of serious criminal sanction upon a person based on negligence.

IV Improvements to Defence of Superior Orders and Related Defences

A *Re-Drafting the Defence of Superior Orders*

A response to the ambiguous concept of 'manifest illegality', and the shadow it casts over the superior orders defence, is more of a guidance as to the relevant factors in determining whether an order was manifestly illegal. The *Rome Statute*, and by logical extension national law implementing it, could be improved by including factors that the decision maker should take into account in determining whether an order was manifestly illegal. These factors are highly situation specific. The suggested factors are:

1. Soldier's age;[180]

This was a factor, together with others, referred to in *United States v Calley* as relevant to manifest illegality:

> In determining whether or not Lieutenant Calley had knowledge of the unlawfulness of any order … you may consider all relevant facts … including Lieutenant Calley's rank; educational background; OCS schooling; other training … his experience on prior operations involving contact with hostile and friendly … [civilians]; his age; and any other evidence tending to prove … that … [he] knew the order under was unlawful…[181]

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179 Patrick White, 'Defence of Obedience to Superior Orders Reconsidered' (2005) 79(1) *Australian Law Journal* 50, 53: 'it is difficult to find much that is morally blameworthy in a soldier trusting in his or her superiors and obeying their commands'.

180 Age is a proxy for experience and knowledge (including knowledge of orders that are, or may reasonably be considered, unlawful).

181 *Calley USCMA* (n 49) 542.

2. Extent to which soldier had combat experience;[182]

This factor derives support from the *Defence Force Discipline Act 1982* (Cth), that in determining the culpability (if any) of a soldier, their experience in the particular area of focus is relevant.[183] It was mentioned in jury's instructions in *Calley*.[184]

3. Soldier's training, including on defence of superior orders;[185]

Rhonda Wheate and Lieutenant Nial J Wheate noted, in the case of the Vietnam massacres, American soldiers had received one hour's training in laws of war.[186] In contrast, training at the ADF Academy today on these matters is thorough.[187] It was a factor referred to in *Calley*.[188] Patel argues American troops involved in mistreatment of detainees during Iraq had been inadequately trained in relevant legal obligations,[189] and this is relevant to culpability.

4. Extent to which soldier was trained to obey orders;[190]

That a fundamental aspect of a soldier's training is to inculcate the importance of following orders quickly and unquestioningly obey is well documented.[191]

5. Soldier's general educational background;[192]

6. Soldier's rank;[193]

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182 The more experience a soldier has in the combat space, the more willing they might be to challenge orders.

183 *Defence Force Discipline Act 1982* (Cth) s 11(2)(a).

184 *Calley USCMA* (n 49) 547.

185 This derives support from *Defence Force Discipline Act 1982* (Cth), which permits a court to consider the reasonableness of the actions of a soldier accused of a criminal offence having regard to their training and experience: ibid s 11(2)(a).

186 Wheate and Wheate (n 134) 21.

187 Ibid 22.

188 *Calley USCMA* (n 49) 547.

189 Patel (n 39) 123.

190 Where a soldier has been subject to extensive training designed to get them to follow orders unquestioningly, this is relevant to a fair consideration of the extent to which illegality might be 'manifest' to them.

191 O'Sullivan (n 72) chs 4–5; Mackmin (n 134) 81.

192 Rowe (n 134) referred to research indicating low levels of education among many in the UK army (42% with literacy standards below that expected of 5–6 year olds): at 174, citing The Basic Skills Agency, *Army Basic Skills Provision: Whole Organisation Approach, Lessons Learnt* (2007).

193 Rowe (n 134) 172: 'The higher a soldier is up the chain of command will generally determine how much he can ask questions of instructions given to him. His scope to do so may be very limited if he is at the bottom of this chain.'

This was alluded to by Cory J (for Gonthier and Major JJ) in the Canadian Supreme Court in *R v Finta* as relevant;[194] the lower the rank of the soldier, the more likely they will feel compelled to comply with a superior's order. They are less likely to have exercised moral choice in doing what they did. It was referred to in *Calley* and *R v Brocklebank*.[195]

Ziv Bohrer discussed three reasons for its relevance:

> In the military … general policies are determined by high-ranking officials. Thus, obligating high-ranking soldiers to disobey orders that violate administrative and negligence legal norms will allow the lawmaker to retain sufficient control over the policies of the military. Secondly, because high-ranking soldiers are military professionals, they can be expected to familiarize themselves with the reasonable practices and administrative procedures that govern their profession. Third, administrative and disciplinary sanctions have greater deterrent effect when carried out against a low-ranking soldier who views military service as a short and temporary experience. Therefore, high-ranking soldiers should be instructed to only obey such legal orders (i.e., to disobey such illegal orders), whereas low-ranking subordinates should be instructed to obey all such orders.[196]

7. Rank of superior who issued order;

This factor is supported by survey of military recruits which showed that, when asked whether they would question the legality of a superior's orders, several indicated the rank of the one issuing would cause them hesitation before questioning legality.[197]

8. Whether or not the order was conveyed during emergency, especially the extent to which there was time for the soldier to consider the lawfulness of the order they were given;

Ansermet suggested the amount of time that the soldier had to evaluate the lawfulness of the order was relevant.[198] Osiel agreed.[199] This makes sense; if issued during an emergency, the soldier would have less time to consider the legality of the order or

194 *Finta* (n 123) 838.

195 (1996) 134 DLR (4th) 377.

196 Bohrer (n 73) 56 (citations omitted).

197 Wheate and Wheate (n 134) 27.

198 Ansermet (n 18) 1456.

199 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 1095:

> If I suspect that the order is illegal, my proper course depends on how much time is available for deliberation. If there is no time to deliberate, then I must obey the order immediately. I can be confident the very exigency of my circumstances will protect me against liability if the order ultimately proves unlawful, for my conduct has been reasonable.

make reasonable inquiries to satisfy themselves. The Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) acknowledges this is relevant.[200] Bohrer added that in emergency, discretionary norms are more likely applicable, complicating matters for a subordinate soldier.[201]

9. Extent to which legality of the order was discoverable, or doubtful;[202]

This idea is Ansermet's,[203] which in turn refers to the work relating to culpability in German criminal law, known as *Schuldtheorie*, under which a defence of mistake of law is available, but only where the mistake was unavoidable.[204] In determining the avoidability, it is relevant to consider whether, with sufficient effort, the person seeking to rely on the defence could have discovered truth (here illegality of the order they were given). If that were discoverable by inquiry, the fact that the soldier failed to pursue it suggests the defence is unavailable.

10. (Relatedly) extent to which soldier had, or had access to, information to permit them to determine lawfulness of order;

The Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) discussing relevant factors to the defence of superior orders in s 14 of the *Defence Force Discipline Act 1982* (Cth), noted some laws of war are 'obscure' and uncodified.[205]

11. Extent to which there was ambiguity on lawfulness.[206]

There is often uncertainty whether particular action is legal. This grey area is larger in military context than general criminal law context.[207] For example, some conduct is only considered unlawful if the gains expected from the activity are disproportionate to its risks.[208] It may be difficult for a soldier to accurately assess this,

200 Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 36 [134(d)].

201 Bohrer (n 73) 57.

202 The more clear-cut the illegality, or the greater the ease by which its unlawfulness might have been discovered, the more likely it will be 'manifest'.

203 Ansermet (n 18) 1458–9.

204 Ibid 1437.

205 Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 37 [135].

206 This factor specifically acknowledges sometimes ambiguity lies in whether orders are lawful.

207 See, eg: Williams Hays Parks, 'The Law of War Adviser' (1980) 31 (Summer) *JAG Journal* 1, 27; Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 969. The law is not settled regarding aspects of the customary law of war, and that this should be taken into account in interpreting the defence of superior orders: Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 37 [135].

208 See, eg, *Criminal Code Act 1995* (Cth) ss 268.38(1)(c), (2)(c).

particularly at junior levels.[209] This might be exacerbated by other factors such as an emergency. Others involve administrative norms or negligence type offences.[210] Some offences involve questions as to whether a soldier's behaviour humiliates, degrades or violates another's dignity,[211] the meaning of which is contested. Soldiers might find it difficult to determine legality of particular bullets.[212] Particularly in situations where civilian courts are considering behaviour that occurred in military context, decision makers must remember this, so a specific factor is suggested.

Application of standards is to a reasonable *soldier*, not a reasonable *person*. This is to take specific account of the military context, and its idiosyncrasies. An argument might be made for further factors to be considered. These have been provided as a basis for discussion.

There is obviously upside and downside in enumerating factors. The upside is that the decision-making body's deliberations will be more transparent. It will state clearly which of the above factors have been utilised, their relative weight, and how they are counter-balanced by others. Soldiers will have better idea how their behaviour will be assessed. The downside is lack of flexibility, given the factors are stated expressly, which is potentially confining, though an 'any other relevant factors' element might counteract this. It would be difficult for the lawmaker to clarify how a court might weigh the factors.

One issue with the current approach is potential inconsistency in approach regarding how 'manifest illegality' will be determined. Osiel noted this in relation to cases involving Vietnam.[213] In *Calley*, the United States Court of Military Appeals provided the jury with specific matters, including Calley's rank, educational background, training, experience in combat and in relations with the enemy, age and other evidence showing that he knew the order was illegal.[214] In contrast, the jury in *United States v Griffin* was not given such details, they were simply informed an order to kill in the factual scenario was manifestly illegal in law.[215] Further,

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209 Bohrer (n 73) 68; William J Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 (Fall) *Military Law Review* 91, 108–9.

210 Bohrer (n 73) 55:

> Orders can also be illegal because they violate either administrative legal norms or negligence offences. Obligating subordinates to disobey illegal orders that violate such laws raises unique concerns. First, since these laws are often discretionary in nature, a legal policy that instructs subordinates to disobey an order that violates such laws will delegate extensive discretion to the subordinate, which will in turn increase the likelihood mistakes will occur.

211 *Criminal Code Act 1995* (Cth) s 268.58(1)(a); Patel (n 39) 117.

212 Patel (n 39) 117.

213 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 1002. See also Aubrey M Daniel III, 'The Defense of Superior Orders' (1973) 7(3) *University of Richmond Law Review* 477, 500–2.

214 *Calley USCMA* (n 49) 542.

215 *United States v Griffen*, 39 CMR 586 (United States Army Board of Review, 1969).

in *Hutto*, a superior orders defence was successful,[216] but unsuccessful in *Calley*. They were based on the same orders. Possibly the fact Calley was a lieutenant while Hutto was a sergeant was relevant, but this is speculative. As shown, some apply a reasonable person test; others apply a reasonable soldier test. It is unclear the extent to which individual characteristics of the soldier concerned are relevant. Assessment of manifest illegality is uneven, unpredictable, and potentially unjust.[217]

Bohrer made the point that

> case law of many legal systems clearly shows that the case-by-case discretion made possible by current legal uncertainty leads to substantial legal inconsistencies when evaluating crimes of obedience, and causes similar cases to be treated differently. …
>
> Judges necessarily vary in their assessments, and thus similar cases are often not treated similarly, which creates a fairness problem. This variation reduces the likelihood of developing clear rules ex ante. As such, a fair-notice problem is created as well. Moreover, since such a policy fails to create clear instructions for soldiers, it leads to inefficiencies. …
>
> [W]e should also not allow courts or states unfettered discretion to regulate crimes of obedience on a case-by-case basis. Justice and efficiency demand that courts, states and soldiers be guided by clear rules set ex ante.[218]

The expression of specific factors for decision makers to consider will assist.

This relates to the rule of law. Lord Bingham articulated sub-rules of the rule of law.[219] One required the law be as accessible, clear and predictable as possible, so individuals could understand legal consequences of their actions.[220] Another required discretion, including that pertaining to judicial processes, be confined.[221] Lord Bingham suggested the looser the discretion given, the more likely power would be exercised arbitrarily, contrary to the rule of law.[222] It has been demonstrated the lack of definition of manifest illegality, or express indication of relevant factors, produces uneven application of the law. This does not foster clear and predictable legal outcomes.

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216 Douglas Robinson, 'Army Clears Hutto in Deaths at Mylai' (15 January 1971) *The New York Times* 15.

217 Patel (n 39) 118: 'the assessment of manifest illegality is completely subjective and different judges may decide differently based on the same set of facts … what is obvious, palpable or manifest to one person, may not be so to another'.

218 Bohrer (n 73) 46–7, 50 (citations omitted). Bohrer favoured soldiers being given specific rules about unlawful behaviour.

219 Lord Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67.

220 Ibid 69–70.

221 Ibid 72.

222 Ibid.

The argument against listing a range of factors is inflexibility — the range of cases discussed has demonstrated many factual scenarios in which this defence has been considered. Arguably, decision makers need flexibility to respond to the wide range of scenarios, which is reduced when required to consider lists of factors. This can be ameliorated by including something like 'any other relevant factor' in the list. Concededly, a list of factors does not eliminate discretion — different decision makers will consider some factors more important than others and does not provide decision makers with guidance as to which are most important, and how to weigh them in given cases. On balance, an approach that specifically identifies and expresses factors relevant to manifest illegality is favoured, for the transparency and greater guidance it provides decision makers.

B *Interpretation of Duress*

As discussed, just as culpability is relevant to how the manifest illegality test should be applied, it is also relevant to situations where duress exists. There have been instances where the subordinate reasonably believed if they did not carry out the orders of the superior, they would be killed. Then, it has been argued that the subordinate is not culpable and should not suffer punishment.[223] Though cogent arguments support this, duress is rarely successfully argued in international criminal law.[224] It is not clear in the *Rome Statute*, and its Australian adoption, whether duress is available to murder charges. The common law position in the United Kingdom is that it is not. This was applied in *Erdemovic*, regarding the Statute of the International Criminal Tribunal for the Former Yugoslavia.[225]

There are questions about culpability in such a situation. Some argued that Erdemovic should not have been punished at all because the duress to which they were subject meant they were not, or not sufficiently, culpable.[226] As noted above, the majority found duress not a defence to murder. Judge Cassese (dissenting) stated:

> the purpose of criminal law, including international criminal law, is to punish behaviour that is criminal, i.e., morally reprehensible or injurious to society, not to condemn behaviour which is 'the product of coercion that is truly irresistible' or the choice of the lesser of two evils. No matter how much mitigation a court allows an accused, the fundamental fact remains that if it convicts him, it regards his behaviour as criminal, and considers that he should have behaved differently.[227]

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223 Geert-Jan Alexander Knoops, *Defences in Contemporary International Criminal Law* (Martinus Nuhoff Publishers, 2nd ed, 2008) 53. See also Bakker (n 77) 67.

224 Jennifer Bond and Meghan Fougere, 'Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law' (2014) 14(3) *International Criminal Law Review* 471, 484.

225 *Erdemovic Appeal* (n 58).

226 Bowers (n 40) 53.

227 *Erdemovic Appeal* (n 58) [48] (emphasis omitted) (citations omitted).

Recall the Nuremberg trials considered whether the accused had 'moral choice'. It is doubted whether Erdemovic had moral choice other than to do what he did. It seems unreasonable to expect a person to relinquish their own lives to save others. Judge Rumpff noted:

> In the application of our criminal law in the cases where the acts of an accused are judged by objective standards, … one can never demand more from an accused than that which is reasonable, and reasonable in this context means, that which can be expected of the ordinary average person … It is generally accepted, … that for an ordinary person in general his [or her] life is more valuable than that of another. Only they who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person. … [S]uch an exception to the general rule which applies in criminal law, is [not] justified.[228]

The common law has traditionally held that, while duress absolves liability for some alleged criminal activity,[229] it is not available as a defence to murder.[230] It is difficult to explain what unites the offences for which duress is unavailable, but they are typically serious. Regarding the traditional exception around murder, for which duress is unavailable as a defence, such unavailability has been explained as being based on revulsion towards taking life,[231] and that punishment should attend such action. The idea was expressed the law expected a person to die themselves rather

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228 *State v Goliath* [1972] SALR 465, 480, quoted in National Criminal Justice Reference Service, 'Duress, Coercion and Necessity' (Working Paper No 5, 1978) 23 [2.53]. Law is based on what society can reasonably expect of its members. It should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below those standards: ibid [47] (Cassese J, dissenting). Dinstein (n 10) 152: 'in many cases it is impossible, from a moral viewpoint, to expect a person to choose death. … [T]he person acts in such cases with no option: we resign ourselves in advance to his taking the course that will save his life. … [H]e has no moral choice'.

229 See, eg, *R v Crutchley* (1831) 5 Car & P 133; 172 ER 909.

230 *R v Tyler* (1838) 8 Car & P 616; 173 ER 643 (Lord Denman CJ); *Smyth* (n 115) 738 (Sholl J); *Brown* (n 115) 485 (Bray CJ, Bright and Mitchell JJ).

231 *Howe* (n 65) 439 (Lord Griffiths), 456 (Lord Mackay, Lord Brandon agreeing at 438); *Gotts* (n 65) 425 (Lord Jauncey).

than kill an innocent,[232] however unrealistic this seems.[233] There may be concern that, if permitted here, the defence could be manipulated, for example unreal threats manufactured in order to justify murder,[234] or it involves questions courts cannot reasonably answer.[235]

Though some have criticised the doctrine in its entirety,[236] its rationale is clear; it is inappropriate to visit criminal liability upon a person where the relevant acts were not a product of their free will.[237] Geert-Jan Alexander Knoops noted:

> The moral justification for imposing punishment and criminal liability is the presumption that the individual has the ability and appropriate possibility to choose otherwise, and therefore actors may be exonerated because of compulsion [duress] … Juridically, the mental and moral ability to refrain from acting wrongly is therefore a *conditio sine qua non* to impose criminal liability and thus, from both the legal-philosophical and neurobiological perspective, the role of free moral choice is essential in attributing criminal responsibility.[238]

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232 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1736) vol 1, 51:

> if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent …

But Hale permitted a wartime exception:

> when a person is under so great a power, that he cannot resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in the time of peace: at 49.

See *Dudley* (n 65) 287: 'To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it.'

233 Sir Francis Bacon expressed a different view:

> So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither se defendendo nor by misadventure, but justifiable.

Sir Francis Bacon, *A Collection of Some Principal Rules and Maximes of the Common Laws of England* (1630) 29–30, quoted in *Dudley* (n 65) 285.

234 Stephen (n 2) 107–8.

235 *Lynch* (n 65) 702 (Lord Kilbrandon).

236 *Howe* (n 65) 436 (Lord Bridge): 'the defence of duress … is difficult to rationalise or explain by reference to any coherent principle of jurisprudence'.

237 *Lynch* (n 65) 690 (Lord Simon); *Brown v United States*, 256 US 335, 343 (1921) (Holmes J): 'Detached reflection cannot be demanded in the presence of an uplifted knife'.

238 Knoops (n 223) 53, quoted in Myers (n 19) 167.

Clearly this rationale can apply to offences including murder. At one point the House of Lords accepted duress as a defence for murder in the second degree.[239] In *Director of Public Prosecutions for Northern Ireland v Lynch* ('*Lynch*'), a majority of the House of Lords recognised self-preservation instincts were natural and ought to be recognised in law.[240] The Law Commission recommended the defence of duress be recognised as available for all crimes.[241] It is so available in the *Model Penal Code* (US).[242] However, the House of Lords subsequently over-ruled *Lynch*, returning to the position that duress could not be a defence to a murder charge.[243]

There is nothing special about a murder charge justifying an exception and not permitting a duress defence. None of the iterations of the defence of superior orders explained above makes exception for murder. Where it applies, the defence of superior orders can apply to excuse killing another. There is often overlap between a superior orders and duress defence. Thus, it is unwise to insist duress not be available to a murder charge where, on identical facts, a soldier could rely on a superior orders defence.

Sometimes, it is suggested while duress should not be a defence to a murder charge, it might be utilised to reduce the penalty for a convicted accused. This was the view in *Erdemovic*, and some House of Lords decisions.[244] However, this compromise is awkward. Duress applies where the will of a person is overborne. In such a situation, if the law recognises this as a defence, it is a complete defence, so the person is not criminally responsible for their acts, because they did not act in accordance with free will. It seems impossible to both accept that the lack of free will does not absolve a person of criminal responsibility, but also accept it makes what the person did 'less bad'.[245]

This finding means that a court interpreting art 31(1)(d) of the *Rome Statute* and s 10.2 of the *Criminal Code Act 1995* (Cth) should not read into it an exception for murder, as occurred in *Erdemovic*.

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239 *Lynch* (n 65) 675–6 (Lord Morris), 683 (Lord Wilberforce), 715 (Lord Edmund-Davies, Lord Simon dissenting at 697, Lord Kilbrandon dissenting at 703).

240 Ibid 671 (Lord Morris). Lord Wilberforce concluded there was no principled reason why duress defence was inapplicable to murder: at 681.

241 The Law Commission, *Criminal Law Report on Defences of General Application* (Report, 28 July 1977) 7–8.

242 *Model Penal Code* (US) (n 16) § 3.02(1)(a).

243 *Howe* (n 65); *R v Z* [2005] 2 AC 467.

244 *Howe* (n 65) 436 (Lord Bridge); *Gotts* (n 65) 424 (Lord Jauncey), 442 (Lord Lowry).

245 Myers (n 19) 161:

> The fundamental issue lies with whether we believe that an accused that acts under duress is morally blameworthy. If we accept the logic that duress eliminates free choice and therefore negates the ability of the accused to behave correctly, then it must follow that the accused is not deserving of any criminal conviction, regardless of whether the conviction is only accompanied by a token sentence.

The way in which art 31(1)(d) requires the decision maker to consider whether the accused intends to cause greater harm than the one they seek to avoid is also problematic. Either the will of a person is overborne or not.[246] It is not reasonable to expect an accused faced with such dire situation to make a utilitarian decision as to the lesser of two evils. The law should not impose unreasonable demands upon a person. It is unreasonable to expect a person to be able to weigh these complex matters, often in short time. It is unreasonable to expect a person to choose harm to themselves, where another choice would or might have harmed more people. As Cassese J noted in *Erdemovic*, this third element in art 31(1)(d) places intolerable strain upon courts.[247] It should be discarded.

C *Mistake of Fact*

Section 9.1 of the *Criminal Code Act 1995* (Cth) states a person is not liable for a criminal offence with a fault element other than negligence where under mistaken belief about facts, and existence of that belief negates the fault element of the offence.[248] This is similar to art 32(1) of the *Rome Statute*. Section 9.1(2) states that the court *may* take into account whether the mistaken belief was reasonable in the circumstances.[249] As an example of how this section might apply in the military context, s 268.24 creates the offence of wilful killing.[250] It requires that a person has killed another person, where that person is owed protection under the *Geneva Conventions* or *Protocol 1*, where the person knows of, or is reckless to the fact the person is so owed.[251] A defence of mistake might apply — the accused might argue they were mistaken whether the person was owed such protections, and this might occur with a superior orders defence — perhaps the soldier's superior officer ordered them to kill on the basis the victim was not owed such protections, and the soldier, acting under that impression, committed the killing. In such a case, the superior officer's mistake translates to the officer who committed the killing.

'Reckless' here is loosely defined in s 5.4 of the *Criminal Code Act 1995* (Cth) being whether the person was aware of a substantial risk the circumstance exists (eg victim is owed Convention protection), and it is unjustifiable in the circumstances to take the risk.[252]

246 O'Regan also referred to the 'sorry history of the doctrine of proportionate response in both self-defence and provocation' as a basis for rejecting its use in the context of duress: RS O'Regan, 'Duress and Murder' (1972) 35(6) *Modern Law Review* 596, 605.

247 '[T]here are enormous, perhaps insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others … how can a judge satisfy himself [sic] that the death of one person is a lesser evil than the death of another?': *Erdemovic Appeal* (n 58) [42].

248 *Criminal Code Act 1995* (Cth) s 9.1.

249 Ibid s 9.1(2).

250 Ibid s 268.24.

251 Ibid s 268.24(1).

252 Ibid s 5.4 (definition of 'recklessness').

For similar reasons given earlier for interpreting 'manifest illegality' to require something more than negligence on the soldier's part in their lack of awareness of illegality — and to avoid undue repetition — the mistake of fact defence in s 9.2 of the *Criminal Code Act 1995* (Cth) should not be negated simply because the mistake the soldier made regarding facts was 'unreasonable'. Something more should be required to deny the defence. This might be criminal negligence.

D *Standard of Proof*

Presumption of innocence is axiomatic in criminal law.[253] A corollary is that it is for the prosecution to prove elements of the alleged offence to the criminal standard of beyond reasonable doubt. Courts have sought to reconcile these fundamental principles with legislation which apparently casts onus of proof upon an accused, for example regarding a defence. Typically, courts have effected this reconciliation by concluding, where an onus is upon an accused, for example regarding a defence, the accused bear an evidentiary onus *only*, not a legal onus.[254] Otherwise, the unwelcome spectre arises an accused could be convicted of a criminal offence despite reasonable doubt.[255]

This is generally reflected in the *Criminal Code Act 1995* (Cth).[256] However, the *Rome Statute* is silent as the standard of proof for the defences discussed here.[257] A recent International Criminal Court decision acknowledges this, but it refers to the prosecution's onus to establish proof of guilt beyond reasonable doubt. Respectfully, the International Criminal Court must resolve the extent to which (if at all) the defence has an onus regarding possible defences. Any such onus must be evidentiary only. This is what has occurred elsewhere — it is a practical way to resolve potential conflict between presumption of innocence, which art 66 of the *Rome Statute* enshrines, and a statutory provision which apparently casts onus upon an accused.

253 *Woolmington* v *DPP* [1935] AC 462, 481 (Viscount Sankey) (except insanity and statutory exceptions); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 11(1); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2).

254 See, eg, *R v Oakes* [1986] 1 SCR 103 ('*Oakes*'); *R v Director of Public Prosecutions*; *Ex parte Kebilene* [2000] 2 AC 326, 344–5 (Lord Bingham, Laws J agreeing at 346, Sullivan LLJ agreeing at 357), 379–80 (Lord Hope); *R v Lambert* [2002] 2 AC 545, 563 (Lord Slynn), 571 (Lord Steyn), 586–9 (Lord Hope), 600–2 (Lord Clyde).

255 *Oakes* (n 254) 132–3 (Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ).

256 *Criminal Code Act 1995* (Cth) s 13.3.

257 *Prosecutor v Ongwen (Trial Judgment)* (International Criminal Court, Trial Chamber IX, Case No ICC-02/04-01/15, 4 February 2021) [2455], [2588].

V Conclusion

Throughout history, the law has struggled for consistency on consequences of a soldier obeying an order and thereby doing something illegal. Initially the law made the soldier personally liable, but in the early 20th century the soldier had impunity. The World Wars moved the law towards a position a soldier may be liable if the order given them was 'manifestly illegal'. While this compromise was understandable, difficulties remain. The law is insufficiently cognisant of the difficult position of the soldier, steeped in obedience training, yet now asked to (sometimes) disobey instructions. The circumstances in which the soldier should disobey orders are unclear; this is compounded by other factors, like short time frame in which events might occur, and that the soldier may have incomplete information. There is clear variety in the factors decisions makers will take into account in applying the test. Further, there is concern with imposing criminal liability based on simple negligence, developed in a non-criminal realm. The article suggested specific improvements to the law here. The law should be applied to a reasonable soldier, not a reasonable person, given the peculiarities of the military context. A list of factors was given to apply the manifest illegality test. Presently, the approach is inconsistent and unpredictable. It was also suggested the law require greater culpability than negligence before determining a soldier's defence of superior orders is lost. In the context of the related defence of duress, the article determined the law should permit a duress defence to a murder charge. It also concluded courts and tribunals should interpret the mistake defence consistently with the principles suggested in the superior orders defence, and clarify that, if an accused is ever subject to an onus of proof, it should be evidentiary only.