

# THE SUPERIOR ORDERS DEFENCE: A GAME OF MUSICAL CHAIRS AND THE JURY IS STILL OUT

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## I INTRODUCTION

As ancient as the laws of war are, soldiers charged with violating them have over the centuries raised 'obedience to orders' as a defence. The defence of 'superior orders' has been embraced in a bid to balance the competing aims of promoting discipline in the military while not entirely subverting humanitarian standards. The superior orders defence is underpinned by the intent and knowledge standard ie was the perpetrator aware that his/her conduct was unlawful? However it is this very aspect that has been central to the fluidity of the superior orders defence over the last four centuries. Over time, the divide between national and international approaches, has solidified. A survey of national law shows a bias towards accepting the defence as automatic and complete. This is no doubt aimed at cementing military discipline which is built on 'total and unqualified obedience [to orders] without any hesitation or doubt'.<sup>1</sup> On the other hand, the standard in supranational criminal tribunals tends towards an absolute liability rule which only provides for a very limited use of the order as a mitigating circumstance.

The international standard was encapsulated in the *Nuremberg Charter*, which explicitly provided that a perpetrator cannot claim absence of guilty knowledge based on his or her ignorance of the illegality of the superior orders upon which he or she executed the act, if he or she in any event approved what had to be done.<sup>2</sup> However, despite the seemingly clear international standard espoused by both the *Nuremberg* and *Tokyo Charters* and cemented by dozens of post World War II cases, the international standard failed to penetrate and influence the national standard. This was evident in 1977 during negotiations to formulate the Additional Protocols to the 1949 Geneva Conventions. The majority of countries were

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1 See Yoram Dinstein, 'The Defence of "Obedience to Superior Orders"' (1965) 19 *International Law* 5 (quoting *Military Prosecutor v Melink* (1957) 17 *Pesakim* (D) 90, 213 (Israel)).

2 *Trial of Otto Ohlendorf & Others*, cited in *United States v Wilhelm List & Others* ('the Hostage cases') (1949) 8 *Trials Of War Criminals Before The Nuerenberg Military Tribunal Under Control Council Law No 1034*, 91.

opposed towards adopting the international standard. Despite lengthy negotiations to draft a provision limiting the defence of superior orders, the effort was unsuccessful due to vociferous objections by a majority of the States: the argument being that that the proposed provision did not adequately balance humanitarian law with military discipline and dissenting States were keen to ensure military discipline by offering their soldiers full immunity. Two decades after the wrangle over the Protocols, in 1998, the national standard received a boost and the international standard took a battering. In a surprise twist, the *Rome Statute* of the International Criminal Court ('ICC') allowed for a limited form of the defence.

This article has as its aim an exploration of the development of the superior orders defence within both the national and international arena. It discusses the case law at both national and international levels as well as reflect on the various legal provisions as encapsulated in international instruments and national military manuals. It concludes with an overview of the military and international law paradox. On the one hand, military law tutors and soldiers are trained to comply with commands in order to ensure organisational integrity and efficiency; on the other hand, international law seems to suggest, by the tenor of its standard, that soldiers should stop and consider the lawfulness of their orders.

## II THE ENSHRINEMENT OF A FORGIVING STANDARD: THE ANGLO–AMERICAN POSITION

In 1906, in his seminal and influential treatise, 'International Law', Professor Oppenheim, a Cambridge scholar, shaped the Anglo-American position for the next four decades by laying down the bedrock for a concrete and definitive Anglo-American military standard. In his work, Oppenheim postulated that obedience to superior orders constituted a complete and absolute defence to criminal prosecution. In this regard he clearly and forcefully asserted that

[i]f members of the armed forces commit violations by order of their Government, they are not war criminals and cannot be punished by the enemy ... In case members of forces commit violations ordered by their commanders, the members cannot be punished, for the commanders are alone responsible.<sup>3</sup>

His formulation was based

on an interpretation of then traditional concepts of international law which [interwove] obedience to orders with respondent superior and its related Act of

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3 Lassa Oppenheim, *International Law: A Treatise* (1st ed, 1906) 264–65.

State Doctrine. In doing so, Oppenheim was instrumental in bringing about a sea change to the soldiers' obedience defence.<sup>4</sup>

Oppenheim's articulation of the standard was codified about five years later in the leading military manual of the time when he wrote Great Britain's 1912 Handbook on the Rules of Land Warfare. This standard (which the Americans would soon incorporate) was to endure for the next four decades. In the handbook, Oppenheim incorporated his dicta that, for subordinates, obedience to orders constituted a complete defence to violations of the law of war. Article 443 of the British manual provided that members of the armed forces who violated the recognised rules of war in compliance with the orders of their government or commander 'are not war criminals and cannot therefore be punished by the enemy.'<sup>5</sup> Superior orders was a complete defence for subordinates with superiors liable under the doctrine of 'command responsibility'.

Two years after Britain's Manual (1912 Handbook on the Rules of Land Warfare), America published its first manual relating to the law of war. In a break with its traditional position, the American manual dutifully encapsulated Oppenheim's dicta moving firmly to align itself with the centuries old British position.<sup>6</sup> Article 443 of the British manual provision was echoed in art 336 of the Rules of Land Warfare approved by the General Staff of the United States Army.<sup>7</sup> In this regard the American manual provided that

individuals of the armed forces will not be punished for these offences in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts ... may be punished by the belligerent into whose hands they may fall.<sup>8</sup>

While the United States' manual stated that officers ordering illegal acts 'may be punished', the following phrase, 'by the belligerent into whose hands they may fall', suggests that, should the officer never be captured, or should he be from the ultimately victorious army, any punishment at all would be problematic. Though the Anglo-American position at the start of 20<sup>th</sup> Century was definite that superior orders was an automatic and complete defence, in continental Europe, however, the position that the defence of superior orders was neither automatic nor complete, continued to prevail. The continental European position is encapsulated in art 47 of the German Military Penal Code of 1872.<sup>9</sup> This provided that the superior issuing an order was alone responsible.<sup>10</sup> However, a subordinate was to be punished as an accomplice in the event that he 'went beyond the order given to him' or 'knew that the order of the superior involved an act which aimed at a civil

4 Gary Solis, 'Obedience of Orders and the Law of War: Judicial Application in American Forums' (1999) 15 *American University International Law Review* 481, 494.

5 George Finch, 'Superior Orders and War Crimes' (1921) 15 *American Journal of International Law* 440, 441.

6 See Donald Wells, *The Laws of Land Warfare: A Guide to the U.S. Army Manuals* (1992) 5.

7 Finch, above n 5, 441.

8 See Wells, above n 6, 118 (quoting para 366 of the 1914 version of The Rules of Land Warfare).

9 See N C H Dunbar, 'Some Aspects of the Problem of Superior Orders in the Law of War' (1951) 63 *Juridical Review* 234, 244.

10 *Ibid.*

or military crime or offence'.<sup>11</sup> The Germans never wavered from this position, and it was still the operative legal principle three decades later during World War I and remained so up until and including World War II.

The article now turns to discuss World War I. This war was significant in offering an avenue for the entry onto the international agenda of the superior orders defence. The Paris Conference, the centrepiece of the post-World War I push by the victorious Allies to create a new world order, spawned the Allied Commission on the Responsibility of the War and the Enforcement of Penalties ('Allied Crimes Commission') and made the first major effort to curb international crimes through an international penal process. This Commission for the first time grappled with the defence of superior orders at an international level and, in a significant effort, heralded the preclusion of the defence as an automatic and complete defence. This stance was at odds with the military manuals of many States, however it favoured the continental European stance over the Anglo-American position.

#### A *The Peace Treaty of Versailles: Superior Orders Gets onto the International Agenda*

In 1914 World War I broke out in Europe. The observations of Oppenheim as encapsulated in the British and American manuals found strong support and defence in Sir Graham Bower, a career soldier and former naval commander. In a speech given to the English Grotius Society in 1915, he endorsed Oppenheim's view as emblematic of prevailing international law doctrine.<sup>12</sup> Bower condemned as 'cruel and inhumane' the then German submarine fleet attacks on merchant vessels under circumstances in which it was impossible to save the passengers and crew.<sup>13</sup> He stressed that according to prevailing military law 'the blame does not rest with them [submarine commanders], but with their superiors'.<sup>14</sup> He concluded that holding a subordinate officer 'responsible is to strike at the foundations of discipline in every army or navy in the world'.<sup>15</sup>

However, there was emerging unease with the Oppenheim standard. In 1918 the Birkenhead Committee of Enquiry on War Crimes, established by the British Government, disputed the statement that a subordinate should never question an order. The Committee recommended that the plea of superior orders should not be applied by courts established to prosecute war criminals. Examples were given of German war criminals whose acts were 'flagrantly' and 'obviously' contrary to the laws of war.<sup>16</sup> However the recommendation of the Committee passed away

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11 Ibid.

12 Graham Bower, 'The Laws of War: Prisoners of War and Reprisals' (1916) 1 *Transactions of the Grotius Society* 15, 24.

13 Ibid.

14 Ibid.

15 Ibid 24–25.

16 Dunbar, above n 9, 243.

quietly and the Oppenheim standard was to reign supreme for another three decades.

In March 1919, the Allied Crimes Commission reported that 'military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offense'.<sup>17</sup> The Commission declared that the courts should determine whether a plea of superior orders was sufficient to acquit the person charged.<sup>18</sup> After much compromise, the representatives on the Commission finally agreed on the terms of the *Treaty of Peace between the Allied and Associated Powers and Germany* ('*Peace Treaty of Versailles*'), concluded at Versailles on 28 June 1919.<sup>19</sup> Besides other important matters including reparations, the *Peace Treaty of Versailles* in art 227 provided for the creation of an ad hoc international criminal tribunal to prosecute Kaiser Wilhelm II for initiating the war.<sup>20</sup> It further provided in arts 228 and 229 for the prosecution of German military personnel accused of violating the laws and customs of war before the Allied Military Tribunals or before the Military Courts of any of the Allies.<sup>21</sup>

Contrary to the British and American manuals of the day, art 228 evinced the collective intention of the Allies to apply individual responsibility for law of war violations, without regard to the defence of superior orders. Professor James Garner, a leading international law scholar of the period, commented on the new frontiers that the article had broken:

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17 See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference' (1920) 14 *American Journal of International Law* 95, 117 (describing the creation and composition of the Commission). The Commission was composed of 15 members, two each from the United States, the British Empire, France, Italy, and Japan, and the other five members elected from the powers with special interests.

18 Ibid.

18 Ibid.

19 *Peace Treaty of Versailles*, opened for signature 28 June 1919, [1920] ATS 1 (entered into force 10 January 1920).

20 Ibid art 227.

21 Ibid art 228 states:

'The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office, or employment which they held under the German authorities.'

Article 229 states:

'Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned. In every case the accused will be entitled to name his own counsel.'

[Article 228] appears to be the first treaty of peace in which an attempt has been made by the victorious belligerent to enforce against the defeated adversary the application of the principle of individual responsibility for criminal acts during war by members of his armed forces against ... the other party.<sup>22</sup>

By 1920, the Allies had compiled a list of approximately 20,000 Germans who were to be investigated for war crimes.<sup>23</sup> These crimes included torture, use of human shields, rape, and the torpedoing of hospital ships by German submarines.<sup>24</sup> By 1921, when the provisions finally got a realistic chance for implementation, the zest of the Allies to set-up joint or even separate military tribunals had waned, and new developments in Europe required that Germany not be further humiliated. While there is no question that these terrible crimes were covered by the international law of armed conflict as it then existed, the Allies were apprehensive of trying so many German officials and personnel as this posed a political problem for them.<sup>25</sup> An alternative solution was therefore proposed. Instead of setting-up an international tribunal, Germany would conduct its own prosecutions. An agreement was thus made, allowing the German Government to prosecute a limited number of war criminals before the Supreme Court of Germany (*Reichsgericht*) in Leipzig instead of establishing an Allied Tribunal, as provided for in art 228.

In response to the Allied request to undertake prosecutions, Germany, which had previously passed a national law to implement provisions contained in arts 228 and 229 of the *Peace Treaty of Versailles*, passed new legislation to assume jurisdiction under its national laws in order to prosecute accused offenders before its Supreme Court, sitting at Leipzig as a way of placating negative public opinion in the Allied countries.<sup>26</sup> Of these trials, two notably involved the defence of superior orders. In the Case of Lieutenant Karl Neumann, the German commander of a German submarine, admitted that he had torpedoed and sunk the British hospital ship, *Dover Castle*, but pleaded that he did so only in obedience to orders issued by the Admiralty.<sup>27</sup> The German Supreme Court held that Neumann believed the order to be a lawful reprisal, as the order specified, and therefore was

22 James Garner, 'Punishment of Offenders Against the Laws and Customs of War' (1920) 14 *American Journal of International Law* 70, 70–71.

23 M Cherif Bassiouni, 'Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal' (1995) 18 *Fordham International Law Journal* 1191, 1194.

24 James Willis, *Prologue To Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 137–39.

25 Germany was trying to reconstruct and the Allies were apprehensive that extensive trials of such a large number of military personnel might jeopardise the stability of the already vulnerable Weimar Republic and expose it to revolutionary Bolshevik influence: *ibid* 113.

26 'Despite the Allied Commission's extensive report and the Allies' supplemental information conveyed to the German Procurator General, only twelve military officers were ultimately prosecuted before the *Reichsgericht*': M Cherif Bassiouni, 'From Versailles To Rwanda in Seventy-Five Years: The Need To Establish a Permanent International Criminal Court' (1997) 10 *Harvard Human Rights Journal* 11, 20.

27 See 'Judgment in Case of Commander Karl Neumann, Hospital Ship "Dover Castle"' (1921) 16 *American Journal of International Law* 704, 708 (acquitting the defendant in the *Dover Castle* case and holding that the defendant had sunk the *Dover Castle* following orders from his highest superiors, which he considered binding, and therefore could not be punished for his conduct).

not personally responsible for the sinking of the *Dover Castle*.<sup>28</sup> Applying the German military standard in regard to a superior orders defence, the German Supreme Court acquitted Neumann.<sup>29</sup> The judgment was clearly based on the lack of knowledge of the manifest illegality on the part of Neumann with regard to his actions.

The *Dover Castle* case can be contrasted with the outcome of the trial of Lieutenants Ludwig Dithmar and Johann Boldt. The military officers were under the command of Captain Helmuth Patzig aboard the submarine U-86 which had sunk a Canadian hospital ship, the *Llandoverly Castle*.<sup>30</sup> At trial, the evidence revealed that, just after the sinking, Captain Helmuth Patzig sought to conceal the 'misadventure' by ordering the two accused subordinates to machine-gun survivors.<sup>31</sup> Like Neumann, Dithmar and Boldt pleaded 'not guilty' on the basis of superior orders from the German naval High Command. The Court found the two officers guilty as accessories to homicide.<sup>32</sup> In explaining its ruling, the Court stated:

According to the Military Penal Code, if the execution of an order ... involves such a violation of law as is punishable, the superior officer issuing such an order is alone responsible. *However, the subordinate obeying such an order is liable to punishment if it was known to him that the order ...involved the infringement of civil or military law.* This applies in the case of the accused.<sup>33</sup>

In summary, the Leipzig trials dealt exclusively with the defence of superior orders within the context of war crimes. On the matter whether this defence applied to other international crimes, remained open. Importantly the thrust of the Peace Treaty was towards individualising criminal responsibility for violations of laws of war and the commission of crimes against humanity. The punishment provisions of the *Peace Treaty of Versailles* sought to limit the scope of the principle of sovereign immunity by punishing military and civilian officials, while at the same time extending universal jurisdiction to cover war crimes and crimes against humanity.<sup>34</sup>

## B *World War II: Relegating the Superior Orders Defence to a Mitigating Circumstance*

The sixth edition of Oppenheim's treatise was published in 1940. The work was edited (in place of the then-deceased Oppenheim) by his successor to the Whewell

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28 See *ibid*.

29 See Morris Greenspan, *The Modern Law of Land Warfare* (1959) 706-07.

30 See 'Judgment in Case of Lieutenants Dithmar and Boldt, Hospital Ship "Llandoverly Castle"' (1921) 16 *American Journal of International Law* 708, 723 (holding that the subordinates were guilty, but their habit of obedience to military authority mitigated their offences).

31 *Ibid* 714.

32 *Ibid* 711.

33 *Ibid* 721 (emphasis added).

34 See Jackson Maogoto, *War Crimes and Realpolitik: International Justice from World War I into the 21<sup>st</sup> Century* (2003) 42-44.

Chair in International Law at Cambridge — Professor Hersch Lauterpacht.<sup>35</sup> The edition was a comprehensive overhaul and revision of earlier editions. With regard to the superior orders defence, Lauterpacht made a significant turn around, distancing himself from the standard that his predecessor's work had been instrumental in establishing. In a dramatic twist, he noted:

The fact that a rule of warfare has been violated in pursuance of an order ... of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. A different view has occasionally been adopted by writers, but it is difficult to regard it as expressing a sound legal principle.<sup>36</sup>

Lauterpacht's position was premised on the central governing principle (which had found expression in continental Europe and in a number of precedent American and German cases) that members of the armed forces

are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiments of humanity.<sup>37</sup>

Limiting liability to the individual issuing an order, in practice, may concentrate responsibility on the head of the state 'whose accountability, from the point of view of both international and constitutional law, is controversial.'<sup>38</sup>

Lauterpacht's turn around did not find favour either at home or across the Atlantic: British and American military law seemed determined to cling to the earlier position espoused by Oppenheim. This is evident in the work of Clyde Eagleton, a leading scholar and legal expert with the United States Department of State. In 1943, he argued that it was 'repugnant' to the average person to punish subordinate soldiers who typically lacked knowledge concerning the legal propriety of their actions and risked immediate execution in the event of disobedience.<sup>39</sup> Eagleton's views were echoed that same year by Professor Hans Kelsen who noted the importance of discipline and unconditional obedience in military organisations and argued that within such strict frameworks, responsibility was more suitably situated with the superior officials who issued the commands.<sup>40</sup>

The following year, as World War II reached its peak and trialling the excesses of the Axis Powers became an increasing reality, the sentiments of Eagleton and Kelsen supporting superior orders as an automatic defence were challenged by Professor Sheldon Glueck, an international law scholar based at Harvard University. In a seminal statement supporting the prosecution of Nazi war

35 Oppenheim, above n 3 (Hersch Lauterpacht ed, 6<sup>th</sup> ed, 1940) 453–54.

36 Ibid.

37 See Lassa Oppenheim, *International Law: A Treatise* (Hersch Lauterpacht ed, 6<sup>th</sup> rev ed, 1944) 453.

38 Ibid.

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

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



criminals, Glueck noted, that the principle of non-liability in the English and American military manuals would 'render impossible' the conviction of a large number of Nazi war criminals.<sup>41</sup> Glueck's statement echoed the standard espoused in American cases such as *Little v Barreme*, *McCall v McDowell* and *Martin v Mott* from the previous century and which had denied the superior orders defence in those instances in which a subordinate actually knew or had reasonable grounds to know of an order's illegality.<sup>42</sup> Within a few short months Britain would revise her war manual and the position by Lauterpacht and Glueck would prevail.

Article 443 of the revised manual text adopted almost word-for-word Lauterpacht's language. It provided that

*members of the armed forces are bound to lawful orders only and ... cannot therefore escape liability, if in obedience to a command, they commit acts which, both violate unchallenged rules of warfare and outrage the general sentiment of humanity.*<sup>43</sup>

Despite having clung onto the Oppenheim standard stubbornly, seven months after the British Manual was revised, the United States followed suit, reversing and revising its field manual. Released on November 15, 1944, the manual incorporated a new provision providing that individuals who

violate the accepted laws and customs of war may be punished. However, the fact that the acts ... were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability.<sup>44</sup>

This change in the Anglo-American standard (which re-aligned it with that of continental Europe) was no doubt driven by pragmatism. With discussions in progress regarding the trials of German and Japanese war criminals, it was practical to preclude the plea of superior orders which was clearly going to be the prevalent and dominant defence. The Anglo-American standard now mirrored the operative rule in continental Europe, encapsulating German military law, which was set forth in art 47 of the German Military Penal Code of 1872 — a subordinate was to be punished as an accomplice in the event that he 'went beyond the order given to him' or 'knew that the order of the superior involved an act which aimed at a civil or military crime or offence'.<sup>45</sup> In the same year, the United Nations War Crimes Commission ('UNWCC') which had been established

41 Sheldon Glueck, *War Criminals: Their Prosecution & Punishment* (1944) 155.

42 *Ibid* 155–56.

43 *Little v Barreme*, 6 US (1 Cranch) 170 (1804); *McCall v McDowell*, 15 F Cas 1235 (CCD Cal 1867); *Martin v Mott*, 25 US (12 Wheat) 19, 30 (1827). *An Exposition of the Laws and Usage of War on Land*, art 44 (1944) quoted in Guenter Lewy, 'Superior Orders, Nuclear Warfare, and the Dictates of Conscience: The Dilemma of Military Obedience in the Atomic Age' (1961) 55 *American Political Science Review* 3, 6 (emphasis added).

44 *Rules of Land Warfare*, s 345.1 (1944) quoted *ibid*.

45 *German Military Penal Code* (1872), quoted in Dunbar, above n 9, 244. A comprehensive discussion of the statutory texts is contained in Mitchell Franklin, 'Sources of International Law Relating to Sanctions Against War Criminals' (1945) 36 *Criminal Law and Criminology* 153, 162–68.

by the Allied Powers in 1942 through an agreement at the Palace of St James<sup>46</sup> took up the issue of 'obedience to orders'. Despite being comprised of some of the leading international legal minds of the time, it conceded that

[t]he question of individual responsibility and punishment in cases in which offences were committed upon the orders of a ... superior authority by a subordinate pledged by law to obey superior orders, is one of great difficulty.<sup>47</sup>

In a robust reversal of the Anglo-American standard (and with World War II's end in sight) that had existed for close to three decades, Justice Robert Jackson, the United States Chief Counsel in the prosecution of Axis war criminals at Nuremberg, articulated the 'new' Anglo-American position on superior orders in a 1945 memorandum to President Franklin Delano Roosevelt.<sup>48</sup> Jackson noted that the doctrine of immunity for heads of state typically was coupled with the superior orders defence.<sup>49</sup> He observed that the combination of these two doctrines would mean that nobody is responsible, insisting that modernly organised society cannot tolerate so broad an area of official irresponsibility.<sup>50</sup>

### C *The Nuremberg International Military Tribunal: The 'New' Standard Applied*

In the relatively short span of time, from June until August of 1945, representatives of the United Kingdom, the Free French, the USSR, and the United States negotiated, drafted, and signed the *Treaty of London*.<sup>51</sup> The Charter of the Tribunal was explicit that it dealt with 'offences which had no particular geographical localisation': art 6(a) of the *Nuremberg Charter* provided for crimes against peace; art 6(b) provided for war crimes; and art 6(c) crimes against humanity. Once the procedural and legal issues were resolved, the *Nuremberg Charter* was appended to the *London Agreement* of 8 August 1945, which established the Nuremberg Tribunal.<sup>52</sup>

46 *St James Declaration* of 13 January 1942, reprinted in *Punishment For War Crimes: The Inter-Allied Declaration Signed at St James' Palace, London, on 13 January 1942, and Relative Documents* (undated). See also United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of Laws of War* (1948) 89–92. The *St James Declaration* was the first step leading to the establishment of the International Military Tribunal at Nuremberg.

47 UNWCC, *ibid* 274 (stating the difficulty of resolving the question of accountability of those acting on orders of a superior); 287 (noting that most defendants before the International Military Tribunal at Nuremberg pled not guilty on grounds of superior orders).

48 Robert Jackson, *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials* (1945) 42.

49 *Ibid* 42, 47.

50 *Ibid*.

51 The *Treaty of London* includes both the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* and the *Charter of the International Military Tribunal*, opened for signature 8 August 1945, 82 UNTS 280 (entered into force 8 August 1945) ('*Nuremberg Charter*').

52 *Nuremberg Charter*, opened for signature 8 August 1945, 82 UNTS 280, art 8 (entered into force 8 August 1945).

Article 8 of the *Nuremberg Charter* addressed the superior orders defence. This provision provided that

*[t]he fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.*<sup>53</sup>

The rejection of the superior orders defence, a key defence enshrined in most of the military manuals of the time, struck directly at the standing of national law within the international arena. Though the rejection of this defence in the drafting of the *Nuremberg Charter* was heavily criticised, the rejection was one of necessity, based on the presumption of an applicable legal order outside of and beyond the nation–state.<sup>54</sup> This rejection of an almost universally accepted defence in the national sphere was an important sign of the transformation of the concept.

At Nuremberg, the pageantry and chauvinism of the State was to be replaced by the solemnity and internationalism of a trial. The Nuremberg Indictment featured four counts: count one, ‘conspiracy to wage aggressive war’; count two, ‘waging an aggressive war’ (or ‘crimes against peace’); count three, ‘war crimes’ and count four, ‘crimes against humanity’. These counts were parcelled out between the prosecutors from the ‘Big Four’ Allied Powers — Robert Jackson (United States), Francois de Menthon (France), Sir Hartley Shawcross (Britain) and R A Rudenko (Soviet Union). In his opening statement at Nuremberg, Justice Jackson noted that the defendants had exercised considerable discretion and power and could not credibly shift responsibility to others.<sup>55</sup> This was echoed and buttressed further by French prosecutor, Francois De Menthon, who argued that orders from a superior do not exculpate defendants who carried out a ‘manifest crime from responsibility. Any other solution would ... be unacceptable, for it would testify to the impotence of all repressive policy’.<sup>56</sup> Predictably, the defendants submitted on their behalf the defence of superior orders.<sup>57</sup> They based this on the principle of absolute loyalty to the Fuhrer’s will — the principle of *Fuhrerprinzip*.<sup>58</sup>

The statements by Jackson and De Menthon were, however, rebuffed by one of the defence attorneys, Horst Pelckmann. Pelckmann, conceded that art 8 of the *Nuremberg Charter* prohibited the defence of superior orders in those instances in which a subordinate was aware of the illegal character of an order.<sup>59</sup> However, he also insisted that the Charter must be interpreted to provide that an individual who

53 Ibid (emphasis added).

54 See Katherine Fite, *The Nuremberg Judgment: A Summary* (1947) 110–11.

55 ‘Opening Statement of Justice Robert Jackson’ (1947) II *Trial of the Major War Criminals Before the International Military Tribunal* 151.

56 ‘Opening Statement of M Francois De Menthon’ (1948) V *Trials of the Major War Criminals Before the International Military Tribunals* 418.

57 See generally ‘Documents in Evidence at Nuremberg’ (1947) I *Trial Of The Major War Criminals Before The International Military Tribunal* 223–24.

58 Ibid 223.

59 See ‘Statement of Horst Pelckmann’ (1948) XXI *Trials of the Major War Criminals Before the International Military Tribunals* 626.

considered that his actions were 'right and legal' should be 'exonerated'.<sup>60</sup> Pelckmann, in a spirited legal challenge to the manifest illegality standard proposed by De Menthon, stated that this would lead to the illogical result that an individual who committed an illicit act without criminal intent would not be subject to punishment. On the other hand, an individual who carried out the same act in response to a superior order would be subject to punishment by virtue of the clearly criminal character of the command.<sup>61</sup> Pelckmann also reminded the Tribunal that a superior order may constitute compulsion and absolve a defendant from guilt.<sup>62</sup>

However in a robust riposte to Pelckmann, British prosecutor Sir Hartley Shawcross, noted in his closing statement that although the Charter provided that superior orders might be recognised in mitigation,<sup>63</sup> no rule of international law accorded immunity to individuals who obeyed orders which were 'manifestly contrary to the very law of nature from which international law has grown'.<sup>64</sup> Shawcross proclaimed that

[n]o one who chooses, as these men did, to abdicate their consciences in favor of this monster [Hitler] of their own creation can complain now if they are held responsible for complicity in what their monster did.<sup>65</sup>

In its judgments, the Nuremberg International Military Tribunal ('IMT') rejected the defence of superior orders. 'Although entitled to do so by its Statute, the Nuremberg Tribunal refused, in practice, to admit the argument of superior orders in mitigation.'<sup>66</sup> In Keitel's case it said

[s]uperior orders, even to a soldier, cannot be considered in mitigation where crimes so shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.<sup>67</sup>

This was echoed in the trial of Jodl:

Participation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes.<sup>68</sup>

Professor Gary Solis, however, cautions that

it is not entirely correct to assert that, '[t]he IMT Charter ... eliminated the defence of superior orders.' As single-mindedly as the IMT Charter may have applied the element as to senior officers and officials, the IMT nevertheless did inject an ameliorating factor not suggested by a strict interpretation of the Charter:

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60 Ibid.

61 Ibid.

62 Ibid.

63 'Closing Statement of Sir Hartley Shawcross' (1948) XIX *Trials of the Major War Criminals Before the International Military Tribunals* 465.

64 Ibid 466.

65 Ibid.

66 William Schabas, 'Sentencing By International Tribunals: A Human Rights Approach' (1997) 7 *Duke Journal of Comparative and International Law* 461, 486.

67 In *Re Gsring et al.*, 13 Annual Digest 536 (1946).

68 *Nuremberg Charter*, opened for signature 8 August 1945, 82 UNTS 280, art 8 (entered into force 8 August 1945).

'The True Test.' The IMT explained that the True Test was the inquiry not of whether there was 'the existence of the [manifestly illegal] order, but whether moral choice was in fact possible.'<sup>69</sup>

The author concurs with Solis that despite the clear statements of the Nuremberg Court, there are certain moral and legal issues to consider — alleged illegal action after all centres on the issue of obedience versus moral choice.<sup>70</sup> This was articulated by the Nuremberg Tribunal in the trial of Wilhelm List. The court commented that in a defence of superior order: '[t]he true test ... is not the existence of the order, but whether moral choice was in fact possible'.<sup>71</sup> In any case:

In the Nuremberg Trials, the distinction between conduct crimes (general intent) and crimes where criminal liability is dependent upon the act serving as a means of bringing about certain specified consequences (special intent) was upheld, and it was there noted that the special intent required for the latter category of crimes may not be presumed as a consequence of the act but must be proved.<sup>72</sup>

In the trials before the Tribunal, the crimes in question were premised on war crimes, crimes against peace and crimes against humanity. In dealing with the defence of superior orders the Court was clear that they did not exonerate subordinates from personal responsibility. Considering that the Court did not explicitly draw a distinction between the three international crimes in rebutting the defence, the author avers that the unspoken position was that the defence (in its limited and diluted form as a mitigating factor) applied to all acts that a subordinate undertook in the course of their duties. This in essence means that the defence had it been available would have applied across the board. The author's assertion is borne out in the subsequent national trials under the umbrella of Allied Control Council promulgated Law No 10 ('CCL No 10') promulgated in December 1945. It should be noted that CCL No 10 mirrored the Nuremberg legal treatment of the superior orders defence, however in a mark of the schism that was to continue between the international and national standards, domestic war crimes trials did not endorse the Nuremberg standard — accepting that under appropriate circumstances, *superior orders could be pled as a defence as well as in mitigation*.<sup>73</sup> The article now turns to consider subsequent national trials which fleshed out many aspects of the legal principles at the centre of the Nuremberg international trials including the applicability of the defence of superior orders in more depth than the Nuremberg IMT had done.

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69 Solis, above n 4, 516.

70 See Herbert Kelman and V Lee Hamilton, *Crimes Of Obedience* (1989) ii (describing the source of superior orders as unquestioning obedience versus principled resistance).

71 John Van der Vyver, 'The International Criminal Court and the Concept of Mens Rea in International Criminal Law' (2004) 12 *University of Miami International and Comparative Law Review* 57, 69–70.

72 *Ibid.*

73 See *Canadian Law Concerning Trials Of War Criminals By Military Courts*, 4 *United Nations War Commission: Law Reports of Trials of War Criminals* 125 (1948) (Annex); *Norwegian Law Concerning Trials Of War Criminals*, 3 *United Nations War Commission: Law Reports of Trials of War Criminals* 81, 85–86 (Annex 1).

## 1 *Superior Orders Defence — Putting Flesh to the Bone*

On 20 December 1945, the Allied Control Council promulgated CCL No 10, which was to govern all further Nazi prosecutions in domestic courts.<sup>74</sup> The law was the fulfilment of the vow made by the Allied Powers in the course of World War II to return war criminals so they could stand trial before tribunals in the territories in which their crimes had been committed.<sup>75</sup> Many advances in enriching international jurisprudence and fleshing out the substantive content of international criminal law were made by post-World War II domestic tribunals in implementing the Nuremberg legacy. Literally thousands of trials were carried out in domestic tribunals in different countries and regions of the world subsequent to the Nuremberg and Tokyo international trials.

CCL No 10 was closely modelled on the *Nuremberg Charter*. Like the *Nuremberg Charter*, it abrogated the act of State doctrine<sup>76</sup> and rejected superior orders as a defence.<sup>77</sup> With regard to the defence of superior orders, CCL No 10 in language essentially identical to art 8 of the *Nuremberg Charter*, provided in art II4(b) that '[t]he fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation'.<sup>78</sup> These trials not only perpetuated the Nuremberg legacy but also made a significant contribution to the corpus of international criminal law and enriched international jurisprudence.

### (a) *The American Proceedings Under Allied Control Council Law No 10*

The decisions of national tribunals under CCL No 10 (especially the 12 decisions by the United States Military Tribunals) applied and extended the Nuremberg principles regarding the development of the corpus of international criminal law.<sup>79</sup> These trials made a substantial contribution by expressly reaffirming the principle of individual criminal responsibility. The 'moral test', which effectively modified art 8 of the *Nuremberg Charter* by ameliorating its blanket rejection of superior orders as a defence, also affected CCL No 10 art proceedings which required establishing duress as a necessary part of a successful defence of superior orders.<sup>80</sup>

74 *Allied Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (20 December 1945), Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946 ('*CCL No 10*').

75 'Declaration on German Atrocities, 30 October 1943', *Documents on American Foreign Relations* (1945) vol 6, 231, 232. 'Declaration on German Atrocities, 30 October 1943' in Council on Foreign Relations, *Documents on American Foreign Relations* (1945) vol 6, 231, 232.

76 *CCL No 10*, art 2, [4(a)].

77 *Ibid.*

78 *Ibid.*, art 4(b).

79 For the most complete discussion, see William Zeck, 'Nuremberg: Proceedings Subsequent to Goering Et Al' (1948) 26 *North Carolina Law Review* 350.

80 See *Prosecutor v Erdemovic*, Case No IT-92-22-A (Judgment of Appeals Chamber, separate opinion of McDonald and Vohrah JJ, 7 October 1997), [35] ('[a]s obedience to superior orders may be considered merely as a factual element in determining whether duress is made out on the facts, the absence of a superior order does not mean that duress as a defence must fail').

The consideration of the 'moral choice' test is apparent in the *Flick*<sup>81</sup> and *Farben*<sup>82</sup> judgments while, in the High Command cases, the American Tribunal noted that the law must allow a soldier to assume that orders conform to international law.<sup>83</sup>

The superior orders clause was first interpreted by a three judge American panel in the Einsatzgruppen judgment.<sup>84</sup> This related to the Einsatzgruppen killing squads which shadowed the Nazi troops as they swept across Russia and ruthlessly carried out the Fuhrer Order, which called for the summary execution of Jews, gypsies, disabled, homeless, mentally challenged individuals and communist functionaries.<sup>85</sup> At trial, Dr Hans Gawlik, attorney for defendant Erich Naumann, the Chief of Einsatzgruppe B (the paramilitary 'task force' operated by the SS with the principal task of the the annihilation of the Jews, and political commissars in Belarus) contended that following World War I, the Commission on Responsibility feared that defendants would mechanically invoke the superior orders defence and, as a result, recommended that the admissibility of the defence should be a matter of judicial discretion. The American Tribunal however stressed that soldiers are 'reasoning agent[s]' and are not mere mechanical machines who reflexively respond to orders.<sup>86</sup> However, the Court clarified that to plead superior orders, an individual must demonstrate an 'excusable ignorance' of an order's 'illegal character'.<sup>87</sup> The judgment established that the superior orders defence was available in those instances in which a defendant was able to demonstrate excusable ignorance concerning the illegality of an order and further, that the defence was available in mitigation in those instances in which a defendant involuntarily carried out a command.

In the High Command trial, Wilhelm von Leeb received the very light sentence of three years in prison, with the tribunal noting that there was much to be said in mitigation: '[t]he United States Military Tribunal specifically noted that this was a case for application of the excuse of superior orders not as a defence but as a factor in mitigation of punishment.'<sup>88</sup> The thrust of the High Command judgment was that a subordinate will not be deemed to possess the requisite criminal intent in the event that he was not aware of, and could not reasonably have been expected to have been aware of, the illegal character of a command.<sup>89</sup> The Tribunal recognised that this rule compelled a commander to choose between

81 See (1952) VI *Trials of War Criminals Before the Nuremberg Military Tribunal* 1197-198 (commenting on the *Flick* case).

82 See (1952) VIII *Trials of War Criminals Before the Nuremberg Military Tribunals* 1206-209 (commenting on *Farben* case).

83 See (1950) XI *Trials of War Criminals Before the Nuremberg Military Tribunals* 511.

84 See *United States v Ohlendorf* (1950) IV *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10*, 411.

85 *Ibid* 412-16.

86 *Ibid* 470.

87 Above n 35.

88 Schabas, above n 66, 487.

89 'Opening Statement for Defendant List' (1950) XI *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, 1236.

possible domestic punishment for disobedience and sanction by the international community for committing a crime against the law of nations.<sup>90</sup> Importantly,

[t]he Court minimized the significance of the earlier provisions of the British and American military manuals, noting that these were neither authoritative legislative nor judicial pronouncements; manuals at most may play an evidentiary role in determining the existence of a custom or practice.<sup>91</sup>

In *The United States of America v Wilhelm List, et al* ('the Hostage cases') the Court ruled that members of the armed forces are only bound to obey lawful orders and cannot escape criminal liability in those cases in which they comply with commands which violate international law and outrage fundamental concepts of justice.<sup>92</sup> The Court asserted:

If the act done pursuant to a superior's order be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of the crime exists and the inferior will be protected.<sup>93</sup>

(b) *The British Proceedings under Allied Control Council Law No 10*

In the trial of Max Wielen and 17 others ('the Stalag Luft III' case), the Head of the Criminal Police in Breslau along with members of the SS were charged with executing 50 members of the Royal Air Force and other Allied forces. On the night of 24 March 1944, 80 officers of the Royal Air Force and other Allied Air Forces had escaped from a prisoner of war camp — the Stalag Luft III — at Sagan, in Silesia through an underground tunnel. On 26 March 1944, the news of the escape reached Hitler at Berchtesgarden and after consultations with his chief lieutenants Goering, Keitel and Himmler, he gave the verbal order that 'more than half of the escapees' were to be shot.<sup>94</sup> The defendants pleaded the defence of superior orders. Dismissing the defence, the British Military Court determined that the defendants must have been aware that the execution of the prisoners violated an unchallenged rule of warfare and outraged the general sentiments of humanity.

*United Kingdom v Eck* ('the *Peleus*' case) was another significant case, to address superior orders before a British CCL No 10 Court. The case concerned an incident of 3 March 1944 in which a German submarine had torpedoed and sank the Greek freighter *Peleus* in the South Atlantic. The submarine then surfaced and strafed the survivors in their lifeboats in an attempt to kill the entire crew. Four

90 Ibid 1236–237.

91 Matthew Lippman, 'Humanitarian Law: The Development and Scope of the Superior Orders Defence' (2001) 20 *Penn State International Law Review* 153, 194.

92 'Opening Statement for Defendant List' (1950) XI *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10*, 862.

93 *The Hostage cases* (1949) VIII *Trials Of War Criminals Before The Nuremberg Military Tribunal Under Control Council Law No 10*, 34, 50; see also *United States v Ohlendorf* (1950) IV *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10* 411, 470–71.

94 *Trial of Willy Zuehlke*, 14 *United Nations War Commission: Law Reports of Trials of War Criminals* 139, 149 (1949).



members of the German submarine crew were convicted of following orders to fire upon the crew of the *Peleus*. The Judge Advocate instructed that there was no duty to obey an unlawful order. The fact that a rule of warfare was violated pursuant to the order of a belligerent government or military official did not deprive the act of its criminal character or confer immunity from punishment. The Judge Advocate recognised that combatants could not be expected to consult an international law text or academic specialist during the heat of battle. However,

it must have been obvious to the most rudimentary intelligence that [the order to fire upon the crew] was not a lawful command, and that those who shot are not to be excused for doing it upon the ground of superior orders<sup>95</sup>

Significantly though, superior orders was viewed as a mitigating circumstance by the British Military Tribunal, and brought a reduced sentence of 15 year's imprisonment.<sup>96</sup>

(c) *In Summary*

This section has dealt at length with the Nuremberg international trials and the subsequent national trials under the umbrella of CCL No 10. However this is not to disregard the international trials at Tokyo (which tried 'Class A' offences — crimes against peace) and the subsequent national trials of some 5,700 Japanese nationals in the Pacific Theatre of 'Class B' (war crimes), and 'Class C' (crimes against humanity) offences by the victorious Allies (the trials were mainly by the United States, Australia, Canada, China and New Zealand). The reality is that the Nuremberg trials were the centre point of the Allied criminal law trials and greatly overshadowed the Tokyo international trials, which commenced in 1946, after the conclusion of the Nuremberg international trials and in the thick of the ongoing CCL No 10 trials. The most vibrant seam of case law that was to dominate and still dominates was that spawned by the Nuremberg IMT and the various subsequent proceedings under the umbrella of CCL No 10. It is noted that The Tokyo IMT Charter's art 6(b) which set the stage for the international trials, as well as paragraph 16 of American Regulations Governing the trial of War Criminals in the Pacific Area which set the stage for the national trials, were similar to the Nuremberg art 8. As happened at Nuremberg, the Tokyo Tribunal rejected pleas of superior orders.<sup>97</sup> The resulting national tribunals for the prosecution of war crimes in the Pacific and the Mediterranean also employed similar procedural articles.

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95 See *United Kingdom v Eck et al* (1947) 1 *United Nations War Commission: Law Reports of Trials of War Criminals* 1, 12.

96 *Ibid* 21.

97 *In re Masuda et al*, reprinted in Hersch Lauterpacht (ed), *Annual Digest and Reports of Public International Law Cases* (1951) 286.

### III POST–WORLD WAR II: A WRONG IS A WRONG

In 1962, the Israel Supreme Court convicted Adolf Eichmann. Eichmann had been an active participant in the ‘Final Solution of the Jewish Question’. He had the responsibility of ‘Transportation Administrator’, which put him in charge of all the trains which would carry Jews to the Death Camps in the territory of occupied Poland. In this role he facilitated and managed the logistics of mass deportation of Jews to ghettos and death camps in occupied Eastern Europe. He was indicted on 15 criminal charges, including charges of crimes against humanity, crimes against the Jewish people and membership of an outlawed organisation. During the whole trial, Eichmann insisted that he was only ‘following orders’ — the same defence used by the Nazi war criminals during the 1945–46 Nuremberg trials. He explicitly declared that he had abdicated his conscience in order to follow the *Führerprinzip*. Addressing the dominant ‘manifestly illegal’ standard in relation to the superior orders defence, the Court stated:

The distinguishing mark of a ‘manifestly unlawful order’ should fly like a black flag above the order given, as a warning saying ‘Prohibited’. Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only to the eyes of legal experts, is important here, but a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart not stony and corrupt, that is the measure of ‘manifest unlawfulness’ required to release a soldier from the duty of obedience upon him and make him criminally responsible for his acts.<sup>98</sup>

In 1953, the legal standard of manifestly illegal orders was evident in the case of *United States v Kinder*.<sup>99</sup> Kinder, an Air Force police officer, ‘apprehended a Korean [national] in a bomb dump’.<sup>100</sup> He was later ordered and complied with the command of Air Police Officer, George Schreiber, to kill the prisoner.<sup>101</sup> The Court Martial ruled that the content and context of the order to execute the Korean detainee was ‘so obviously beyond the scope of authority’ of Kinder’s superior and ‘so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding’.<sup>102</sup>

Two decades after Kinder, Lieutenant William Calley ‘was convicted by a general court martial ... of premeditated murder and ... assault with intent to commit murder’.<sup>103</sup> On 16 March 1968, Calley’s platoon swept through the hamlet of My Lai with an investigation later revealing that while in My Lai, Calley supervised and participated in the execution of hundreds of unarmed Vietnamese

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98 *Attorney-General of the Government of Israel v Eichmann* (1962) 36 ILR 275, 277.

99 (1953) 14 CMR 742.

100 *Ibid* 753.

101 *Ibid* 755.

102 *Ibid* 774.

103 *United States v Calley* (1973) 46 CMR 1131, 1138.

civilians.<sup>104</sup> Calley's principle defence was that he acted in accordance with superior orders and lacked a criminal intent.<sup>105</sup> He contended that on five separate occasions his superior Captain Ernest Medina had ordered him to 'waste' the villagers.<sup>106</sup> Medina, according to Calley, clearly commanded 'that under no circumstances would we let anyone get behind us, nor would we leave anything standing in these villages'.<sup>107</sup> The Court of Military Review dismissed the defendant's argument that a subordinate should only be held liable in the event that he personally knew of an order's illegality.<sup>108</sup> The Court of Military Appeals affirmed that the 'man of ordinary sense and understanding' under the circumstances would have been aware of the illegality of the order.<sup>109</sup> However, in a strong dissent, Judge William Darden argued that

*adherence to superior orders was an essential ingredient of discipline and should constitute a defence unless the commands would be recognised as illegal by persons of minimal intelligence and experience.*<sup>110</sup>

In summary, the author avers that the defence of superior orders applied to all international crimes. In this regard it is of note that even in the post-World War II My Lai massacre which amounted to a systematic massacre that met the benchmark of a crime against humanity, the defence of superior orders put forth by Calley was entertained but dismissed. The availability of the defence was also discussed in the 1990s Canadian case of *Regina v Finta* where the Court noted the applicability of the superior orders defence but discounted it in circumstances in which superiors acted oblivious to known or foreseeable facts. In this regard, Justice Cory, speaking for the majority, stated that

the mens rea requirement of both crimes against humanity and war crimes would be met if it were established that the accused was willfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences.<sup>111</sup>

The case importantly bolsters a stance that the *Rome Statute* departed from four years later when it set a dichotomy in allowing the defence for war crimes but precluding it for crimes against humanity and genocide.

#### A *The 1990s: The Ad Hoc International Criminal Tribunal — The Nuremberg Legacy Lives On*

The end of the Cold War, which had paralysed the United Nations from its inception, was a cause for celebration and hope. Following the historic Security

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104 Ibid 1173.

105 Ibid 1180.

106 Ibid 1182.

107 Ibid 1181–182.

108 Ibid 1184.

109 Ibid 1184.

110 Ibid 1196 [emphasis added].

111 [1994] 1 SCR 701, 819.

Council Summit Meeting of January 1992, the then Secretary-General of the United Nations, Boutros Boutros-Ghali, spoke of a growing conviction:

among nations large and small, that an opportunity has been regained to achieve the great objectives of the UN Charter — a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, ‘social progress and better standards of life in larger freedom’.<sup>112</sup>

However, even as this optimistic mission statement was being made, the Balkans had erupted into a theatre of war and Rwanda’s genocidal conflagration was in the making. These events were to lead to the establishment of two ad hoc international criminal tribunals for the former Yugoslavia and Rwanda and create the impetus for the establishment of the ICC in 1998 during the Rome Conference of the same year.

The Statutes of both the International Criminal Tribunal for the former Yugoslavia (‘ICTFY’) and the International Criminal Tribunal for Rwanda (‘ICTR’) explicitly exclude the defence of ‘superior orders’ from the litigation part of the trial.<sup>113</sup> The Statutes provide in almost identical terms that reliance by an accused person on an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the tribunal determines that justice so requires.<sup>114</sup> Thus, although not strictly a defence, obedience to orders can be a relevant and admissible fact. This articulation of the superior orders defence under which a subordinate who committed a crime can escape responsibility because s/he was following the orders of his/her superior enshrines and cements the position of the *Nuremberg Charter*.<sup>115</sup> The position further buttresses the trend in international law towards absolutely discarding superior orders as a ground of justification in cases involving the commission of international crimes.<sup>116</sup>

In the first case since World War II before an international criminal tribunal, the ICTFY in *Prosecutor v Erdemovic* (‘*Erdemovic*’) sentenced a Croat infantryman, Drazen Erdemovic, to 10 years. The issue of superior orders was central to the sentencing debate. The Trial Chamber noted that the provisions in the ICTFY Statute dealing with superior orders are ‘practically identical’ to those applicable at Nuremberg.<sup>117</sup> In this regard the international criminal tribunal noted

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112 *Report of the Secretary General on the Work of the Organization*, UN GAOR, 47<sup>th</sup> sess, UN Doc A/47/277, S/24111 (1992).

113 See Statute of the *International Criminal Tribunal for the Former Yugoslavia* (‘ICTFY Statute’), art 7(4); *International Criminal Tribunal for Rwanda Statute* (‘ICTR Statute’) art 6(4). As with the Nuremberg trials, the courts in Yugoslavia and Rwanda consider the ‘superior orders defence’ only as a mitigating factor in the sentencing stage.

114 *Ibid.* ICTFY Statute, art 7(4); ICTR Statute, art 6(4).

115 *Nuremberg Charter*, opened for signature 8 August 1945, 82 UNTS 280, art 8 (entered into force 8 August 1945): ‘The fact that the defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires.’

116 Van der Vyver, above n 71, 77.

117 See *Erdemovic*, Case No IT-96-22-T (Sentencing Judgment of Trial Chamber I, 29 November 1996) [48].

that superior orders is expressly excluded as a defence. The Trial Chamber noted that the Nuremberg IMT had not accepted superior orders as a mitigating factor in the case of the major war criminals, but signalled its willingness to adopt a more forgiving position based on the position of the subordinate.<sup>118</sup> In the specifics of *Erdemovic*, the Trial Chamber accepted as relevant the fact that he had followed orders and held a subordinate position in the military hierarchy.<sup>119</sup> McDonald and Vohrah JJ endorsed the following proposition:

We subscribe to the view that obedience to superior orders does not amount to a defence per se but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out.<sup>120</sup>

The position in *Erdemovic* was symptomatic of several other trials at the ICTFY and the ICTR. The ad hoc international criminal tribunals proved amenable to the defence of superior orders despite the contrary language of their Statutes in cases that indicated that the defendant acted in obedience to a superior under circumstances of duress and/or coercion.<sup>121</sup> The emerging standard at the ad hoc international criminal tribunals is that 'evidence of having received orders from superiors, though not a complete defence, is relevant and admissible to the question of whether the soldier laboured under duress when performing the command'.<sup>122</sup> This position by the tribunals is the dominant and consistent approach and negates any further sustained analysis of the case law of the ad hoc international criminal tribunals considering that the article has already extensively canvassed the case law of the Nuremberg/Tokyo IMTs, which is reflected and echoed in the ad hoc international criminal tribunals. In summary, a synthesis of the case law of the ad hoc international criminal tribunals (as exemplified in the *Erdemovic* trial) points to a cementing of the international law standard (noted in Part II above) that discards superior orders as a defence but allows it only as a mitigating factor.

The seeming linear progression towards a bright line legal principle in international law regarding the defence that had been propagated eight decades earlier at Versailles at the end of World War I was however to receive a major jolt in 1998. In a serious shake-up of the international standard, the *Rome Statute* became the first multilateral treaty dealing with international penal process to recognise the defence of superior orders (even though in a diluted form).<sup>123</sup> The Statute in a departure from prevailing legal provisions encapsulated in the *Nuremberg Charter* and the Statutes of the ad hoc international criminal tribunals

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118 Ibid [53].

119 Ibid [92]–[95].

120 *Erdemovic*, Case No IT-92-22-A (Judgment of Appeals Chamber, separate opinion of McDonald and Vohrah JJ, 7 October 1997), [34].

121 Drazen Erdemovic, Case No IT-96-22-T, 9 ('While the complete defence based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application are particularly strict.')

122 Mark Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War* (1999) 43.

123 *Rome Statute*, UN Doc A/Conf.183/9, opened for signature 17 July 1998 (entered into force 1 July 2002), reprinted in 37 ILM 1002 (1998).

allows for the defence of superior orders upon certain conditions being present: The subordinate was under a legal obligation to obey orders; the subordinate did not know the order was unlawful; and the order was not manifestly unlawful.<sup>124</sup> However the Statute explicitly specifies that orders to commit genocide or crimes against humanity are illegal as a matter of law.<sup>125</sup>

### B *The Rome Statute: From the 1990s into the 21<sup>st</sup> Century — The Past in the Present? Where is the Future*

During the Rome Conference in the summer of 1998 that led to the establishment of the ICC, it was clear that some States were keen to retain the virtues of military discipline through a recognition of the superior orders as a complete defence. This position was spearheaded by the American delegation which in a reversal of its support for discarding the defence in the negotiations for the *Nuremberg Charter*, sought to convince others that superior orders ought to be accepted as a valid defence under the rules of international law (and not simply as a mitigating factor). The Americans argued that the position taken by the Nuremberg IMT in precluding the defence ought to be seen as an aberration that was contingent upon the special circumstances that prevailed in Nazi Germany.<sup>126</sup> In essence, the Americans sought to resurrect the pre-World War II Anglo-American position. Interestingly, among the many delegations that opposed the American view was the United Kingdom.<sup>127</sup>

The American position, driven strongly by the muscle of its delegation — the largest — and backed by the formidable political muscle of the world's superpower, was too strong to be swept aside despite vigorous objection. Further impetus was added when some major players (including China, India, Nigeria and Russian) joined hands with the United States in insisting on an absolute threshold. To achieve consensus, compromises had to be made. A visible sign of compromise is the apparent threshold introduced in the forefront of art 8 defining war crimes. The first paragraph of art 8 orients the Court specifically towards planned or widespread commission of war crimes.<sup>128</sup> This is elaborated further by a more radical move enumerating permissible defences in art 33. The article in responding to the two divergent and opposing views — absolute liability or non-absolute liability — seeks to strike a balance. It provides as follows:

- 1 The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a

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124 *Rome Statute*, art 33(1).

125 *Ibid* art 33(2).

126 K Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 *Criminal Law Forum* 1, 30–31.

127 These countries argued that a subordinate who has been instructed to perform an act which constitutes a crime within the jurisdiction of the ICC should not be excused but could in appropriate circumstances raise the defence of mistake or duress.

128 *Rome Statute*, art 8(1).

superior, whether military or civilian, shall not relieve that person of 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.

- 2 For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Article 33 was specifically drafted to cover the category of war crimes.<sup>129</sup> As para 2 provides, it clearly and automatically excludes the relevance of para 1 for crimes against humanity and genocide.<sup>130</sup> Indeed, one of the cumulative requirements for the accused being relieved of criminal responsibility — *dolus eventualis* — is missing due to the very nature of the crimes. John Van der Vyver notes that in general an analysis of this provision shows that the *Rome Statute* does not recognise superior orders as an objective ground of justification at all, because an order to commit an international crime is in itself unlawful.<sup>131</sup> However, the three requirements in art 33 apply cumulatively, and successfully raising the defence of superior orders therefore depends in the final analysis on the 'mental' component of that defence (guilty knowledge).

The *Rome Statute* thus accepts superior orders as a defence provided the order was executed by a subordinate in circumstances that excludes guilty knowledge and therefore negates the element of fault, a situation that may be possible in the case of war crimes where responding to orders is central and may, in the author's position, be a plausible excuse in isolated incidents; scenarios of which the author will paint below. In a further shift towards creating a dichotomy between war crimes and the other two international crimes (crimes against humanity and genocide), Part three on general principles of criminal law contains four grounds for excluding criminal responsibility: mental disease or defect, intoxication, defensive action and duress.<sup>132</sup> It however admits of an additional ground defence of property which is limited to the sole category of war crimes.<sup>133</sup>

The author submits that a key reason that the *Rome Statute* deals separately with war crimes is premised on the special instance of crimes against humanity and genocide — the *mens rea*. To elaborate this statement, let us begin with a look at art 1 of the *Rome Statute*. In this article, the Statute upholds the principle of no liability without fault to the letter. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.<sup>134</sup> The conjunctive requirement of intent and knowledge encapsulated

129 Ibid art 33(1).

130 Ibid art 33(2).

131 Van der Vyver, above n 71, 80–81.

132 *Rome Statute*, art 31(1).

133 Ibid art 31(1)(c).

134 Ibid art 30(1).

in art 1 is further defined in art 30(1) of the *Rome Statute*. This article makes criminal responsibility for any of the crimes within the subject-matter jurisdiction of the Court conditional upon the material elements of the crime concerned having been committed 'with intent and knowledge'. Paragraph 2 of art 30 defines intent as follows:

For the purposes of this article, a person has intent where:

- (a) In relation to conduct, that person means to engage in the conduct;
- (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

Synthesising the foregoing provisions, it is evident that the *Rome Statute* recognises mistake of law as a ground of exculpation in all cases where the perpetrator, because of the mistake, lacks mens rea. If the perpetrator honestly believes that his/her act would fall within the confines of circumstances that would legally deprive the act of criminality, then it cannot be said that s/he intentionally committed the crime. Guilty knowledge is an essential component of crimes against humanity and genocide but the thinking in precluding superior orders arguably was based on the fact that the very nature and threshold indicia for these two crimes (systematic and widespread) excludes all doubts that might be entertained in assessing intent and knowledge.

Carrying forth the argument, 'knowledge' is defined in the *Rome Statute* as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.<sup>135</sup> This definition covers *dolus directus*, *dolus indirectus* and *dolus eventualis*. Therefore, with regard to crimes against humanity and genocide 'intent' in relation to conduct, as defined in the *Rome Statute*, transcends *dolus directus* and *dolus indirectus* to encompass *dolus eventualis*. The latter excludes the provision requiring intent and knowledge considering that intentional killing of human beings encompasses *dolus eventualis* and falls within the purview of the intent and knowledge test that covers crimes against humanity and genocide and the particular consequence as an essential component of the crimes concerned.

To elaborate on this, let us consider four brief scenarios. A soldier may mistakenly fire a missile into a civilian shelter owing to faulty intelligence or target marking or bomb a rail bridge over a river unaware that a train with civilians is approaching. However, a soldier lining up unarmed women and children for execution or loading up unarmed civilians onto cattle trucks for transportation to a detention camp is a different story. Michael Bothe, challenges the position that these scenarios support as set-out by the author and argues that the repetition of words denoting intent in the *Rome Statute*, in its definitions of particular war crimes, denotes that 'not only the actual conduct (eg the dropping of a bomb), but also the consequences (eg hitting a civilian object) must be covered by the intent'.<sup>136</sup> The author disagrees, as indicated above, that crimes against humanity

<sup>135</sup> Ibid art 30(3).

<sup>136</sup> Michael Bothe, 'War Crimes' in A Cassese et al (eds), *The Rome Statute Of The International Criminal Court: A Commentary* (2002) 370, 389.



and genocide are special intent crimes, while many war crimes are not necessarily so. A soldier's acts are to be judged in the context of the facts and knowledge that s/he had at the time of the act and which s/he genuinely relied on (the scenario of the civilian shelter and rail bridge) not the facts emerging thereafter. However as can be seen through the scenario of the unarmed women and children and the cattle truck transportation no justification, precedent or subsequent, can amount to a mistake of fact. This position finds support in Professor Leila Sadat's riposte to Bothe which dismisses Bothe's assertion as incorrect. Responding to Bothe's scenarios, Sadat asserts that not one of the war crimes listed by Bothe are special intent crimes, and the conclusion seems inevitable that repeating the element of intent in these cases add nothing to the general requirement of fault.<sup>137</sup> Considering that crimes against humanity and genocide are special intent crimes no one claiming *ignorantia juris* in respect of these crimes can be taken seriously considering that they require a distinct manifestation of *dolus specialis* and *dolus directus*. This was summed-up in an erudite fashion in the Eichmann trial.

In targeting the superior orders defence as applicable to war crimes and not to crimes against humanity and genocide, the *Rome Statute* seems to adopt a pragmatic approach. On one hand, acting upon superior orders to commit a crime within the jurisdiction of the ICC is no excuse, because the order to commit any of those crimes is in itself unlawful and must be disobeyed by the subordinate. However, there is the centuries old exception to the rule which has championed the position that: if the perpetrator of the crime acted upon the orders of his or her government, or of a military or civilian superior, while being unaware that the order was unlawful, the subordinate will not be responsible for the offence, provided he or she was under a legal obligation (which soldiers are under as a matter of law) to obey orders of the government or of the concerned military or civilian superior, and the order was not manifestly unlawful. In light of the threshold requirements set by the *Rome Statute* for crimes against humanity, Cassese observes that 'the requisite *mens rea* must include the awareness that the individual criminal act is part of a widespread or systematic attack on a civilian population'.<sup>138</sup> The element of fault prescribed for the crime of genocide is a variety of *dolus specialis* and as such qualifies the acts through which genocide is committed: the act must be committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.<sup>139</sup>

In summary, the distinction made in the *Rome Statute* in regard to the mental element pertaining to conduct and the mental element pertaining to a consequence of the conduct seems to have been the rallying point around which the dichotomy between war crimes on the one hand and crimes against humanity and genocide,

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137 Leila Nadya Sadat, *The International Criminal Court And The Transformation Of International Law: Justice For The New Millennium* (2002) 162, 210–11.

138 A Cassese, 'Crimes against Humanity' in A Cassese et al (eds), *The Rome Statute Of The International Criminal Court: A Commentary* (2002) 353, 373.

139 See *Prosecutor v Jean Kambanda*, Case No ICTR-97-23-S (Judgment and Sentence, 4 September 1998), [16]; *Prosecutor v Radislav Krstic*, Case No IT-98-33-T, (Judgment of Trial Chamber I, 2 August 2001), [571].

on the other, were differently treated. Thus the nature of crimes against humanity and genocide means the essential element of knowledge (being aware that a circumstance exists or a consequence will occur in the ordinary course of events)<sup>140</sup> does not explicate *dolus directus* and *dolus indirectus* but rather should be synthesised by encompassing the *dolus eventualis* standard.

## IV CONCLUSION

More than six decades ago Kelsen decried having combatants fighting for survival being placed in the position of calibrating the legal status of commands.<sup>141</sup> From the foregoing discussion and analysis, the trend has been that international criminal tribunals prohibit a defence of superior orders per se, but typically allow the fact that a subordinate followed a superior's order to serve as a mitigating factor for sentencing purposes.<sup>142</sup> But even this linear development was derailed with the adoption of the *Rome Statute* which allows a diluted form of the standard but only for war crimes.

The position regarding the defence of superior orders is no clearer in the 21<sup>st</sup> Century and its legal parameters remain opaque. The dominant international legal instruments the Statutes of the two ad hoc international criminal tribunals on the one hand and the *Rome Statute* on the other, continue to encapsulate an ambivalence that leaves the exact status of the defence open and fluid. In summary, it can be said that a subordinate can rely on a superior order that culminated in the commission of a crime, 'but then only (i) if the subordinate knew or should have known that the order was illegal, or (ii) the order was manifestly illegal. This view also has some support as being the norm that applies in international law.'<sup>143</sup> It is evident that the question of whether a rule of warfare violated in pursuance of an order of a belligerent commander deprived the act in question of its character as a war crime, or whether it conferred upon the perpetrator immunity from punishment, is still the subject of serious but inclusive debate. To date, the concept remains the subject of different national and international legal dimensions and scholarly debate with no clear position legally and, in case law, as to what the consensual legal principle is.<sup>144</sup>

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140 *Rome Statute*, art 30(3).

141 Kelsen, above n 40, 556.

142 See eg *In Re Von Leeb* (1948) XI *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No 10*, 511, 533.

143 Van der Vyver, above n 71, 78.

144 See Oppenheim, above n 37, 453–54.