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## Article on the Law of War

# Humanitarian Law: The Development and Scope of the Superior Orders Defense

Dr. Matthew R. Lippman\*

The prosecution of combatants who have contravened the law of war in obedience to a superior order raises perplexing and profound issues concerning the code of armed conflict. Soldiers are tutored and trained to comply with commands in order to insure organizational integrity and efficiency. Their personal safety, security and self-interest are subordinated to the overarching goal of safeguarding the sovereign sanctity of the State. On the other hand, the conduct of armed conflict is constrained by an internationally mandated code of conflict, which is intended to preserve humanitarian and humane values. These legal rules reflect the noble aspirations of chivalry and care and concern for the weak and

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defenseless, which historically have animated the warrior's ethic. The law of war also recognizes that while the employment of armed force is the sovereign prerogative of States, the exercise of this right may not provide a pretext or occasion to ravage resources, incinerate the innocent or to eradicate the enemy.<sup>1</sup>

The effectiveness and enforcement of the law of war, in part, depends upon soldiers assuming the stance of reasoning and autonomous agents rather than reflexive robots. This demands that subordinates interrogate and resist the demands and directives of their superiors. In addition, ordinary combatants must be capable of cataloging and comprehending the encyclopedic rules of the law of war during the heat of battle, many of which require intricate and nuanced factual and legal judgments. A measure of courage also is involved. The requirements of international law may be counter to the claims of self-preservation which arise during the course of armed combat. In addition, disobedience to the dictates of authority may result in discipline, demerit or detention.<sup>2</sup>

The complexity of these conflicting concerns is illustrated by the conviction and execution of Breaker Morant, a romantic renegade firmly entrenched in the hagiography of Australia.<sup>3</sup> By mid-1900, the British had vanquished their Boer foes and asserted command and control over South Africa.<sup>4</sup> The Boers, however, resisted formal surrender and dissolved into marauding guerilla bands.<sup>5</sup>

The British military lacked the expertise and experience to combat the Boers and resorted to scorched earth policies and to the internment of women and children, tactics which only fanned the flames of resistance.<sup>6</sup> The increasingly desperate British formed a ferocious fighting force dominated by Australian ranch rovers who were accustomed to the methods and morality of mobile irregular

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1. See generally, GEOFFERY BEST, HUMANITY IN WARFARE (1980); MARK J. OSIEL, OBEYING ORDERS ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR (1999); and MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 309-16 (1977).

2. See generally *id.*

3. See generally F.M. CUTLACK, BREAKER MORANT: A HORSEMAN WHO MADE HISTORY WITH A SELECTION OF HIS BUSH BALLADS (1962); MARGARET CARNEGIE & FRANK SHIELDS, BREAKER MORANT BALLADIST AND BUSHVELDT CARBINEER (1979).

4. CUTLACK, *supra* note 3, at 44.

5. *Id.* at 46-47. The Boers were a mixture of Dutch and French Huguenots who are progenitors of the modern Afrikaners. CARNEGIE & FRANK, *supra* note 3, at 4.

6. CUTLACK, *supra* note 3, at 46; CARNEGIE & FRANK, *supra* note 3, at 148.

conflict in an untamed landscape.<sup>7</sup> The Boers met their match in these Bush Veldt Carbineers, and the ruthless renegade Captain Breaker Morant.<sup>8</sup>

The Boers resorted to tactics such as stripping the khaki uniforms from dead British soldiers and infiltrating the English forces and orchestrating ambushes through the display of false flags of surrender.<sup>9</sup> In order to combat these maneuvers, commander-in-chief Lord Herbert Kitchner ordered the execution of Boers captured while wearing British uniforms.<sup>10</sup> This later was amended to provide that no quarter should be extended to Boers.<sup>11</sup> Although these orders elicited some concern, there is no indication that punishment was meted out to British officers who executed Boers.<sup>12</sup>

Morant learned, in August 1901, that his close friend, Captain Frederick Hunt, had been abused, savaged and killed by a band of Boers.<sup>13</sup> A grief-stricken Morant immediately pursued the perpetrators and apprehended the Boer Visser, who was wearing Hunt's clothes.<sup>14</sup> Morant ordered Visser's execution and reported the killing to his superiors.<sup>15</sup> Morant later apprehended eight other Boers who also were killed.<sup>16</sup> The shooting was inadvertently witnessed by a German missionary, the Reverend C.A. Daniel Hesse, who himself was subsequently found shot to death.<sup>17</sup> Several weeks later, on September 12, three additional Boers were detained and killed by Morant's men.<sup>18</sup> Morant seemingly redeemed doubts concerning his character and courage when roughly two weeks later he captured the notorious Boer commando Cornet Kelly along with nine of his men.<sup>19</sup>

Despite Great Britain's military success, she was subjected to increasing international criticism for the tactics and strategies deployed in the South African campaign, most notably from Germany.<sup>20</sup> In an effort to palliate public opinion and to assuage

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7. CUTLACK, *supra* note 3, at 48-50

8. *Id.* at 55.

9. *Id.* at 48.

10. CARNEGIE & FRANK, *supra* note 3, at 83.

11. CUTLACK, *supra* note 3, at 62, 86.

12. *Id.* at 57-58; CARNEGIE & FRANK, *supra* note 3, at 64.

13. CUTLACK, *supra* note 3, at 61-62.

14. CARNEGIE & FRANK, *supra* note 3, at 82.

15. CUTLACK, *supra* note 3, at 63-64.

16. *Id.* at 66.

17. *Id.* at 67.

18. *Id.* at 67-68.

19. *Id.* at 69-70.

20. CARNEGIE & FRANK, *supra* note 3, at 111-12.

anger over the death of Hesse, Morant and two other Australian, officers were arrested in October 1901.<sup>21</sup>

Morant testified at trial that Visser had been wearing Captain Hunt's clothes and that he followed Kitchner's command and summarily executed the prisoner.<sup>22</sup> In addition, Morant insisted that Captain Hunt admonished that prisoners were not to be brought in alive.<sup>23</sup> He noted that the authorities clearly countenanced his conduct since there had been no response or reaction to reports of the killings.<sup>24</sup> Morant also noted in mitigation that he only took these extreme measures following the death of his comrade Captain Hunt.<sup>25</sup> The Breaker's Australian attorney, Major J.F. Thomas, argued that Morant reasonably believed that he was acting pursuant to orders issued by his superiors and that while he perhaps should be subject to censure, that he was not deserving of criminal punishment.<sup>26</sup> Thomas further contended that the Bush Veldt Carbineers had been assigned to combat the terror tactics of marauding Boer bands and waged war under a separate set of legal expectations and standards.<sup>27</sup> The Crown Prosecutor responded that Morant carried out an obviously illegal and improper command and should be subjected to a severe sentence.<sup>28</sup> The fact that the Boers disregarded the directives of the code of conflict did not justify the retributive response of summarily executing prisoners.<sup>29</sup> Morant's military inexperience and lack of understanding of the requirements of the humanitarian law of war did not constitute a legal defense.<sup>30</sup>

Morant was adjudged guilty of murder and sentenced to death in February 1902.<sup>31</sup> He subsequently was indicted and convicted along with two others for the killing of the eight Boers.<sup>32</sup> Morant and Lieutenant Peter Handcock, however, were acquitted of the murder of the missionary Hesse.<sup>33</sup> Commentators have speculated that Morant and Handcock, in fact, were executed for their

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21. *Id.* at 111.

22. *Id.* at 116-27.

23. *Id.* at 117.

24. *Id.*

25. CARNEGIE & FRANK, *supra* note 3, at 111-12.

26. CUTLACK, *supra* note 3, at 83.

27. *Id.* at 86.

28. *Id.* at 83-84.

29. *Id.* at 86-87.

30. *Id.* at 84.

31. CARNEGIE & FRANK, *supra* note 3, at 118-19.

32. *Id.* at 126.

33. *Id.* at 134-35.

suspected involvement in the killing of Hesse since other British units routinely shot prisoners without suffering recrimination.<sup>34</sup> Hancock wrote his sister on the eve of his execution and stated the following: "I obeyed my orders and served my King as I thought best."<sup>35</sup> In order to mute potential protest, the English did not inform the Australian government of the executions for seven weeks.<sup>36</sup>

The trial of Breaker Morant presents the issue whether a soldier should be exonerated in those instances in which he or she obeys commands which later are adjudged to have clearly contravened the law of war. What is the standard for determining whether a combatant should have been, or was, aware of the illegality of a superior order? Did not the orders to kill prisoners appear legal in light of the tactics and strategies during the Boer War? Can reason and rationality be demanded of combatants given the pressures of armed conflict? Should responsibility be limited to those who issued the orders or shared equally by individuals in the higher and lower-levels of command? Is it equitable to hold a lower-level and inexperienced combatants responsible for comprehending the encyclopedic code of conflict and deciphering the legality of orders? Should there be a distinction between combatants, such as Morant, who are not under immediate pressure to abide by orders and soldiers confronting immediate retribution for disobedience? Does the trial of ordinary combatants provide a politically palatable scapegoat for authorities? In the end, should superior orders be a complete defense, plea in mitigation, or of no significance absent a demonstration of duress or mistake of fact?<sup>37</sup>

This essay traces the development and debate over the defense of superior orders over the course of the last century. The doctrine has preoccupied and bedeviled philosophers and jurists and is of significant practical import since it promises to be increasingly relied upon by defendants confronting prosecution before the newly-formed international criminal courts.<sup>38</sup>

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34. *Id.* at 64, 148-49. There is evidence that Morant and Hancock killed Hesse. *Id.* at 149-50.

35. *Id.* at 165. On January 23, Morant and Hancock were released from confinement in order to assist in defending the town of Pietersburg against a Boer attack. They helped to repel the Boers and then were returned to prison. CUTLACK, *supra* note 3, at 78-79.

36. CUTLACK, *supra* note 3, at 18.

37. *See supra* notes 3-36 and accompanying text.

38. *See Rome Statute for the International Criminal Court, A/Conf. 1839 (1998), reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A*

## I. An Early Precedent

The 1474 trial of Peter of Hagenbach, Charles of Burgundy's Governor of Breisbach, is considered the progenitor of modern war crimes trials.<sup>39</sup> The Archduke of Austria pledged his possessions on the Upper Rhine, including the fortified town of Breisbach, to Charles on the condition that Charles respect the liberties of the towns and inhabitants.<sup>40</sup> Charles had no intention of returning these territories, refused repayment of the Archduke's debt and directed Hagenbach to implement a policy of repression designed to eliminate opposition.<sup>41</sup> Austria formed a coalition with Berne, France and with the towns and knights of the Upper Rhine, captured Breisbach and subjected Hagenbach to trial.<sup>42</sup>

Austria presided over the tribunal which consisted of twenty-eight judges from allied towns.<sup>43</sup> The accused was charged with violating the laws of God and man through murder, rape, perjury and other depredations.<sup>44</sup> Hagenbach's representative responded that the defendant's only judge and master was the Duke of Burgundy and that as a soldier that he lacked the standing and status to question the Duke's demands.<sup>45</sup> The Tribunal rejected this defense on the grounds that it contravened the law of God.<sup>46</sup> Hagenbach was stripped of his knighthood and executed; Charles was subsequently defeated and killed in the Battle of Nancy of 1477.<sup>47</sup>

This judgment undoubtedly was influenced by the partisan predisposition of the panel. The reference to the laws of God and man nevertheless suggested that there were transcendent rules which took precedent over those promulgated by even the most elevated member of the aristocracy.<sup>48</sup> As illustrated in the following

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DOCUMENTARY HISTORY 39 (M. Cherif Bassiouni comp., 1998) [hereinafter Rome Statute].

39. GEORG SCHWARZENBERGER, II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 462 (1968).

40. *Id.*

41. *Id.* at 463-64.

42. *Id.*

43. *Id.*

44. SCHWARZENBERGER, *supra* note 39, at 465.

45. *Id.*

46. *Id.*

47. *Id.*

48. *See supra* notes 39-48 and accompanying texts. Hagenbach's plea was consistent with various authoritative statements of law. The Justinian Digest states that "any person who, in war, commits any act forbidden by his commander, or fails to obey his orders, shall suffer death, even if his mission be successfully

sections, this decision's constrained conception of the prerogatives of sovereignty anticipated the twentieth century jurisprudence of superior orders.

## II. World War I

### A. *Competing Perspectives on the Superior Orders Defense*

The weight of scholarly opinion was that English, French and American law insulated a subordinate officer who acted in accordance with superior orders from criminal prosecution.<sup>49</sup> The leading treatise on international law authored by Professor Lasa Oppenheim, the Whewell Professor at Cambridge, pronounced that "[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."<sup>50</sup>

Professor Oppenheim drafted the provision of the British Manual of Military Law on superior orders issued in 1914 and reprinted in 1917.<sup>51</sup> Article 443 asserted that members of the armed forces who violated the recognized 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>52</sup> Article 443 further provided that individuals issuing illegal orders

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accomplished." L.C. Green, *The Defence Of Superior Orders In The Modern Law Of Armed Conflict*, 31 ALBERTA L. REV. 320, 321 (1993). The Articles of War promulgated by Richard II in 1385 provided that "every one be obedient to his captain . . . under penalty of losing his horse and armor." *Id.* James II, in 1688, stated that "if any inferior officer or soldier shall refuse to obey his superior officer . . . he shall be cashiered, or suffer such punishment as a Court Martial shall think fit." *Id.* Similar provisions also appeared in the military instructions issued under the authority of Emperor Maximilian, those issued by Robert Earl of Leicester, when commanding the Netherlands and English forces in 1586, and in the Letter of Articles on Military Discipline promulgated under the auspices of Prince Maurice of Orange which remained in force until 1799. *Id.* The superior orders plea also was unsuccessfully invoked by the commander of the guard as a defense to the charges of murder and treason stemming from the killing of King Charles I. The Court ruled that obedience to a traitor's order also was traitorous. See Jeanne L. Bakker, *The Defense of Obedience to Superior Orders: The Mens Rea Requirement*, 17 AM. J. CRIM. L. 55 n.2 (1989).

49. See George Gordon Battle, *The Trials Before the Leipsic Supreme Court of Germans Accused Of War Crimes*, 8 VA. L. REV. 1, 24-25 (1921).

50. LASA OPPENHEIM, II INTERNATIONAL LAW, A TREATISE: WAR AND NEUTRALITY 310 (2nd ed. 1912)

51. George A. Finch, *Superior Orders and War Crimes* 15 AM. J. INT'L L. 440, 441 (1921).

52. *Id.* Redress was to be through "other means," presumably reprisals. *Id.*



were subject to criminal punishment.<sup>53</sup> This provision was adopted, with only slight modification, as Article 336 of the Rules of Land Warfare approved by the General Staff of the United States Army and issued in April 1914.<sup>54</sup> Article 336 provided, in part, that members of the armed forces may not be punished for offenses “committed under 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>55</sup>

Former naval commander Sir Graham Bower, in a talk before the English Grotius Society in 1915, endorsed Oppenheim’s view as emblematic of prevailing international law doctrine.<sup>56</sup> Bower condemned as cruel and inhumane the German submarine fleet’s attacks on merchant vessels under circumstances in which it was impossible to save the passengers and crew.<sup>57</sup> However, he stressed that according to prevailing military law that “the blame does not rest with them [submarine commanders], but with their superiors.”<sup>58</sup> Bower noted that subordinates typically lacked sufficient information to make a reasoned judgment and that even an order which appeared to be facially invalid may constitute a justifiable reprisal.<sup>59</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>60</sup>

Dr. Hugh Bellot, who in 1918 would be named secretary of the British government’s war crimes commission, responded in a presentation to the Grotius Society.<sup>61</sup> Bellot stressed that the British Manual of Military Law was an advisory statement of the

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53. *Id.*

54. *Id.*

55. *Id.* Some significant textual distinctions between the American and British text are discussed in Alexander N. Sack, *Punishment of War Criminals and the Defence of Superior Orders*, 80 L.Q. REV. 63, 66 (1944). French law is briefly discussed in Battle, *supra* note 49, at 24. The previous American rule was that a “superior officer cannot order a subordinate to do an illegal act and if a subordinate obey such an order and disastrous consequences result, both the superior and the subordinate must answer for it.” The Trial of Captain Henry Wirz for Conspiracy and Murder (Washington D.C., 1865), 8 AMERICAN STATE TRIALS 657, 823 (1917).

56. Graham Bower, *The Laws of War: Prisoners of War and Reprisals*, in I TRANSACTIONS GROTIUS SOC’Y 15, 24 (1916).

57. *Id.*

58. *Id.*

59. *Id.* at 25.

60. *Id.*

61. Hugh H. L. Bellot, *War Crimes: Their Prevention and Punishment*, in II TRANSACTIONS GROTIUS SOC’Y 31 (1917).

law and possessed no statutory force or authority.<sup>62</sup> The exculpation of subordinates would “make wastepaper of the whole chapter.”<sup>63</sup> This would mean that only the Kaiser would be criminally culpable, and an international tribunal was not likely to indict an individual of the Kaiser’s stature and transform him into a martyr.<sup>64</sup> Bellot queried whether it could be credibly contended that a lower-level officer, who acted under orders and directed his men to shoot non-combatants without trial, was not a war criminal? What of the officer in command of the German U-boat which torpedoed the civilian ship, the *Lusitania*, and sent 1,200 non-combatants to their death?<sup>65</sup> Bellot urged the British government to clearly proclaim that all those involved in war crimes would be brought to the bar of justice.<sup>66</sup>

Commentators observed that any German insistence that the Allies respect superior orders in prospective war crimes trials had been compromised by the conviction and execution of English Captain Charles Fryatt.<sup>67</sup> Fryatt directed his merchant vessel to ram an approaching German submarine which was forced to submerge to avoid a collision.<sup>68</sup> He was convicted by a German court martial of terrorism despite the fact that scholars noted that Fryatt’s actions were in conformity with the instructions of the British Admiralty and consistent with international law.<sup>69</sup>

Anglo-American judicial opinion in claims of civil liability was divided on the defense of superior orders.<sup>70</sup> In the *Flying Fish*, the commander of a naval vessel, in accordance with instructions issued by the President of the United States, seized a Danish brigantine

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62. *Id.* at 46.

63. *Id.*

64. *Id.*

65. *Id.* at 49.

66. Bellot, *supra* note 61, at 49. English commentator C.A. Hereshoff Bartlett, would insulate subordinates from liability for having carried out legal orders. He suggested that this immunity would be lost in cases in which a combatant engaged in “wanton, cruel and unnecessary crime,” suggesting that the subordinate must engage in an “intentional” and “willful” wrong. C.A. Hereshoff Bartlett, *Liability for Official War Crimes*, 35 L.Q. REV. 177, 189, 191 (1919). George Finch noted that a recognition of the superior orders defense would undermine efforts to enforce provisions of the law of war designed to humanize armed conflict. George A. Finch, *Superior Orders and War Crimes*, 15 AM. J. INT’L L. 440, 445 (1921).

67. See Edwin Maxey, *The Execution of Captain Fryatt*, 37 CANADIAN L. TIMES 456 (1917).

68. See James Brown Scott, *The Execution of Captain Fryatt*, 10 AM. J. INT’L L. 865-66 (1916).

69. *Id.* at 876-77.

70. See Finch, *supra* note 66, at 442.

which was sailing from a French port.<sup>71</sup> The Act of Congress under which the President promulgated the order only authorized the seizure of vessels sailing to French ports.<sup>72</sup> Chief Justice John Marshall, held that the seizure lacked legal authorization and that the commander was responsible for the resulting damages.<sup>73</sup> Marshall acknowledged that he previously believed that subordinates should be immune from civil liability in those instances in which a vessel had been seized pursuant to the order of a superior.<sup>74</sup> He explained that his view was based on the indispensability of organizational discipline.<sup>75</sup> Marshall, however, explained that “I acquiesce in that [the view] of my brethren, which is, that the instructions cannot change the nature of the transaction, nor legalize an act which without those instructions would have been a plain trespass.”<sup>76</sup> Chief Justice Roger Taney reiterated the same position in *Mitchell v. Harmony*, in 1851, and noted that “it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify.”<sup>77</sup>

A contrary view was articulated by Justice Joseph Story, in *Martin v. Mott* in 1827, when he opined that a “prompt and unhesitating obedience to orders is indispensable” and that “every obstacle to an efficient and immediate compliance” poses a threat to the public interest.<sup>78</sup> Story stressed that hesitation, pause and procrastination may undermine military effectiveness and efficiency and lead to disaster and depredation.<sup>79</sup> The fear of legal liability for following orders “would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation.”<sup>80</sup> Officers and combatants would demand access to confidential and classified information in order to protect themselves from penal prosecution.<sup>81</sup>

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71. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

72. *Id.* at 176-78.

73. *Id.* at 179.

74. *Id.*

75. *Id.*

76. *Barreme*, 6 U.S. at 179.

77. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1851) (seizure of property belonging to an American commercial trader by the United States military during the Mexican-American war). *See also* *United States v. Carr*, 25 F. Cas. 305 (Case no. 14, 732) (1872).

78. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827).

79. *Id.*

80. *Id.* at 30.

81. *Id.* at 31.

Courts recognized that the polar positions which viewed superior orders as either a defense or as of no legal significance failed to calculate the complexity of the issue.<sup>82</sup> Some domestic courts responded by narrowing subordinate liability to those instances in which a soldier carried out a command “which he knows, or ought to know, to be illegal.”<sup>83</sup> This was limited, in practice, to orders whose illegality was “apparent and palpable to the commonest understanding.”<sup>84</sup> The latter test was intended to limit liability to instances in which subordinates acted “wantonly” with a “criminal intent.”<sup>85</sup> This discussion of superior orders anticipated the debate over the prosecution of accused German war criminals following World War I.

### *B. The Commission on Responsibility*

The Preliminary Peace Conference at Versailles appointed a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to determine responsibility for World War I.<sup>86</sup> The commission found that the war was premeditated by Germany and Austria together with their Turkish and Bulgarian allies.<sup>87</sup> However, the commission determined that the waging of wars of aggression was not contrary to positive international law and could not be made the subject of criminal prosecution.<sup>88</sup> These “gross outrages” against the “law of nations” and “international good faith” were nevertheless sufficiently serious that they should be subject to “formal condemnation” and a provision should be made for future criminal sanctions.<sup>89</sup>

Germany and her allies were determined to have contravened the laws and customs of war and humanity by engaging in the most “cruel practices which primitive barbarism” could devise for the

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82. See *supra* notes 70-81 and accompanying text.

83. See *United States v. Jones*, 26 F. Cas. 653, 658 (Case No. 15, 495) (1813).

84. *In re Fair*, 100 F. 149, 155 (1900).

85. *Id.* The leading early twentieth century English authority was *R. v. Smith* (1900), 17 S.C. 561, 567-69 (Cape of Good Hope) cited in L.C. Green, *supra* note 48, at 324. The Court noted that “if the orders are not so manifestly illegal that he [the subordinate] must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer.” *Id.*

86. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1919), 14 AM. J. INT’L L. 95 (1920) [hereinafter Commission on Responsibility].

87. *Id.* at 98, 107.

88. *Id.* at 118, 120.

89. *Id.* at 120.

“execution of a system of terrorism.”<sup>90</sup> The commission made the unprecedented proposal that individuals, whatever their rank or status, should be held criminally culpable for these acts.<sup>91</sup> The vindication of the laws and customs of war and the principles of humanity would be incomplete in the event that the former Kaiser was immunized from prosecution.<sup>92</sup> There was little doubt in the mind of the commission that the Kaiser and others in authority were aware of and could have intervened to mitigate or to prevent the barbarities committed during the war.<sup>93</sup>

States already were authorized under international law to bring enemy belligerents to trial in accordance with their domestic practices and procedures.<sup>94</sup> The commission further recommended the appointment of an international tribunal to preside over cases in which an individual’s criminal acts or orders affected the nationals of several countries or in which multinational prosecutions were considered advisable.<sup>95</sup> The tribunal was to apply the “principles of the law of nations” which were to be drawn from the “usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience.”<sup>96</sup>

The commission was unable to reach a consensus on superior orders. The report argued that civil and military authorities should not be relieved of responsibility by the fact that a superior had been convicted of the same offense.<sup>97</sup> At the same time, the commission was reluctant to adopt a position on superior orders and advised that “[i]t will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility.”<sup>98</sup>

The American representatives Robert Lansing and James Brown Scott objected to the imposition of liability for violations of the elementary principles of humanity.<sup>99</sup> The laws and customs of

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90. *Id.* at 113.

91. Commission on Responsibility, *supra* note 86, at 116-17.

92. *Id.* at 117.

93. *Id.*

94. *Id.* at 121.

95. *Id.* at 121-22.

96. Commission on Responsibility, *supra* note 86, at 122.

97. *Id.* at 117.

98. *Id.* The commission suggested that extending liability to civilian and military officials was a requisite for the recognition of the superior orders defense. The panel noted that “the trial of the offenders might be seriously prejudiced if they attempted and were able to plead the superior orders of a sovereign against whom no steps had been or were being taken.” *Id.*

99. Memorandum of Reservations Presented By the Representatives of the United States to the Report of the Commission of Responsibilities. *Id.* at 127.

war were a standard certain while prosecution for violation of the varying, variable and undefined laws of humanity risked retroactive punishment.<sup>100</sup> This was particularly troubling when extended to Heads of State who heretofore were deemed to be immune from prosecution by foreign sovereigns.<sup>101</sup> The Americans also expressed reservations concerning the extension of criminal culpability to acts of omission in those instances in which an individual lacked the knowledge, authority and duty to intervene to prevent or to punish criminal conduct.<sup>102</sup> In addition, Lansing and Scott recognized that international law authorized States to bring accused war criminals before existing national tribunals for acts directed against a State's nationals or property.<sup>103</sup> However, they questioned whether the Allied Powers could create an international tribunal with jurisdiction over acts which did not affect the countries represented on the court. This newly constituted organ would be applying a novel form of jurisdiction to enforce recently constituted laws and penalties and would be retroactive in character and content.<sup>104</sup>

The peace treaty with Germany incorporated provisions providing for criminal prosecution.<sup>105</sup>

Germany recognized the right of the Allied and Associated Powers to bring before military tribunals persons accused of violating the laws and customs of war and pledged to hand these individuals over for trial.<sup>106</sup> The accused were to be brought before the relevant military or mixed military tribunals.<sup>107</sup> In Article 227, the Allied and Associated Powers "publicly arraigned[ed]" William II of Hohenzollern, the former Kaiser, for the heretofore unknown "supreme offense against international morality and the sanctity of treaties."<sup>108</sup> This provision preserved the sovereign legal immunity of the former Kaiser by providing for a "special" international tribunal which was to be guided by the "highest motives of international policy" with a view towards "vindicating the solemn obligations of international undertakings and the validity of international morality."<sup>109</sup>

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100. *Id.* at 134.

101. *Id.* at 135.

102. *Id.* at 143.

103. *Id.* at 146-47.

104. *Id.* at 147.

105. Treaty Of Peace With Germany, 13 AM. J. INT'L L. 151 (Supp. 1919).

106. *Id.* art. 228.

107. *Id.* art. 229.

108. *Id.* art. 227.

109. *Id.*

### C. *The Penal Senate of the German Supreme Court*

The Allied Power sought the extradition of 890 alleged war criminals.<sup>110</sup> The fledgling Weimar regime objected that the trials would fuel support for both the conservatives and communists and lead to the end of liberal democratic rule.<sup>111</sup> The Allied Powers compromised and agreed to a revised list of forty-five individuals who were to be tried before the Penal Senate of the German Supreme Court at Leipzig.<sup>112</sup>

In the most prominent case involving the superior orders, submarine commander Karl Neumann was acquitted of sinking the hospital ship, *Dover Castle*.<sup>113</sup> At the time of the attack, the hospital ship was transporting the sick and wounded from Malta to Gibraltar; six members of the crew perished in the assault.<sup>114</sup> The accused pled that Neumann acted in accordance with an order of the German Admiralty which instructed that British hospital ships in the Mediterranean were being utilized for military purposes and should be targeted for attack.<sup>115</sup>

The Penal Senate relied on the provisions of German law which required subordinates to obey superior orders and held that commanders were solely responsible.<sup>116</sup> The attack on the *Dover Castle* did not fall within the two exceptions to this rule. The accused had not gone beyond parameters of the order and had taken extraordinary measures to limit injury and death.<sup>117</sup> In addition, Neumann relied on the memorandum issued by the admiralty and believed that the attack was "not contrary to international law" and constituted a "legitimate reprisal."<sup>118</sup> He dutifully reported the assault on the *Dover Castle*, lending credence to the conclusion that Neumann viewed the attack as legally

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110. JAMES F. WILLIS, PROLOGUE TO NUREMBERG, THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 119 (1982).

111. *Id.* at 120, 125.

112. *Id.* at 128.

113. Judgment In Case of Commander Karl Neumann Hospital Ship "Dover Castle" (1921), 16 AM. J. INT'L L. 704 (1922) [hereinafter *Dover Castle*]. See WILLIS, *supra* note 110, at 135.

114. *Dover Castle*, *supra* note 113, at 705-06.

115. *Id.* at 706.

116. *Id.* at 707.

117. *Id.* The defendant was unable to issue a warning to the *Dover Castle* since it was escorted by two warships. Neumann also allowed roughly ninety minutes to elapse between the firing of the first and second torpedo to permit the evacuation of the sick and wounded. *Id.*

118. *Dover Castle*, *supra* note 113, at 707.

justified.<sup>119</sup> The Leipzig panel stressed that the German rule was in accord with prevailing legal principles of “all other civilized states,” including England.<sup>120</sup>

In a second prosecution, General Karl Stenger, a severely wounded war hero, was exonerated of issuing orders to execute wounded French prisoners of war.<sup>121</sup> These commands were transmitted and implemented by Major Benno Crusius.<sup>122</sup> The Court accepted Stenger’s testimony that following the cessation of hostilities that he heard isolated rifle shots from the French wounded and excitedly and angrily remarked that these individuals should be shot.<sup>123</sup> Five days later, on August 26, 1914, as Stenger’s troops marched past on their way to battle, he testified that he informally warned the formations that the French were known to feign being wounded and then attack from the rear.<sup>124</sup> Stenger testified that he admonished that in such cases that the French were to be considered armed belligerents and were to be shot.<sup>125</sup> This was characterized by the Court as a cautionary comment rather than an explicit order which was not applicable to all wounded enemy combatants<sup>126</sup> and which was entirely consistent with the requirements of international law.<sup>127</sup> Stenger lashed out in the courtroom against his accusers and swore that he had served his country with honor and dedication.<sup>128</sup>

Crusius transmitted and implemented what he believed was General Stenger’s order and joined several of his men in executing a number of French wounded.<sup>129</sup> Other witnesses failed to corroborate the issuance of the command.<sup>130</sup> The Tribunal, at any rate, noted that an order to execute prisoners would have been illegal and should not have been carried out.<sup>131</sup> The Court, in

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119. *Id.* at 708.

120. *Id.* at 707. A subordinate was liable in those instances in which he went beyond the requirements of the order. A subordinates also was culpable as an accomplice in the event that he knew that his superiors ordered him to undertake an act which constituted a civil or military crime or misdemeanor. *Id.*

121. CLAUD MULLINS, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS’ TRIALS AND A STUDY OF GERMAN MENTALITY* 151, 164 (1915). See WILLIS, *supra* note 63, at 135.

122. MULLINS, *supra* note 121, at 152.

123. *Id.* at 153-54.

124. *Id.* at 162.

125. *Id.*

126. *Id.* at 164.

127. MULLINS, *supra* note 121, at 154.

128. WILLIS, *supra* note 110, at 136.

129. MULLINS, *supra* note 121, at 157-60.

130. *Id.* at 159.

131. *Id.* at 155, 160-61.



convicting Crusius of negligent homicide and sentencing him to two years in prison, determined that he acted under the mistaken impression that Stenger promulgated such an order and, as a result of Crusius' excited and nervous condition, was unable to appreciate that this indiscriminate killing constituted "a monstrous war measure, in no way to be justified."<sup>132</sup>

Crusius also carried out General Stenger's alleged command of August 26.<sup>133</sup> The Court, again, refused to credit Crusius' account.<sup>134</sup> Crusius, however, was acquitted based on the finding that at the time that he was suffering from a "complete mental derangement," constituting "a morbid derangement of his mental faculties which rendered impossible the exercise of his free volition."<sup>135</sup>

In a third case, the steamer Llandovery Castle, while transporting wounded and sick Canadian soldiers, was torpedoed by a German U-boat.<sup>136</sup> First-Lieutenant Helmut Patzig erroneously presumed without proof or authorization that the steamer was ferrying troops as well as munitions.<sup>137</sup> At least three of the five life-boats lowered into the sea survived the sinking of the ship.<sup>138</sup> Patzig ordered an attack on the lifeboats which resulted in the death of the occupants of two of the vessels.<sup>139</sup> In Patzig's absence, charges were brought against Lieutenants Ludwig Dithmar and John Boldt, who complied with Patzig's commands and fired at the lifeboats.<sup>140</sup> They were deemed to have lacked a specific criminal intent to kill and were held liable as accessories.<sup>141</sup>

The Penal Chamber stressed that a superior officer issuing an order violative of international law was solely responsible.<sup>142</sup> A combatant obeying such an order only was liable "if it was known to him that the order of superior involved an infringement of civil or military law."<sup>143</sup> The subordinate may assume that a superior order is consistent with international standards and is not obliged to question a facially legal command.<sup>144</sup> Subordinates, however, may

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132. *Id.* at 160-61.

133. *Id.* at 161-2, 165.

134. MULLINS, *supra* note 121, at 163-64.

135. *Id.* at 166.

136. Judgment In Case Of Lieutenants Dithmar And Boldt, (1921) 16 AM. J. INT'L L. 708, 709-10 (1922) [hereinafter Llandovery Castle].

137. *Id.* at 710.

138. *Id.* at 711.

139. *Id.* at 719.

140. *Id.*

141. Llandovery Castle, *supra* note 136, at 721.

142. *Id.* at 721-22.

143. *Id.* at 722.

144. *Id.*

incur liability in those instances in which “an order is universally known to everybody . . . to be without any doubt whatever against the law.”<sup>145</sup> The Penal Senate stressed that Patzig’s order to fire at defenseless individuals in lifeboats was one of those “rare” and “exceptional” instances in which “it was perfectly clear” that an order constituted a “breach of the law.”<sup>146</sup> The command was “universally known” to be contrary to “the law of nations.”<sup>147</sup> The defendants, as professional naval officers, were well-aware of the relevant law and were obligated to refuse to carry out the command.<sup>148</sup>

Two former high-ranking German naval officers testified that the common “impression” in the German fleet was that an officer who exceeded the limits of the law in the course of combat was only answerable to his superiors.<sup>149</sup> The Court, however, noted that that this did not mean that this view was shared by the accused.<sup>150</sup> At any rate, the sinking of the lifeboats was a calm and calculated decision and was not undertaken during armed conflict.<sup>151</sup> The Court further rejected that Patzig was prepared to enforce his orders through threat or force; this would risk Dithmar and Boldt disclosing the attack and result in Patzig’s possible prosecution and punishment.<sup>152</sup>

The Court stressed that Patzig was principally responsible for the killings.<sup>153</sup> Dithmar and Boldt, of course, should have resisted his orders, but the Tribunal recognized that this would have required “a high degree of resolution” from individuals trained to obey.<sup>154</sup> The defendants’ actions nevertheless were contrary to the most basic ethical principles and constituted a taint on the German submarine fleet.<sup>155</sup> Both were sentenced to four years in prison.<sup>156</sup>

These convictions did not stand the test of time. In late 1925, the prosecutor’s office at Leipzig pronounced that it would not pursue outstanding war crimes charges.<sup>157</sup> A closed session of the

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145. *Id.*

146. Llandovery Castle, *supra* note 136.

147. *Id.* at 721.

148. *Id.* at 722.

149. *Id.*

150. *Id.*

151. Llandovery Castle, *supra* note 136.

152. *Id.* at 722-23.

153. *Id.* at 723.

154. *Id.*

155. *Id.*

156. Llandovery Castle, *supra* note 136.

157. WILLIS, *supra* note 110, at 146.

Penal Senate, in 1928, annulled the convictions of Dithmar and Boldt.<sup>158</sup> A few months following Adolf Hitler's ascendancy to power, in 1933, all war crimes convictions were quashed.<sup>159</sup> American George Gordon Battle rationalized that while "it shocks our sense of justice that the monstrous war crimes of Germany should go unpunished, it is perhaps best, in view of the interest of all the world and the future generations that this should be so rather than that further seeds of hatred between the nations should be sown."<sup>160</sup>

In summary, the Penal Senate of the German Supreme Court at Leipzig in *Dover Castle* held that a subordinate generally was not culpable for carrying out a superior order.<sup>161</sup> The subordinate was liable in only those instances in which he or she went beyond the parameters of the order or carried out a command which he was aware contravened civil or criminal law.<sup>162</sup> Defendant Neumann relied upon a memo issued by the German Admiralty and his candor concerning the sinking of the hospital ship lent credence to the conclusion that he believed that this was a legitimate reprisal.<sup>163</sup> In *Llandovery Castle*, the Penal Senate seemingly supplemented the subjective intent standard and held that knowledge of illegality would be imputed in instances of clear and conspicuous illegality.<sup>164</sup> The Penal Senate, in *Crusis*, held that the defendant's mistaken belief that he was carrying out commands by executing prisoners of war resulted in liability for negligent rather than intentional homicide.<sup>165</sup> These three decisions appeared to balance the desirability of military discipline with recognition that subordinates possessed the responsibility to resist clearly and conspicuously illegal demands and directives.<sup>166</sup> The defendants' convictions for negligent rather than intentional homicide and the relatively lenient sentences suggests that the Penal Senate recognized that the

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158. *Id.*

159. *Id.*

160. Battle, *supra* note 49, at 17.

161. *See supra* note 116 and accompanying text.

162. *See supra* notes 117-20 and accompanying text.

163. *See supra* note 119 and accompanying text.

164. *See supra* notes 145-48 and accompanying text.

165. *See supra* note 132 and accompanying text. The trials of Turkish leaders are discussed in Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221 (1989).

166. *See supra* notes 113-56 and accompanying text.

defendants' punishment should be mitigated by the exigencies of warfare, military discipline and their lack of clear criminal intent.<sup>167</sup>

### III. World War II

#### A. *Scholarly Opinion*

The prospective international prosecution of German war criminals stimulated scholarly debate over superior orders defense.<sup>168</sup>

Legal commentators remained divided.<sup>169</sup> Clyde Egelton, in 1943, 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>170</sup> Egelton noted that limiting liability to high-level civilian and military officials did not pose a bar to the prosecution of Nazi war criminals since charges could be brought against subordinates who acted without authorization or in contravention of orders or against officials who formulated and planned Nazi atrocities.<sup>171</sup> He also contended that the trials of low-level combatants who dutifully followed orders would prove to be of only modest importance in the development of the inchoate field of international criminal jurisprudence.<sup>172</sup>

Egelton's views were echoed by noted international scholar Hans Kelsen who, in 1943, wrote an essay in which he discussed the

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167. See *supra* notes 132, 156 and accompanying text. The decisions on naval warfare had an immediate influence. The Washington Conference on the Limitation of Armaments, in 1922, drafted a treaty which abrogated the superior orders defense. The instrument was not ratified. See *A Treaty on Submarines and Noxious Gases in Warfare*, 16 AM. J. INT'L L. 57, art. 3 (Supp. 1922) (never ratified) [hereinafter *Submarines and Noxious Gases*]. But the superior orders defense was not incorporated into subsequent treaties regulating submarine warfare. See *Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London on Apr. 22, 1930 reprinted in* 31 AM. J. INT'L L. 661 (Supp. 1937).

168. See *Declaration on German Atrocities* (Oct. 30, 1943), VI DOC. AM. FOREIGN POL'Y 231 (1945) (commitment by the United Kingdom, United States and Soviet Union to bring Nazi war criminals to trial).

169. See George Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AM. J. INT'L L. 407, 417-18 (1943) (surveying the diverse international and municipal approaches).

170. Clyde Egelton, *Punishment of War Criminals By the United Nations*, 37 AM. J. INT'L L. 495, 497 (1943).

171. *Id.*

172. *Id.*

consequences of abrogating the superior orders defense.<sup>173</sup> Kelsen noted the importance of discipline and unconditional obedience in military organizations and argued that in such strict structures that responsibility was suitably situated in the superior officials who issued commands.<sup>174</sup> Combatants fighting for survival should not be placed in the position of calibrating the legal status of commands.<sup>175</sup> Kelsen recognized that the some States had abrogated the superior orders defense in the case of manifestly illegal orders.<sup>176</sup> However, he queried whether soldiers could be expected to comprehend the intricacies of international law.<sup>177</sup> Kelsen also questioned the impact of abolishing the defense, noting that the verdicts in the Leipzig trials suggested that domestic courts were reluctant to punitively punish subordinates.<sup>178</sup> As for transnational tribunals, one English commentator doubted whether the international community could accept sending hundreds of thousands of soldiers to prison for carrying out commands.<sup>179</sup>

The weight of scholarly opinion, however, favored a limitation on the superior orders defense.<sup>180</sup> Edwin Dickinson, in 1943, lectured the American Association of International Law that a failure to restrain the application of the defense would result in the preposterous position that the “only war criminals available for punishment are Hitler and Tojo, neither of whom is likely to be available alive when the victory is finally won.”<sup>181</sup>

Political scientist, Jacob Berger, in arguing against recognition of the superior orders defense, noted that it would be absurd to severely punish the occasional war crimes committed by otherwise well-disciplined forces while absolving the perpetrators of systematic atrocities carried out pursuant to superior orders.<sup>182</sup> Berger conceded that there might be circumstances justifying recognition of superior orders in mitigation or as a complete

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173. Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530 (1943).

174. *Id.* at 556.

175. *Id.*

176. *Id.* at 557-58.

177. *Id.* at 558.

178. Kelsen, *supra* note 173, at 558.

179. Ernst J. Cohn, *The Problem of War Crimes Today*, TRANSACTIONS GROTIUS SOC'Y 125, 144 (1941)

180. See Quincy Wright, *War Criminals*, 39 AM. J. INT'L L. 257, 272-73 (1945).

181. Charles Cheney Hyde, *Punishment of War Criminals*, 37 PROC. AM. SOC'Y INT'L L. 39, 49 (1943) (comment by Edwin Dickinson).

182. Jacob Berger, *The Legal Nature of War Crimes and the Problem of Superior Orders*, 38 AM. J. INT'L L. 1203, 1207 (1944).

defense.<sup>183</sup> However, the plea should not be accepted in those cases in which an accused acted as part of a premeditated plan to destroy a nation.<sup>184</sup>

Professor Sheldon Glueck of Harvard, in his seminal statement supporting the prosecution of Nazi war criminals, 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>185</sup> A new rule was required which struck a balance between the precarious position of subordinates and the need to deter and to denounce brutality.<sup>186</sup> Glueck proposed to deny the superior orders defense in those instances in which a subordinate actually knew or had reasonable grounds to know of an order’s illegality.<sup>187</sup> This would include situations in which the order was “patently” or “manifestly” or “universally known to be” unlawful as well as less egregious situations.<sup>188</sup> In such circumstances, Glueck advocated considering the order in mitigation of punishment.<sup>189</sup> This would involve weighing and balancing various facts and circumstances specific to the situation of the accused.<sup>190</sup>

The events of World War I and II led to a slight modification in the discussion of superior orders in Oppenheim’s treatise.<sup>191</sup> The fourth edition, in 1926, maintained that members of the armed forces committing violations of the law of war pursuant to superior orders were “not war criminals” and “may not be punished by the enemy.”<sup>192</sup> A footnote recognized that the “contrary is sometimes

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183. *Id.* at 1208.

184. *Id.*

185. SHELDON GLUECK, *WAR CRIMINALS: THEIR PROSECUTION & PUNISHMENT* 155 (1944).

186. *Id.*

187. *Id.* at 155-56.

188. *Id.* at 157.

189. *Id.* at 156-57.

190. GLUECK, *supra* note 185. These factors would include the age and intelligence of the accused; his military rank; the amount of discretion exercised by the subordinate; the nature and extent of the injury caused by obedience to the illegal order; the clarity or complexity concerning the order’s illegality; the subordinate’s instruction on the laws and customs of war; and whether the order required instant obedience. *Id.* at 156-57.

191. *See supra* notes 51-55 and accompanying texts. *Id.* at 145-57. In those instances in which the Nazi-Fascist domestic law clashed with the well known provisions of the law of nations respecting the rules and customs of legitimate warfare or with almost universally accepted principles and criminal law, the latter should take precedence. *Id.* at 158.

192. LASA OPPENHEIM, *INTERNATIONAL LAW, A TREATISE: DISPUTES, WAR AND NEUTRALITY* 410 (4th ed. 1926).

asserted,"<sup>193</sup> but that it was "difficult" to contend that "recent events" had abrogated the immunity accorded to individuals acting in accordance with superior orders since the "law cannot require an individual to be punished for an act which he was compelled by law to commit."<sup>194</sup>

The treatise was completely revised in the sixth edition, in 1944.<sup>195</sup> The text recited that the fact that a rule of warfare has been violated pursuant to a superior order does not "deprive the act in question of its character as a war crime" or "in principle, confer upon the perpetrator immunity from punishment by the injured belligerent."<sup>196</sup> A contrary view has "occasionally" been adopted, but "it is difficult to regard it as expressing a sound legal principle."<sup>197</sup> At the same time, the treatise qualified this rule in stressing that courts undoubtedly would consider that members of the armed forces were obligated to obey military orders and that combatants cannot be expected to scrupulously weigh the legal merits of directives, particularly given the complex and controversial nature of the rules of warfare.<sup>198</sup> An act otherwise amounting to a war crime also may have been carried out in obedience to an order characterized as a reprisal.<sup>199</sup> Oppenheim thus concluded that the central governing principle was 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>200</sup>

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193. *Id.* at 410 n.2.

194. *Id.* at 410 n.2. The footnote cites in support Article 3 of A Treaty on Submarines and Noxious Gases in Warfare, Washington Conference on the Limitation of Armaments of 1922. *Id.* See Submarines and Noxious Gases, *supra* note 167. But see Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare (1923), 32 AM. J. INT'L L. 1, 11, art. 12 (1938) (abrogating personal liability for radio operators). Oppenheim's statement was criticized for failing to consider that the lawfulness of a command is a matter of international rather than domestic law. Sack, *supra* note 55, at 67.

195. See LASA OPPENHEIM, INTERNATIONAL LAW, A TREATISE: DISPUTES, WAR AND NEUTRALITY 453 (6th ed. rev. 1944).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* Oppenheim observed that political authorities are unlikely to prosecute and punish war crimes committed by enemy belligerents during armed conflict and risk retaliation against their own nationals. *Id.* He concluded that the complexity of various surrounding "circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime." OPPENHEIM, *supra* note 195.

200. *Id.*

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>201</sup>

Article 443 of the British Manual was modified to coincide with Oppenheim's treatise.<sup>202</sup> The revised text, in part, 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>203</sup> A newly formulated American provision provided that individuals who "violate the accepted laws and customs of war may be punished therefor. 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>204</sup> There was speculation that these amendments had been adopted in anticipation of the trial of German and Japanese war criminals, many of whom were likely to invoke the plea of superior orders.<sup>205</sup>

The operative rule of German military law during the Second World War was set forth in Article 47 of the German Military Penal Code of 1872, which also had been applicable during World War I.<sup>206</sup> This provided that the superior issuing an order was alone responsible.<sup>207</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

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201. *Id.*

202. *See supra* notes 51-53, 195-201 and accompanying text.

203. 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*, 55 AM. POL. SCI. REV. 3, 6 (1961). Professor Oppenheim's provision had been retained in the military manual for over thirty years despite the fact that the Birkenhead Committee of Enquiry on War Crimes, established by the British government in 1918, 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 which might be established to prosecute German war criminals in those cases in which acts were "flagrantly" and "obviously" contrary to the laws of war. *See* N.C.H. Dunbar, *Some Aspects of the Problem of Superior Orders in the Law of War*, 63 JUR. REV. 234, 243 (1951).

204. Rules of Land Warfare sect. 345.1 (1944) *quoted in* Lewy, *supra* note 203, at 6.

205. *Id.*

206. German Military Penal Code (1872) *quoted in* Dunbar, *supra* note 203, at 244. A comprehensive discussion of the statutory texts is contained in Mitchell Franklin, *Sources of International Law Relating to Sanctions Against War Criminals*, 36 CRIM. L. & CRIMINOL'Y 153, 1162-68 (1945).

207. Dunbar, *supra* note 203, at 244.



aimed at a civil or military crime or offense.”<sup>208</sup> Professor Sheldon Glueck of Harvard, in reviewing the German jurisprudence on superior orders, argued that the prosecution must establish that the superior’s order “was in fact aimed at the commission of a crime” and that the “subordinate actually knew that such was the superior’s intention in giving the illegal order.”<sup>209</sup> Knowledge was imputed in those isolated instances in which a command contravened a rule of international law which was simple and universally known.<sup>210</sup> Glueck noted that the Germans’ primary reliance on a subjective standard made it “extraordinarily difficult” to convict subordinates who invoked the superior orders defense, particularly given the skepticism of German courts towards international law.<sup>211</sup> He ruefully concluded that “the German rule is little better than one which completely exempts from responsibility all subordinates acting upon any orders of military superiors.”<sup>212</sup>

Joseph Goebbels, the former German Minister of Propaganda, however, publicly dismissed the superior orders defense in 1944. He argued that “it is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare.”<sup>213</sup> This statement, which had been issued by Goebbels “to justify his call for the civilian population to lynch Allied airmen, would later haunt the defendants at Nuremberg.”<sup>214</sup>

The London International Assembly, established under the auspices of the League of Nations, addressed the superior orders defense.<sup>215</sup> The Assembly adopted a resolution, in 1943, providing that a subordinate may not invoke as a defense the fact that the criminal act with which he is charged was undertaken in response to

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208. *Id.*

209. GLUECK, *supra* note 185, at 153.

210. *Id.*

211. *Id.* at 154.

212. *Id.* This interpretation was shared by Sir George Cave, Head of the British Home Office. Sir George Cave, *War Crimes and Their Punishment*, 8 TRANSACTIONS GROTIUS SOC’Y XIX, XXII (1923). Lord Cave noted that the qualification on the superior orders defense “is so closely guarded that it might as well not exist.” *Id.*

213. Lewy, *supra* note 203, at 7.

214. *Id.*

215. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 99 (1948) [hereinafter WAR CRIMES COMMISSION].

the order of a superior.<sup>216</sup> Courts, according to the resolution, were entitled to acquit or to mitigate the punishment of an accused compelled to follow superior orders and to commit a crime.<sup>217</sup> However, this exculpatory or extenuating circumstance should be disregarded when the act was so “obviously heinous” that it was “revolting [to] the conscience of an average human being” or when at the time of the offense the accused was a member of an organization “whose membership implied the execution of criminal orders.”<sup>218</sup>

This was refined by Professor Hershel Lauterpacht in a comprehensive study undertaken for the International Commission for Penal Reconstruction and Development, an organization of English and European scholars and jurists.<sup>219</sup> Lauterpacht proposed that an accused who acted in good faith on the basis of superior orders either should be deemed to possess “no liability” or “diminished liability.”<sup>220</sup> This would not pertain in the case of orders which were “clearly illegal” to “any person of ordinary understanding by reference to generally acknowledged principles of international law.”<sup>221</sup> At the same time, a combatant obeying an “illegal order which is not on the face of it unlawful” under the threat of military discipline should be acquitted on the grounds of superior orders.<sup>222</sup>

The United Nations, in 1943, established a Commission for the Investigation of War Crimes.<sup>223</sup> After substantial debate and consideration of the standard adopted by the London International Assembly,<sup>224</sup> the commission resolved that “it can[not] usefully propound any principle or rule” in light of the fact that States have adopted various standards on superior orders and that the extent of exoneration or mitigation depended on the circumstances of a particular case.<sup>225</sup> The War Crimes Commission, however, unanimously agreed that “the mere fact of having acted in obedience to

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216. *Id.* at 275.

217. *Id.*

218. *Id.*

219. *Id.* at 94-95, 275-77.

220. WAR CRIMES COMMISSION, *supra* note 215, at 277.

221. *Id.*

222. *Id.* See also H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 1944 BRIT. Y.B. INT'L L. 58, 69-74.

223. WAR CRIMES COMMISSION, *supra* note 215, at 127.

224. *Id.* at 278-79.

225. *Id.* at 280.

the orders of superior does not of itself relieve a person who has committed a war crime from responsibility.”<sup>226</sup>

Calls for the continuance of the superior orders defense<sup>227</sup> came under increasing attack by scholars favoring a limitation on the plea.<sup>228</sup> This was reflected in Oppenheim influential treatise which was modified to provide that the fact that a combatant committed a war crime pursuant to superior orders did not relieve him from legal liability for contravening an unchallenged component of the law of war.<sup>229</sup> This led to a limitation on the superior orders defense in the British<sup>230</sup> and American manuals on humanitarian law.<sup>231</sup> German law, however, remained resistant and maintained a largely subjective statutory standard.<sup>232</sup> In anticipation of the Nuremberg trials, both non-governmental assemblies<sup>233</sup> and international organs<sup>234</sup> supported abrogating the defense in the case of orders which were clearly contrary to the law of war.<sup>235</sup> In other instances, superior orders might be variously considered as part of a plea of mistake of fact or duress.<sup>236</sup> This debate and discussion set the stage for the formulation of an international standard on superior orders at Nuremberg.

### *B. The Nuremberg Standard*

Justice Robert Jackson, the United States chief counsel in the prosecution of the principal Axis war criminals at Nuremberg, articulated the American position on superior orders in a 1945 memorandum to President Franklin Delano Roosevelt.<sup>237</sup> Jackson noted that the doctrine of immunity of heads of state typically was coupled with the superior orders defense.<sup>238</sup> He observed that the combination of these two doctrines “means that nobody is

226. *Id.*

227. *See supra* notes 170-79 and accompanying text.

228. *See supra* notes 181-90 and accompanying text.

229. *See supra* notes 195-201 and accompanying text.

230. *See supra* notes 202-03 and accompanying text.

231. *See supra* note 204 and accompanying text.

232. *See supra* notes 206-12 and accompanying text. *But see supra* note 210 and accompanying text.

233. *See supra* notes 217-22 and accompanying text.

234. *See supra* notes 223-26 and accompanying text.

235. *See supra* notes 218, 221 and accompanying text.

236. *See supra* notes 217, 222, 226 and accompanying text.

237. *Report to the President by Mr. Justice Jackson, June 6, 1945, in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 42 (1945) [hereinafter JACKSON REPORT].*

238. *Id.* at 47.

responsible.”<sup>239</sup> Jackson insisted that society “as modernly organized cannot tolerate so broad an area of official irresponsibility.”<sup>240</sup> He conceded that there doubtlessly were circumstances in which the superior orders defense should be recognized. For instance, a conscript or enlisted soldier assigned to a firing squad should not be held responsible for an unjustifiable execution.<sup>241</sup> The defense, however, should not pertain in those instances in which individuals, as a result of their rank or the nature of their orders, exercised discretion.<sup>242</sup> Superior orders also should not be applied in those instances in which an individual voluntarily and knowingly enlisted in a criminal or conspiratorial organization, such as the Nazi security police.<sup>243</sup> Jackson proposed that judges weigh the facts and circumstances in each instance and initially determine whether to recognize the superior orders defense and then whether to apply the plea in exculpation or in mitigation.<sup>244</sup>

This formed the basis of the American proposal presented to the United Kingdom, France and the Soviet Union at the 1945 London conference convened to establish an international military tribunal.<sup>245</sup> Article Eleven of the United States draft stated that the fact that a defendant acted pursuant to the “order of a superior or government sanction” shall not constitute an absolute defense but may be considered either in “defense or in mitigation of punishment if the tribunal before which the charges are being tried determines that justice so requires.”<sup>246</sup> This subsequently was slightly modified to clarify that superior orders might be considered as either a legal defense or in mitigation, depending on the circumstances of the case.<sup>247</sup> A Soviet proposal provided that superior orders shall not limit a defendant’s responsibility, but “[i]n certain cases when the subordinate acted blindly in carrying out the orders of his superior, the Tribunal has a right to mitigate the punishment of the defendant.”<sup>248</sup> A sub-committee amended the

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239. *Id.*

240. *Id.*

241. *Id.*

242. JACKSON REPORT, *supra* note 237.

243. *Id.*

244. *Id.*

245. *American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945*, in JACKSON REPORT, *supra* note 237, at 22.

246. *Id.* at 24, ¶ 11.

247. *Revision of American Draft of Proposed Agreement, June 14, 1945*. *Id.* at 55, 58, ¶ 15.

248. *Draft Showing Soviet and American Proposals in Parallel Columns*. *Id.* at 165, 181, art. 29.

American proposal in accordance with the Soviet alternative.<sup>249</sup> This draft formed the basis of the final version incorporated into the Nuremberg Charter and stated that the fact that a defendant acted pursuant to the order of a superior or government sanction “shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”<sup>250</sup>

Soviet representative General I.T. Nikitchenko later questioned whether it was appropriate to recognize superior orders as a mitigating factor in a document dedicated to the prosecution of major war criminals.<sup>251</sup> These high-ranking officials typically were not constrained by a chain of command and exercised a degree of discretion.<sup>252</sup> Sir David Maxwell Fyfe observed that there may be a situation in which a defendant was threatened to be shot in the event that he did not carry out an order and that in such circumstances that the court might be willing to “let him off with his life.”<sup>253</sup> Sir David stressed that the “important part is that it should not be an absolute defense.”<sup>254</sup> Justice Jackson explained that the United States contemplated utilizing the Nuremberg trial to establish organizational criminality and then to bring charges against lower-level members of groups such as the security police.<sup>255</sup> He recognized that in these prospective trials that an individual’s rank and authority should be considered in affixing punishment.<sup>256</sup>

In summary, the Nuremberg standard seems to have been intended to apply to high-level officials who, in general, exercised sufficient discretion so as not to be subject to superior orders.<sup>257</sup> There, however, might be exceptional cases involving lower-level officials and combatants in which the defense might be recognized in mitigation of punishment.<sup>258</sup> Justice Jackson, in fact, suggested

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249. *Draft of Agreement and Charter, Reported by Drafting Subcommittee, July 11, 1945, in id.* at 195, 197 art. 8.

250. *Id.* See also *Redraft of Charter, Submitted by British Delegation, July 23, 1945 in JACKSON REPORT, supra* note 237, at 348, 352, art. 8. See *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 8, 58 Stat. 1544, 82 U.N.T.S. 279* [hereinafter *Nuremberg Charter*].

251. JACKSON REPORT, *supra* note 237, *Minutes of Conference Session of July 24, 1945. Id.* at 360, 367.

252. *Id.*

253. *Id.* at 368.

254. *Id.*

255. *Id.*

256. Jackson Report, *supra* note 237.

257. See *supra* notes 251-56 and accompanying text.

258. See *supra* note 253 and accompanying text.

that the superior orders provision had been included as a matter of equity in the event that prosecutions were initiated against individuals for organizational membership.<sup>259</sup>

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>260</sup> French prosecutor M. Francois De Menthon 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>261</sup>

Defense attorney Horst Pelckmann conceded that Article Eight of the Nuremberg Charter prohibited the defense of superior orders in those instances in which a subordinate was aware of the illegal character of an order.<sup>262</sup> However, he also insisted that the Charter must be interpreted to provide that an individual who considered that his actions were “right and legal” should be “exonerated.”<sup>263</sup> Pelckmann argued that acceptance of the manifest illegality standard proposed by De Menthon would lead to the illogical result that an individual who committed an illicit act without a 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>264</sup> Pelckmann also reminded the Tribunal that a superior order may constitute compulsion and absolve a defendant from guilt.<sup>265</sup>

A number of defendants invoked the superior orders defense in their closing statements.<sup>266</sup> They pled that at the time of their service to the Reich that they believed that they were fulfilling their

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259. See *supra* notes 255-56 and accompanying text.

260. II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 151 (1947) (opening statement of Justice Robert H. Jackson).

261. V TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNALS 418 (1948) (opening statement of M. Francois De Menthon).

262. XXI TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNALS 626 (1948) (statement of Horst Pelckmann).

263. *Id.*

264. *Id.*

265. *Id.*

266. See XXII TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNALS 366-410 (1948) (statement of the defendants).

patriotic duty.<sup>267</sup> Alfred Jodl, Chief of the Operations Staff of the High Command, proclaimed that “I believe and avow that a man’s duty toward his people and fatherland stands above every other. To carry out this duty was for me an honor, and the highest law.”<sup>268</sup>

British prosecutor Hartley Shawcross, in his closing statement, replied that although the Charter provided that superior orders might be recognized in mitigation<sup>269</sup> that 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>270</sup> Prosecutor 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>271</sup>

The judgment of the International Military Tribunal at Nuremberg noted that international law imposed duties and liabilities upon individuals as well as States.<sup>272</sup> Crimes against international law were committed by men, not by “abstract entities,” and only by punishing individual perpetrators can the provisions of international law be preserved and enforced.<sup>273</sup>

The Tribunal noted that most of the defendants claimed to have acted in accordance with superior orders.<sup>274</sup> Superior orders were addressed in Article Eight which was in “conformity with the law of all nations.”<sup>275</sup> The Court noted that the fact that a soldier was ordered to kill or torture in violation of international law has never been recognized as a defense to acts of “brutality,” but might be recognized in mitigation.<sup>276</sup> The Tribunal ruled that the “true test[,] which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.”<sup>277</sup> The Court later noted that those with full

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267. *See id.* at 385 (statement of Wilhelm Frick).

268. *Id.* at 400.

269. 19 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNALS 465 (1948).

270. *Id.* at 466.

271. *Id.* at 515.

272. *United States v. Hermann Goring et. al.*, XXII TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNALS 411, 465 (1948) [hereinafter Nuremberg Judgment].

273. *Id.* at 466.

274. *Id.*

275. *Id.*

276. *Id.*

277. Nuremberg Judgment, *supra* note 272.

knowledge of Hitler's aims, who cooperated with Nazi regime, had become partners in the Fuhrer's pernicious plans.<sup>278</sup>

The judgment specifically addressed Jodl's superior orders claim.<sup>279</sup> Jodl directly reported to Hitler in planning the strategy and conduct of military operations.<sup>280</sup> He initialed and issued Hitler's orders for the invasions of Austria, Albania and Russia.<sup>281</sup> Jodl also circulated the Commando Order, which required the summary execution of Allied combatants apprehended behind German lines in Czechoslovakia, France, Italy and Norway.<sup>282</sup> In addition, he distributed an order from Hitler to evacuate and to burn northern Norway.<sup>283</sup>

Jodl testified that as a soldier that he was required to obey Hitler's commands.<sup>284</sup> He claimed that he employed objection, delay and subterfuge to frustrate orders with which he disagreed, such as the directive to summarily lynch captured Allied pilots<sup>285</sup> and the Commando Order.<sup>286</sup> The Tribunal, however, ruled that "[t]here is nothing in mitigation[.] 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>287</sup> Jodl was sentenced to death.<sup>288</sup>

Jodl's superior, Wilhelm Keitel, Chief of the High Command of the Armed Forces, also raised a superior orders claim.<sup>289</sup> Keitel carried out commands to organize the aggressions against Austria, Czechoslovakia, the Soviet Union, Greece and Yugoslavia and to plan and direct the attack on Norway.<sup>290</sup> In addition, he followed Hitler's commands to distribute a number of relentlessly ruthless directives, including the Commando Order.<sup>291</sup> Keitel conceded that he did not believe that this order was legal, but claimed that he lacked the authority and power to impede Hitler's satanic

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278. *Id.* at 468-69.

279. *Id.* at 568.

280. *Id.*

281. *Id.* at 569-70.

282. Nuremberg Judgment, *supra* note 272, at 570.

283. *Id.* at 571.

284. *Id.* at 568.

285. *Id.*

286. *Id.* at 570.

287. Nuremberg Judgment, *supra* note 272, at 571.

288. *Id.* at 589.

289. *Id.* at 533.

290. *Id.* at 533-34.

291. *Id.* at 533.



schemes.<sup>292</sup> Keitel also approved and implemented repressive regulations concerning Soviet prisoners of war and dismissed the objections of Admiral Wilhelm Canaris, head of the military intelligence service, as arising from the antiquated “military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.”<sup>293</sup> Keitel distributed orders directing the killing of Russian political officers captured during combat, the execution of civilians suspected of offenses against German troops and passed on the infamous “Night and Fog” decree, which authorized the secret deportation and trial of Polish opponents of the Reich.<sup>294</sup> He pled that as a soldier he was properly positioned to invoke superior orders.<sup>295</sup> The Court, however, again noted that Article Eight precluded this defense and stressed that superior orders cannot be considered in mitigation “where crimes so shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.”<sup>296</sup> Keitel was sentenced to death.<sup>297</sup>

In summary, the Nuremberg decision interpreted Article Eight to prohibit superior orders from being invoked as a defense; it was limited to mitigation of punishment.<sup>298</sup> The Tribunal refused to recognize superior orders as mitigating in the case of defendants who carried out commands that were clearly contrary to the humanitarian law of war.<sup>299</sup> For instance, Erich Raeder, Commander-in-Chief of the German Navy, was found guilty of passing down the Commando Order with full awareness that it was unprecedented to summarily execute combatants captured in uniform.<sup>300</sup> Baldur von Schirach was convicted of continuing the policy of deporting Jews from Vienna with knowledge that the “best the Jews could hope for was a miserable existence in the ghettos of the East.”<sup>301</sup>

A moral choice, it appears, was deemed to have been available in those instances in which a defendant exercised a measure of discretion and was not shown to have confronted immediate

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292. Nuremberg Judgment, *supra* note 272, at 534-35.

293. *Id.* at 535.

294. *Id.* at 535-36.

295. *Id.* at 536.

296. *Id.*

297. Nuremberg Judgment, *supra* note 272, at 588.

298. *See supra* note 277 and accompanying text.

299. *See supra* notes 287, 296 and accompanying text.

300. Nuremberg Judgment, *supra* note 272, at 563.

301. *Id.* at 565-66.

retribution in failing to fulfill a command.<sup>302</sup> In most cases, the defendants at Nuremberg enthusiastically embraced and extended Hitler's policies. For instance, Reich Minister for Foreign Affairs Joachim Ribbentrop was described as being in "complete sympathy" with the main tenets of National Socialism and his collaboration with the Fuhrer was "whole-hearted."<sup>303</sup>

The Nuremberg Tribunal thus introduced a voluntariness test. An individual carrying out a clearly criminal command under international law was considered culpable absent evidence that he lacked moral choice and that his act was the product of duress or coercion.<sup>304</sup> This standard was subsequently endorsed by the United Nations General Assembly.<sup>305</sup>

Various questions remained concerning the moral choice test. How was the moral calculus to be measured? Is there not always a choice whether to obey a command? At what point did the potential harm to an individual refusing to obey the order outweigh the harm resulting from the illegal order? Was a combatant required to sacrifice his life? Must the threatened harm be imminent or immediate? Should not a crime carried out in response to coercion or threat be excused based on a lack of criminal intent rather than merely mitigated? Was there a differentiation between the justice standard in Article Eight and the moral choice test articulated by the Court?<sup>306</sup> Other than a lack of moral choice what factors might mitigate punishment in the interests of justice? The ill-defined moral choice test established by the International Military Tribunal at Nuremberg proved to have a limited impact on courts adjudicating the fate of lower-level Nazi combatants and officials.

### *C. American Prosecutions Under Control Council Law No. 10*

Control Council Law No. 10 established a "uniform legal basis" for the Allied Occupying Powers' prosecution of alleged Nazi war criminals.<sup>307</sup> The provision on superior orders was

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302. See *supra* note 290 and accompanying text.

303. *Id.* at 533.

304. See *supra* notes 276-77 and accompanying text.

305. See U.N.G.A. Res. 95(I), 188 U.N. Doc. A/64/Add. 1 (1946). This General Assembly resolution affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal." *Id.*

306. See *supra* notes 279-97 and accompanying text.

307. Control Council Law No. 10 pmble, reprinted in VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 XVIII (1952).

modeled on the Nuremberg Charter and provided 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>308</sup>

The superior orders clause was first interpreted by a three judge American panel in the *Einsatzgruppen* judgment.<sup>309</sup> The *Einsatzgruppen* killing squads shadowed the Nazi troops as they swept across Russia and ruthlessly carried out the Fuhrer Order, which called for the summary execution of political opponents of the Nazi regime. This resulted in the execution of over a million Jews, Gypsies, disabled, homeless, mentally challenged individuals and communist functionaries.<sup>310</sup>

At trial, Dr. Hans Gawlik, attorney for defendant Erich Naumann, the Chief of Einsatzgruppe B, argued that the defendants should be judged in accordance with the rules of international law existing at the time of the acts alleged in the indictment.<sup>311</sup> Neither the Nuremberg Charter nor Control Council Law No. 10 could change the pre-existing requirements of international law established in transnational agreements and in the practice of States.<sup>312</sup>

Gawlik contended that following World War I, the Commission on Responsibility feared that defendants would mechanically invoke the superior orders defense and, as a result, recommended that the admissibility of the defense should be a matter of judicial discretion. However, according to Gawlik, the commission favored recognition of superior orders in those instances in which an order was “incontestably” established.<sup>313</sup> He argued that since 1914, the defense had been recognized in the field regulations of most armies.<sup>314</sup> The British and American manuals,

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308. *Id.* art. 4(b).

309. See *United States v. Ohlendorf, IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 411 (1950)* [hereinafter *Einsatzgruppen Judgment*].

310. *Id.* at 412-16.

311. See *Extract From the Closing Statement for Defendant Naumann, IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 329 (1950)* [hereinafter *Einsatzgruppen Materials*].

312. *Id.* at 329.

313. *Id.* at 332. See Commission on Responsibility, *supra* notes 97-98. According to Gawlik, formal recognition of the defense would have placed the insurmountable burden of disproving the existence of the order on the prosecution. The Commission thus determined that this should best be made a matter of judicial discretion. See *Einsatzgruppen Materials, supra* note 311, at 332.

314. *Id.*

prior to 1944, made no distinction between lawful and unlawful orders; subordinates were instructed to obey rather than to question commands.<sup>315</sup> Gawlik observed that “one cannot help thinking that the [recent] amendment [of the British and American military manuals] was evidently made in view of the impending end of the war and the contemplated trials of war criminals.”<sup>316</sup> The application of the Nuremberg standard to defendant Naumann would be analogous to the retroactive laws utilized against opponents of the Nazi regime, a practice which had been properly condemned by the international community.<sup>317</sup>

Gawlik urged the Tribunal to consider that “obedience has been preached as the supreme duty” in Germany.<sup>318</sup> This certainly was the case under the National Socialist regime which required individuals to be silent and supportive.<sup>319</sup> The Nuremberg notion that subordinates possessed a duty to disobey illicit orders was premised on the possibility of appealing to a superior. This avenue of redress, however, did not exist in those countries in which orders emanated from an all-powerful dictator who monopolized the instruments of State power, such as Hitler.<sup>320</sup>

Defense attorney Dr. Willie Heim contended in his opening plea for defendant Paul Blobel that those who refused to carry out commands were condemned to concentration camps or summarily executed.<sup>321</sup> Defendant Otto Ohlendorf proclaimed that even absent this threat that as a soldier he “surrendered . . . [his] moral conscience” and was a “wheel in a low position . . . of a great machinery; and what . . . [he] did there is the same as is done in any other army.”<sup>322</sup> Defendant Erich Naumann, in his closing statement, insisted that soldiers on both sides executed orders which tested their conscience. Allied pilots must have possessed qualms over killing 200,000 in the bombing of Dresden, reducing the old town of Nuremberg to rubble and incinerating thousands of civilians in the atomic bombing of Hiroshima.<sup>323</sup> Defendant Blobel seemed to capture the complexity of the defendants’ self-described dilemma when he observed that he had become caught in a conflict

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315. *Id.* at 333.

316. *Id.*

317. *Id.* at 334.

318. Einsatzgruppen Materials, *supra* note 311, at 335.

319. *Id.*

320. *Id.* at 336.

321. *Opening Statement for the Defendant Blobel*, *id.* at 82, 87.

322. *Extracts From the Testimony of the Defendants Ohlendorf, Haensch and Braune*, *id.* at 203, 305

323. *Final Statements of the Defendants*, *id.* at 384, 394.

between “law and morality, obedience and refusal to obey orders, harsh necessity of war, and personal feelings.”<sup>324</sup>

The *Einsatzgruppen* Tribunal stressed that soldiers are “reasoning agent[s]” and are not mere mechanical machines who reflexively respond to orders.<sup>325</sup> Otherwise, the Tribunal noted that the absurd situation could arise in which a sergeant could order the corporal to shoot the lieutenant, the lieutenant could order the sergeant to shoot the captain, the captain could order the lieutenant to shoot the colonel, and, in each instance, the perpetrator would be absolved from guilt.<sup>326</sup>

Subordinates were required to obey only lawful orders and could not plead superior orders in mitigation in those instances in which they voluntarily and knowingly executed criminal commands.<sup>327</sup> A subordinate could not claim a lack of awareness of an order’s illicit character in those instances in which a command was “manifestly beyond the scope of the superior’s authority.”<sup>328</sup> The Court clarified that to plead superior orders, an individual must demonstrate an “excusable ignorance” of an order’s “illegal character.”<sup>329</sup>

The defendants claimed that the Fuhrer Order was lawful.<sup>330</sup> The defense distinguished between the order to shoot Jews and a hypothetical order to execute all grey-eyed people on the grounds that the Jews were the incubators and infectious instigators of bolshevism and had been killed as an act of self-defense.<sup>331</sup> The Tribunal, however, questioned whether Russians were less inclined to be communists than Jews.<sup>332</sup> How does the defendants’ contention explain the incidence of well-known conservative Jews throughout Europe?<sup>333</sup> Did Russian Jews, even if bolsheviks, pose an imminent threat to Germany?<sup>334</sup> The Tribunal noted that international law did not permit the killing of civilians based on the fact that they were deemed dangerous.<sup>335</sup> This, were it not “so

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324. *Id.* at 396.

325. *Einsatzgruppen Judgment, supra* note 309, at 470.

326. *Id.*

327. *Id.* at 470-71.

328. *Id.* at 471.

329. *Id.* at 473.

330. *Einsatzgruppen Judgment, supra* note 309, at 474-75.

331. *Id.* at 476.

332. *Id.*

333. *Id.*

334. *Id.* at 464.

335. *Einsatzgruppen Judgment, supra* note 309.

tragic,” could “only be considered nonsensical.”<sup>336</sup> The fact that the order emanated from the Fuhrer was not controlling; Hitler was not above international law.<sup>337</sup>

The Tribunal stressed that an individual was not required to forfeit his life or to suffer serious harm in an effort to avoid carrying out an obviously illegal order.<sup>338</sup> A plea of duress in the execution of a superior order required that an individual demonstrate that he carried out a command to avoid the infliction of a “disproportionally [sic] greater” harm.<sup>339</sup> The threat must be “imminent, real, and inevitable.”<sup>340</sup> A subordinate who shared the intent and aspirations of a superior may not invoke the superior orders defense.<sup>341</sup> Duress also may not be relied upon in those instances in which the order could have been foreseen as the logical extension of a program which was illegal at its inception.<sup>342</sup> The Nazi Party’s pernicious platform was clear and an individual involved in the steady escalation of attacks against Jews “may not plead surprise when he learns that what has been done sporadically; namely murder, now is officially declared policy.”<sup>343</sup>

In order to plead duress in mitigation, a subordinate may not merely mentally rebel at the time the order is issued. Resistance must be unrelenting and acquiescence at any point precludes the plea of superior orders.<sup>344</sup> The defendants claimed to have been stunned and shocked and to have internally objected to the Fuhrer Order.<sup>345</sup> The Tribunal determined that this was insufficient, contending that a defendant who claimed to have been constitutionally incapable of engaging in the slaughter generally would have been assigned to other duties in order to insure the effective and efficient murder of Jews.<sup>346</sup> Defendants could not assume that

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336. *Id.* at 478.

337. *Id.* at 486

338. *Id.* at 480. In a statement which later would prove controversial, the Court opined that “[n]o court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.” *Id.*

339. Einsatzgruppen Judgment, *supra* note 309, at 471. It would not be an adequate excuse, for example, if a subordinate, under orders, killed an individual known to be innocent in order to avoid a few days confinement. An individual may not claim duress once the threat of harm is removed. *Id.*

340. *Id.* at 480.

341. *Id.*

342. *Id.*

343. Einsatzgruppen Judgment, *supra* note 309, at 481.

344. *Id.* Superior means superior in capacity and power to force a certain act; it is not limited to rank. The latter presumably was meant to encompass the informal exercise of authority, particularly in informal organizations. *Id.*

345. *Id.* at 481.

346. *Id.*

protest would have proven profitless: “[n]o one can shrug off so appalling a moral responsibility with the statement that there was no point in trying.”<sup>347</sup> A soldier who sought to avoid such a terrible task would not be a coward; he would simply be refusing to assume the role of an assassin.<sup>348</sup>

Several defendants argued that it would have been futile to refuse to implement the Fuhrer Order since their successors would merely have carried out the command.<sup>349</sup> The Tribunal, however, stressed that the defendants were responsible for their own conduct. The actions of others was unknowable. Resistance may have led to the withdrawal of the order or might have encouraged combatants to refuse to cooperate. At the very least, innocent lives would have been preserved for at least another day.<sup>350</sup>

Defendant SS Brigadier General Erich Naumann was head of *Einsatzgruppe B* and contended that the Fuhrer Order already was in effect when he assumed command.<sup>351</sup> The Tribunal concluded that the accused nevertheless was aware of the order and countenanced its continued implementation.<sup>352</sup> The Court observed that the superior orders defense would be available in mitigation in the event that Naumann was able to demonstrate that he did not agree with the Fuhrer Order and was compelled by the chain of command and fear of drastic consequences to kill innocent human beings.<sup>353</sup> Naumann, however, testified that “I considered the decree to be right because it was part of our aim of the war and, therefore, it was necessary.”<sup>354</sup> He also later stated that he “saw nothing wrong with the order, even though it did involve the killing of defenseless human beings.”<sup>355</sup>

SS Brigadier General Erwin Schulz was commander of *Einsatzkommando 5* which received orders to participate in the execution of Jews.<sup>356</sup> Schulz claimed that he opposed the order and, on August 24, 1941, left for Berlin where he arranged to be removed from his post in the latter part of September.<sup>357</sup> Between August 24 and 30, *Einsatzkommando 5* executed 157 Jews and

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347. *Einsatzgruppen Judgment, supra* note 309, at 482.

348. *Id.* at 485.

349. *Id.*

350. *Id.*

351. *Id.* at 517.

352. *Einsatzgruppen Judgment, supra* note 309.

353. *Id.*

354. *Id.* at 518.

355. *Id.*

356. *Id.*

357. *Einsatzgruppen Judgment, supra* note 309, at 519.

other Russians.<sup>358</sup> The Court noted that the operation had been planned prior to Schultz's departure and refused to accept his absence as a defense.<sup>359</sup> It noted that "[t]he man who places a bomb, lights the fuse, and rapidly takes himself to other regions is certainly absent when the explosion occurs, but his responsibility is no less because of that prudent nonpresence."<sup>360</sup> The Court mitigated Schulz's prison sentence to twenty years on the grounds that although he undoubtedly was aware of the illegal nature of the Fuhrer's commands that "confronted with an intolerable situation, he did attempt to do something about it."<sup>361</sup> SS Brigadier General Heinz Jost, Chief of Einsatzgruppe A, assumed command following the implementation of the Fuhrer Order.<sup>362</sup> He nevertheless failed to revoke the order and was aware of its continued implementation.<sup>363</sup> The Tribunal was unable to corroborate Jost's claim that he had been recalled as a result of his refusal to order the execution of Jews and had been demoted to sergeant and sent to the frontlines.<sup>364</sup> The panel recognized that after participating in mass killings and the enslavement of civilians, Jost may have experienced a moral transformation and protested and that while this was to his "credit, it could not" wipe out the criminality which preceded his withdrawal from the field.<sup>365</sup>

In sentencing SS Colonel Walter Blume to death by hanging,<sup>366</sup> the Tribunal expressed regret that such a "resolute person" cooperated in Hitler's callous campaign.<sup>367</sup> The fact remains that "Hitler with all his cunning and unmitigated evil would have remained as innocuous as a rambling crank if he did not have the Blumes, the Blobels, the Braunes, and the Bibersteins to do his bidding—to mention only the B's."<sup>368</sup> The Court pointed out that defendant SS Lieutenant Colonel Gustav Nosske defied an order to shoot a number of half-Jews in Duesseldorf, presumably because he considered the victims to be Germans.<sup>369</sup> The Tribunal noted that this refusal "demonstrated, contrary to the argument advanced

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358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* at 521, 588.

362. Einsatzgruppen Judgment, *supra* note 309, at 513.

363. *Id.* at 512-13.

364. *Id.* at 514-15.

365. *Id.* at 515. Jost was sentenced to life imprisonment. *Id.* at 587.

366. *Id.* at 588.

367. Einsatzgruppen Judgment, *supra* note 309, at 532.

368. *Id.*

369. *Id.* at 558.



throughout the trial in behalf of the various defendants, that a member of the German Armed Forces could protest a superior order and not be shot in consequence.<sup>370</sup>

The *Einsatzgruppen* judgment established that the superior orders defense was available in those instances in which a defendant was able to demonstrate excusable ignorance concerning the illegality of an order.<sup>371</sup> The Tribunal also recognized the defense in mitigation in those instances in which a defendant involuntarily carried out a command.<sup>372</sup> The threat must have been serious, sudden and substantial;<sup>373</sup> human life may not be taken or serious injury imposed in order to avoid a light and insignificant harm.<sup>374</sup> An individual who knowingly and voluntarily joined a band of brigands could not later complain that he was compelled to commit a crime.<sup>375</sup> Defendants also could not credibly claim that resistance was futile or that others would have merely carried out the commands.<sup>376</sup> The Tribunal pointed to the example of those whose sentences were mitigated based on their timely and successful efforts to withdraw from participation in Nazi criminality.<sup>377</sup>

The American Tribunal in the *Hostage* case further refined the parameters of the superior orders defense.<sup>378</sup> The defendants were charged with murdering hundreds of thousands of civilians in Greece, Yugoslavia and Albania.<sup>379</sup> The seizure and killings of these innocent hostages was carried out in an effort to deter and to defeat resistance in the Balkans.<sup>380</sup> The Tribunal uncovered a “record of killing and destruction seldom exceeded in modern history. Thousands of innocent inhabitants lost their lives by means of a firing squad or hangman’s noose, people who possessed the same inherent desire to live as do these defendants.”<sup>381</sup>

On September 16, 1941, Adolf Hitler assigned defendant Wilhelm List to serve as Military Commander Southeast with a

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370. *Id.* at 558-59.

371. *See supra* notes 327-29 and accompanying text.

372. *See supra* notes 338-39 and accompanying text.

373. *See supra* note 340 and accompanying text.

374. *See supra* note 339 and accompanying text.

375. *See supra* notes 342-43 and accompanying text.

376. *See supra* notes 349-50 and accompanying text.

377. *See supra* notes 369-70 and accompanying text.

378. *See* United States v. Wilhelm List, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1230 (1950) [hereinafter *Hostage Judgment*].

379. *Id.* at 1233.

380. *Id.*

381. *Id.* at 1254.

mandate to suppress the insurgency in the Balkans.<sup>382</sup> Field Marshal Wilhelm Keitel, Chief of the High Command of the Armed Forces, simultaneously issued a directive which called for the death penalty for fifty to one hundred “communists” in retaliation for the killing of a single German soldier.<sup>383</sup> List subsequently distributed the order to his subordinate units.<sup>384</sup> General Franz Boehme, appointed to head German forces in Serbia, proceeded to direct his troops to serve as “avengers” of the German dead and to create an “intimidating example” and to “hit the whole population most severely.”<sup>385</sup> Three days later, on September 28, 1941, Keitel ordered List to insure that military commanders had hostages “at their disposal,” at least some of whom were from the leading personalities and families in the occupied territories.<sup>386</sup> On October 4, 1941, Keitel also called for the collection in concentration camps of individuals suspected of taking part in combat or supporting the partisans.<sup>387</sup> These hostages were to be executed in the event of continued armed resistance.<sup>388</sup> At the same time, Boehme issued a reprisal order for the execution of 2,100 Serbian internees.<sup>389</sup> The Chief of the Security Police subsequently reported the killing of 2,200 Serbs and Jews.<sup>390</sup>

List was succeeded by Lieutenant General Walter Kuntze in October 1941.<sup>391</sup> Kuntze continued the reprisal policy and issued an order, in March 1942, proclaiming “[n]o false sentimentalities! It is preferable that 50 suspects are liquidated than one German soldier lose his life.”<sup>392</sup> He admonished that “soldiers who do not follow orders and who do not act decisively are to be called to account.”<sup>393</sup>

Defense attorney Hans Laternser argued at trial that the plea of superior orders was a widely recognized principle of international law as demonstrated by the works of leading international writers and by certain provisions of the military manuals of the United States and Great Britain.<sup>394</sup> Laternser reiterated the

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382. *Id.* at 1264.

383. Hostage Judgment, *supra* note 378.

384. *Id.* at 1265.

385. *Id.*

386. *Id.*

387. *Id.* at 1265-66.

388. Hostage Judgment, *supra* note 378, at 1266.

389. *Id.* at 1267.

390. *Id.* at 1268.

391. *Id.* at 1276.

392. *Id.* at 1277-78.

393. Hostage Judgment, *supra* note 378.

394. *Opening Statement for Defendant List*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW

argument that this rule may not be revised by the unilateral action of the victorious Allied Powers.<sup>395</sup>

The *Hostage* Court, however, 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>396</sup> 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>397</sup> The Tribunal recognized that this rule compelled a commander to choose between possible domestic punishment for disobedience and sanction by the international community for committing a crime against the law of nations.<sup>398</sup> The judges nevertheless admonished that to “choose the former in the hope that victory will cleanse the act of its criminal characteristics manifests only weakness of character and adds nothing to the defense.”<sup>399</sup> The Court explained that absent this rule that belligerents would be bereft of protection against the criminal conduct of enemy forces.<sup>400</sup>

The Tribunal dismissed Oppenheim’s prior advocacy of the superior orders defense as a “decidedly minority view.”<sup>401</sup> His contention that a subordinate may not be punished for carrying out an order overlooked that an illegal law cannot be considered a valid enactment.<sup>402</sup> The 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>403</sup> The Court noted that in any event, the army regulations of States were in substantial conflict as to the defense of superior orders.<sup>404</sup> The Tribunal declared without citation that the abrogation of superior

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No. 10 855, 859 (1950) [hereinafter *Hostage Materials*].

395. *Id.* at 864. Attorney Laternser distinguished between the domestic application of superior orders within national jurisdictions and the prosecution of alleged war criminals by an enemy. The latter was to be guided by the requirements of international law. *Id.* at 862.

396. *Id.* at 1236.

397. *Id.* at 1237.

398. *Hostage Materials*, *supra* note 394, at 1236-37.

399. *Id.* at 1237.

400. *Id.*

401. *Id.*

402. *Id.*

403. *Hostage Materials*, *supra* note 394.

404. *Id.* at 1238.

orders was a “fundamental rule of justice” which had found “general acceptance” and that compliance with orders had never been a “mandatory bar to the prosecution of war criminals.”<sup>405</sup>

Defendant List distributed the Keitel order of September 16, 1941 reciting the reprisal ratios for wounded or killed German soldiers.<sup>406</sup> The Tribunal ruled that it was irrelevant whether this was mandatory or directory, in either event the order illicitly authorized a fixed retaliation ratio regardless of the nature of the provocation.<sup>407</sup> There was no evidence that the hostages who had been executed supported, shielded or assisted the partisans or were residents of the areas from which attacks had been initiated.<sup>408</sup> The Court concluded that international law vested “no such unrestrained and unlimited power” in the commanding general of an occupied territory, this was “nothing less than plain murder.”<sup>409</sup>

List was not relieved from responsibility by the fact that the order emanated from the High Command of the Armed Forces.<sup>410</sup> A subordinate officer was only bound to carry out lawful commands: “[o]ne who distributes, issues, or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character.”<sup>411</sup> The Court stressed that a field marshal with more than forty years of military experience certainly knew or should have known of the criminal character of the command.<sup>412</sup> List’s awareness of the order’s illegality is attested to by the fact that he opposed the issuance of the command and reportedly did what he could to lessen its impact.<sup>413</sup> The Tribunal ruled that the uncertainty created by the fact that the world community had neglected to address the issues of hostages and reprisals to some

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405. *Id.*

406. *Id.* at 1269.

407. *Id.*

408. Hostage Materials, *supra* note 394, at 1270

409. *Id.*

410. *Id.* at 1271.

411. *Id.*

412. *Id.*

413. Hostage Materials, *supra* note 394. List pled that he was absent from headquarters and lacked knowledge of many of the killings. Absence from headquarters does not constitute a defense. He may not, however, be charged with acts committed on the order of another which were outside the basic orders which he issued. An officer is required to rescind such illegal orders if time permits; otherwise he is required to take steps to prevent the order from being reissued. *Id.*

extent mitigated List's guilt;<sup>414</sup> he was sentenced to life imprisonment.<sup>415</sup>

Several officers attempted to ameliorate criminal commands and, as a result, their sentences were mitigated. Ernst Dehner was appointed Commander of the LXIX Reserve Corps in northern Croatia at the end of August 1943.<sup>416</sup> He issued a series of directives which attempted to align German hostage and reprisal policies with international law,<sup>417</sup> admonishing that "[i]t is impossible to make use of hostages for the execution of reprisal measures for the German soldiers killed in the fight against bands."<sup>418</sup> As a result, his punishment was mitigated to seven years imprisonment.<sup>419</sup> Defendant Herbert Lanz, Commander of the XXII Mountain Corps, protested an order to execute thousands of captured Italian combatants.<sup>420</sup> He also resisted a modified order to summarily shoot the entire officer corps and instead organized a court martial which resulted in the execution of the high-echelon command.<sup>421</sup> The Court observed that although Lanz succeeded in reducing the number killed, that the execution of these ranking officers as terrorists still constituted a war crime.<sup>422</sup>

The *Hostage* Tribunal once again affirmed that a subordinate was required to obey only lawful orders and that superior orders do not constitute a mitigating factor in the case of commands which outrage fundamental concepts of justice.<sup>423</sup> The Court noted that this was a fundamental principle of justice which was consistent with international law.<sup>424</sup> Officers with the extensive experience of the defendants certainly knew or should have known of the criminal

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414. *Id.* at 1274.

415. *Id.* at 1318. Defendant Kuntze assumed command in the Southeast on October 27, 1941. He was convicted of conveying orders to take reprisals. *Id.* at 1277-78. The orders "he issued and his subsequent failure to take steps to end these unlawful killings after they had been reported to him makes him criminally responsible under the law previously announced and applied in this opinion to the defendant List." *Id.* at 1279. As a professional soldier with forty years experience, he knew or ought to have known, that the killing of thousands under the guise of carrying out reprisal measures when such measures "were legitimate in no sense of the word made them crimes no matter what name was applied to them." *Hostage Materials, supra* note 394, at 1281.

416. *Id.* at 1297.

417. *Id.* at 1299-1300.

418. *Id.* at 1300.

419. *Id.* at 1319.

420. *Hostage Materials, supra* note 394, at 1312.

421. *Id.*

422. *Id.* at 1313. Lanz was sentenced to twelve years in prison. *Id.* at 1319.

423. *See supra* notes 396-97 and accompanying text.

424. *See supra* note 405 and accompanying text.

character of the hostage reprisal orders.<sup>425</sup> Punishment might be mitigated in those instances in which international law was uncertain<sup>426</sup> or in which an officer actively intervened to ameliorate a criminal command.<sup>427</sup>

The issue of superior orders also was discussed in the *High Command* case in which leading members of the Nazi officer corps were convicted of executing a catalogue of criminal commands.<sup>428</sup> These included the Commando Order of October 1942, which called for the execution of Allied commando units operating behind German lines.<sup>429</sup> The Tribunal concluded that this “was criminal on its face. It simply directed the slaughter of these ‘sabotage’ troops.”<sup>430</sup> The Commissar Order of June 1941 authorized the execution of captured Soviet political operative attached to Russian military units.<sup>431</sup> This was characterized as “one of the most obviously malevolent, vicious, and criminal orders ever issued by any army at any time.”<sup>432</sup> The Barbarossa Jurisdiction Order was issued in May 1941 and abolished the jurisdiction of military courts over crimes committed by enemy civilians within the Russian theater.<sup>433</sup> Partisans and enemy civilians who attacked or were suspected of having attacked German troops instead were subject to summary execution.<sup>434</sup> Collective punishment was to be carried out against towns and villages from which assaults had been directed at German troops.<sup>435</sup>

The Tribunal observed that the criminal acts condemned in Control Council Law No. 10 were part of international common law.<sup>436</sup> A domestic directive to violate this standard was therefore void and afforded no protection to individuals who carried out the command.<sup>437</sup> The Court observed that the purpose of international law was to channel and to control the conduct of States and that this was most effectively accomplished through holding govern-

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425. See *supra* note 412 and accompanying text.

426. See *supra* note 415 and accompanying text.

427. See *supra* notes 417-19 and accompanying text.

428. United States v. Wilhelm von Leeb, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 462 (1950) [hereinafter High Command Judgment].

429. *Id.* at 526-27.

430. *Id.* at 527.

431. *Id.* at 517.

432. *Id.* at 515.

433. High Command Judgment, *supra* note 428, at 521.

434. *Id.*

435. *Id.*

436. *Id.* at 508.

437. *Id.*

mental officials accountable.<sup>438</sup> It would be unrealistic and a legal fiction to maintain that the State, rather than those who devised, designed and implemented policies, was legally liable.<sup>439</sup> Nor should all sins and slanders be attributed to Hitler as the supreme legal authority; this would absolve lower officials of guilt and responsibility.<sup>440</sup>

Defendants who received illicit "orders were placed in a difficult position, but compliance with clearly criminal" commands based upon a speculative fear of disadvantage or possible punishment did not constitute a defense.<sup>441</sup> "The defense of coercion or necessity in the face of danger required" that a reasonable person "would apprehend that he was in such imminent physical peril as to deprive him" of the ability to choose "right" from "wrong."<sup>442</sup> An officer also could not credibly contend that in light of his or her character that subordinates should have realized that they were expected to disregard an order.<sup>443</sup> The Tribunal found it "contemptible" that subordinates would be expected to display the "courage to disobey the order which he himself in passing it down showed that he lacked."<sup>444</sup> The rule that superior orders do not constitute a defense should come as no surprise to individuals who had been subject to German military code.<sup>445</sup>

The central contribution of the *High Command* decision was to articulate the scope of legal liability of field commanders and staff officers. A commander may legitimately assume that orders routinely transmitted through the chain of command were in conformity with international law.<sup>446</sup> The defendants were soldiers rather than lawyers and could not be expected to have drawn fine distinctions in regards to the intricacies of armed combat.<sup>447</sup> The Tribunal determined "that to find a field commander criminally responsible for the transmittal of an order, [the officer] must have passed the order [through] the chain of command and the order must [have been] criminal upon its face, or one which he is shown to have known was criminal."<sup>448</sup> The orders conveyed by the

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438. High Command Judgment, *supra* note 428.

439. *Id.*

440. *Id.* at 508-09.

441. *Id.* at 509.

442. *Id.*

443. High Command Judgment, *supra* note 428, at 520.

444. *Id.* at 520-21.

445. *Id.* at 509.

446. *Id.* at 510-11.

447. *Id.* at 511.

448. High Command Judgment, *supra* note 428.

defendants in this case, according to “any standard of civilized nation . . . were contrary to the customs of war and accepted standards of humanity. Any commanding officer of normal intelligence must see and understand their criminal nature.”<sup>449</sup>

The Tribunal also held that a chief of staff might incur liability.<sup>450</sup> A chief of staff who translated a criminal concept into a military order, either himself or through subordinates, or took personal action to distribute the order to units which implemented the criminal command, was criminally liable under international law.<sup>451</sup> Staff officers typically did not possess general command authority or responsibility for the conduct of troops in the field and their only available avenue was to “call [misconduct] . . . to the attention of the commanding officer.”<sup>452</sup> Still, staff officers exercised discretion in the drafting and distribution of orders.<sup>453</sup> They were “indispensable” to developing and disseminating many of the Nazi’s odious directives and “cannot escape criminal responsibility . . . on the plea that they were complying with the orders of a superior who was more criminal.”<sup>454</sup>

Field Marshal Wilhelm von Leeb was Commander in Chief of the Army Group North in the Russian campaign.<sup>455</sup> He was present during a meeting, in March 1941, at which Hitler announced the order to exterminate commissars.<sup>456</sup> Von Leeb reportedly considered this to be violative of international law and conveyed his misgivings to the Army High Command on numerous occasions.<sup>457</sup> Hitler, however, refused to rescind the order and circumvented command resistance by routing the directive to subordinate army groups.<sup>458</sup>

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449. *Id.* at 512.

450. *Id.* at 513. The Hostage Judgment, *supra* note 378, acquitted staff officers Hermann Fofstich, *id.* at 1281-86, and Kurt von Geitner, *id.* at 1286-88. The High Command Judgment, *supra* note 428, limited this analysis to the facts and declined to interpret this as absolving staff officers from criminal culpability as a matter of law. *Id.* at 513.

451. High Command Judgment, *supra* note 428, at 512.

452. *Id.* at 514.

453. *Id.* at 515.

454. *Id.*

455. *Id.* at 553. “Criminal orders were executed by units subordinate to [von Leeb] and criminal acts were carried out by agencies within his command.” The prosecution was required to demonstrate that von Leeb knew of and had “been connected with such criminal acts, either [through] participation or criminal acquiescence.” High Command Judgment, *supra* note 428, at 555.

456. *Id.* at 555.

457. *Id.* at 555-56.

458. *Id.* at 556.



Von Leeb countered the command by expressing opposition to subordinate military officials.<sup>459</sup> The Tribunal sympathetically noted that an effort to revoke the order would have constituted "flagrant disobedience."<sup>460</sup> Resignation would have been futile and only would have neutralized von Leeb as a force of resistance.<sup>461</sup> Under these circumstances, tacit opposition seemed the correct course of conduct.<sup>462</sup> Although the order resulted in numerous atrocities, the Tribunal exonerated von Leeb.<sup>463</sup> He did not disseminate the order and protested and opposed the command in "every way short of open and defiant refusal to disobey it."<sup>464</sup> The fact that his subordinate commanders disseminated and enforced the directive is "their responsibility and not his."<sup>465</sup> Von Leeb, however, was convicted of transmitting the Barbarossa Jurisdiction order.<sup>466</sup> The Tribunal determined that he placed the weight of his authority behind the order and took no steps to prevent its implementation.<sup>467</sup> The command was criminally applied by von Leeb's subordinate units and, having set the order in motion, he must assume a measure of responsibility.<sup>468</sup>

Field Marshal Georg Karl Friedrich-Wilhelm von Kuechler was Commander of the 18th Army and, in 1942, succeeded von Leeb as Commander of Army Group North.<sup>469</sup> At the time that the Commissar Order was implemented, in 1941, von Kuechler was in charge of the 18th Army during the Russian campaign.<sup>470</sup> The Tribunal observed that von Kuechler distributed the order and that he must have been aware that it was being enforced by his subordinates.<sup>471</sup> This was a "criminal order upon its face" and the fact that von Kuechler was emotionally divided or that disobedience may have resulted in retribution, may be considered in mitigation.<sup>472</sup> The Tribunal queried whether it was "any wonder

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459. *Id.* at 557.

460. High Command Judgment, *supra* note 428.

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. High Command Judgment, *supra* note 428, at 558.

466. *Id.* at 560-61.

467. *Id.* at 560.

468. *Id.* at 560-61. Von Leeb was sentenced to fifteen years imprisonment. *Id.* at 696.

469. *Id.* at 565.

470. High Command Judgment, *supra* note 428, at 565-66.

471. *Id.* at 567.

472. *Id.*

that persecutions followed when heads of armies were issuing such inflammatory and inciting orders?”<sup>473</sup>

General Hermann Hoth was Commander of Panzer Group 3.<sup>474</sup> He testified that he received the Commissar Order and passed it on, confident that his subordinates would be aware that he opposed enforcement of the command.<sup>475</sup> The Tribunal noted that the “unexpressed hope” that a criminal order will not be carried out is neither a defense nor grounds for the mitigation of punishment.<sup>476</sup>

Defendant Hans Reinhardt was Commanding General of the XLI Panzer Corps.<sup>477</sup> He orally communicated the Commissar Order to his divisional commanders and claimed that he directed that the command was not to be carried out.<sup>478</sup> Reinhardt also purportedly protested to his direct superior and his misgivings were allegedly transmitted through the chain of command to the Chief of the German Army.<sup>479</sup> He nevertheless received reports that the order was being effectively and efficiently implemented.<sup>480</sup> The Tribunal admonished that if international law is to prove effective that high commanding officers “must have the courage to act, in definite and unmistakable terms, so as to indicate their repudiation of such an order.”<sup>481</sup> The proper response to a request from the military command “to report the number of commissars killed would have been that this unit does not murder enemy prisoners of war.”<sup>482</sup> The Court also dismissed the defense that the Commissar Order inevitably would have become widely known and implemented by troops at the front regardless of whether it had been disseminated by the defendant.<sup>483</sup>

Defendant Lieutenant General Hermann Reinecke was Chief of the General Wehrmacht Office with authority over Prisoner of War Affairs.<sup>484</sup> He drafted and prepared orders under the authority

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473. *Id.* at 580. There was contradictory evidence as to whether von Kuechler had lodged complaints. *Id.* at 566-67. Von Kuechler was sentenced to twenty years in prison. High Command Judgment, *supra* note 428, at 695.

474. *Id.*

475. *Id.* at 582.

476. *Id.*

477. *Id.* at 596.

478. High Command Judgment, *supra* note 428, at 597.

479. *Id.*

480. *Id.*

481. *Id.* at 598.

482. *Id.* Reinhardt contended that he orally expressed opposition to the order and that the reports that commissars were killed were fictitious and intended to please military authorities. High Command Judgment, *supra* note 428, at 597.

483. *Id.* at 598.

484. *Id.* at 650.

of his superior, Wilhelm Keitel, Chief of the High Command of the Armed Forces.<sup>485</sup> The Tribunal noted that the defendant formulated, drafted and prepared orders which were issued under his signature and may not escape responsibility based on the claim that the commands had been conveyed under Keitel's general authority.<sup>486</sup>

Brigadier General Walter Warlimont was Chief of National Defense in the Army High Command.<sup>487</sup> He was adjudged guilty of crafting and consolidating the Commando Order and contributing to the content of the command.<sup>488</sup> There was no evidence that he ameliorated the harshness of the directive.<sup>489</sup> This was only one of the many orders which he helped to draft which "brought suffering and death to countless honorable soldiers and unfortunate civilians."<sup>490</sup> Rudolf Lehmann was Chief of the Legal Department of the High Command and was convicted of assisting in the drafting of the Barbarossa Jurisdiction Order.<sup>491</sup> Lehmann explained that in drafting the order that he removed jurisdiction over civilian offenses from military courts in anticipation that defendants would be acquitted based on a lack of evidence and that this would provoke Hitler to attack and to abolish the panels.<sup>492</sup> The Tribunal criticized Lehman's defense as amounting to the claim that "in order to avoid criticism of military courts by [Hitler], he was ready to sacrifice the lives of innocent people" by authorizing the military to summarily execute enemy civilians charged with offenses against the Reich.<sup>493</sup>

The central contribution of the *High Command* decision was to define the scope of liability of commanders in the field and staff officers. A commander was liable for transmitting an order which was facially criminal or which he was aware contravened the code of armed conflict.<sup>494</sup> The Tribunal appreciated that the defendant officers were not legal technicians, but stressed that the orders conveyed from the High Command would have been viewed as clearly criminal by similarly situated individual of "normal

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485. *Id.* at 651.

486. *Id.* at 653.

487. High Command Judgment, *supra* note 428, at 662.

488. *Id.* at 665.

489. *Id.*

490. *Id.* at 683.

491. *Id.* at 691-93.

492. High Command Judgment, *supra* note 428, at 693.

493. *Id.*

494. *See supra* notes 446-48 and accompanying text.

intelligence.”<sup>495</sup> Staff officers incurred legal liability in those instances in which they assisted in the formulation or shaping of conspicuously criminal commands or were involved in transmitting these directives through the chain of command.<sup>496</sup> The Court mitigated punishment in those instances in which a defendant’s disagreement was clearly communicated to both superiors and subordinates and active efforts were undertaken to prevent the implementation and enforcement of the command.<sup>497</sup> Commanders also could not credibly contend that their opposition was effectively communicated through silence or subtlety.<sup>498</sup>

These three decisions under Control Council Law No. 10 significantly secured and clarified the international law of superior orders. Obedience to orders was recognized as essential to the military enterprise, but the Tribunals cautioned that international law only required obedience to lawful orders.<sup>499</sup> The principle that superior orders were not a defense to criminal acts was deemed to be a rule of fundamental justice that had been adopted by civilized nations; orders may mitigate but may not justify the crime.<sup>500</sup> German military law recognized the defense in those instances in which a combatant was cognizant of the illegality of a command.<sup>501</sup> This subjective test was expanded in the Control Council Law No. 10 cases to encompass an objective standard which encompassed commands which would be clearly criminal to an individual of the defendant’s military experience and status.<sup>502</sup> An individual thus was criminally liable in those instances in which he obeyed an order which he knew or reasonably should have known was contrary to the humanitarian law of war.<sup>503</sup>

The Nuremberg moral choice standard was interpreted to mean that an officer carrying out superior orders could mitigate his punishment in those instances in which he implemented a command in order to avoid an imminent and overwhelming harm which was disproportionate to the harm potentially resulting from carrying out the order.<sup>504</sup> Defendants in such instances were considered to lack

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495. *See supra* note 449 and accompanying text.

496. *See supra* notes 450-54 and accompanying text.

497. *See supra* notes 458-65 and accompanying text.

498. *See supra* notes 475-76 and accompanying text.

499. *See supra* note 327 and accompanying text.

500. *See supra* note 405 and accompanying text.

501. *See supra* notes 117-20 and accompanying text.

502. *See supra* note 412 and accompanying text.

503. *See supra* notes 396-97 and accompanying text.

504. *See supra* notes 339-40 and accompanying text.

the requisite criminal intent.<sup>505</sup> An individual enlisting in a criminal crusade could not later contend that he did not anticipate being compelled to engage in illicit activity.<sup>506</sup>

A defendant also might mitigate his punishment in those instances in which he impeded the implementation of an order by actively articulating opposition to superiors and subordinates,<sup>507</sup> resigned,<sup>508</sup> limited the scope of a criminal order,<sup>509</sup> issued directives intended to align the command with the requirements of the humanitarian law of war,<sup>510</sup> or in which the requirements of international law were ambiguous or uncertain.<sup>511</sup> Punishment also was mitigated in those instances in which a commanding officer was not responsible for transmitting an order through the chain of command.<sup>512</sup> An officer could not assume that subordinates would automatically appreciate that he opposed and expected them to resist an order.<sup>513</sup>

#### *D. Other Prosecutions Before Control Council No. 10 and Domestic Courts*

The case notes to a decision by a United States military commission sitting in Shanghai China, in 1946, observed that the plea of superior orders was the most frequently raised defense in post-World War II war crimes trial.<sup>514</sup> A British military court later observed in *Wielen* that recognition of the defense in the case before it would result in only the now deceased Adolf Hitler being held liable for the murder of fifty English officers.<sup>515</sup>

A British military court, in *Peleus*, convicted a German commander and various subordinates of attacking the survivors of a military transport ship.<sup>516</sup> The Court dismissed the contention that

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505. See *supra* note 338 and accompanying text.

506. See *supra* notes 342 and accompanying text.

507. See *supra* note 457-65 and accompanying text.

508. See *supra* notes 357-61 and accompanying text.

509. See *supra* notes 421-22 and accompanying text.

510. See *supra* notes 417-19 and accompanying text.

511. See *supra* note 414 and accompanying text.

512. See *supra* notes 458-65 and accompanying text.

513. See *supra* notes 475-76 and accompanying text.

514. Trial of Lieutenant General Shigeru Sawada and Three Others (U.S. Milit. Comm'n, Shanghai, Feb. 27-April 15, 1946) V L. REPT. TRIAL WAR CRIM. 1, 13(U.N. War Crimes Comm'n, 1948) (notes on the case) [hereinafter Sawada].

515. Trial of Max Wielen and 17 Others (The Stalag Luft III Case) (Brit. Milit. Ct., Hamburg, Germany, July 1-Sept. 3, 1947) XI L. REPT. TRIAL WAR CRIM. 31, 47 (U.N. War Crimes Comm'n, 1947) (notes on the case) [hereinafter Wielen].

516. Trial of Kaitanleutenant Heinz Eck and Four Others (The Peleus Trial) (Brit. Milit. Ct., Hamburg Germany Oct. 17-20, 1945) I L. REPT. TRIAL WAR

it was inappropriately extending its jurisdiction into a matter of German sovereignty and disregarding a strong tradition of contemporary jurisprudence, which recognized that totalitarian States were entitled to the undivided and devoted loyalty of citizens and conscripts.<sup>517</sup> The defense queried in response whether the defendants could have been expected to disregard the directives of the Nazi regime in light of the recognition accorded to the National Socialist government by the United States and Great Britain.<sup>518</sup>

The case notes to *Wielen* observed that when confronted with the “insoluble dilemma” of whether to observe the dictates of domestic or international law that the weight of legal opinion was that transnational law must prevail.<sup>519</sup> In *Sawada*, a United States military court rejected the defense that the Japanese defendants were obligated to obey the Enemy Airmen’s Law which flagrantly contravened international law by imposing a mandatory summary death sentence on captured enemy pilots.<sup>520</sup> In successfully calling for the conviction of German defendants who followed orders to beat and to execute a British pilot whose plane had crashed, the prosecutor in *Renoth* noted that “there could be no doubt that shooting at a pilot . . . was an act which both violated the rules of warfare and outraged the general feelings of humanity.”<sup>521</sup>

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CRIM. 1 (1947) [hereinafter *Peleus*].

517. *Id.* at 8.

518. *Id.* at 9.

519. *Wielen*, *supra* note 515, at 50. The Judge Advocate in *Rhode* argued that it was not unfair to impose liability on the defendants despite the fact that they had been trained to obey orders. He noted that in the event that the judges were to visit a field-marshal in a mental institution who proceeded to direct them to kill the director that they were not likely to carry out the command. This, according to the Judge Advocate, was emblematic of the question which had confronted the defendants: “whether if anyone gives an order, emanating even from the highest authority, which obviously cannot be permitted, you are going to obey it or not.” Trial of Werner Rhode and Eight Others (Brit. Milit. Ct., Wuppertal, Germany, May 29-June 1, 1946) V L. REPT. TRIAL WAR CRIM. 54, 58 (Notes On The Case) (emphasis omitted) (trial of six defendants for following orders to execute four British nurses).

520. *Sawada*, *supra* note 514, at 23 (Notes On The Case).

521. The Trial of Hans Renoth and Three Others (Brit. Milit. Ct., Elten, Germany, Jan. 8-10, 1946) XI L. REPT. TRIAL WAR CRIM. 76, 78 (1949) (Notes On The Case). In convicting Hauptsturmfuhrer Karl Buck for the execution of fourteen prisoners of war, the Judge Advocate proposed a tripartite standard which was widely-cited. Under this test an accused would be criminally culpable in the event that he committed a war crime pursuant to an order which was obviously unlawful; he knew was unlawful; or he ought to have known to be unlawful had he considered the circumstances under which it was issued. Trial of Karl Buck and Ten Others (Brit. Milit. Ct., Wuppertal, Germany, May 6-10, 1946) V L. REPT. TRIAL WAR CRIM. 39, 43 (U.N. War Crimes Comm’n, 1948) (Notes On the Case) [hereinafter *Buck*]. The Judge Advocate observed that the maxim that ignorance

In *Jaluit Atoll*, four Japanese defendants were convicted of following orders to execute three United States airmen.<sup>522</sup> The accused invoked the cultural plea that they were bound to obey the orders of their superiors which were considered to emanate from His Majesty the Emperor.<sup>523</sup> The Court refused to accept that the law of superior orders should accommodate the fact that the liberal notion of individual autonomy was inconsistent with Japan's "totalistic and absolutistic military society."<sup>524</sup> The Tribunal ruled that an individual of ordinary sense and understanding would have grasped the illegal nature of the execution order and sentenced to death all those integrally involved in the killings.<sup>525</sup>

The punishment was mitigated of several defendants who carried out superior orders and played a modest role in war crimes. The three defendants who followed orders to execute United States airmen in *Jaluit Atoll* were sentenced to death.<sup>526</sup> However, defendant Tasaki, who was in charge of the prisoners and turned them over for execution, was sentenced to ten years imprisonment based on his "brief, passive and mechanical" role.<sup>527</sup>

The sentences of the defendants in *Sawada* also were mitigated.<sup>528</sup> Eight United States airmen were shot down following an attack against a Japanese steel mill, oil refinery and aircraft

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of the law did not constitute an excuse did not fully pertain in the international law of war. Although the defendants were not lawyers and may not be conversant with the details of military jurisprudence, the Judge Advocate stressed that courts must consider whether a defendant should have expected to know "as a matter of general facts of military life" that his acts were violative of the rights of prisoners of war." *Id.* at 44 (Notes On The Case). Dutch courts determined that the Nuremberg standard was limited to the prosecution of high-ranking German officers and was not a general rule of international law. As a result, the judiciary relied on domestic statutes and on the German law of superior orders. *See* Trial of Willy Zuehlke (Netherlands Special Ct., Amsterdam, Aug. 3 1948 & Netherlands Special Ct. of Cassation, Dec. 6, 1948) XIV L. REPT. TRIAL WAR CRIM. 139, 147-50 (U.N. War Crimes Comm'n, 1949) (Notes On The Case).

522. Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy (The Jaluit Atoll Case) (U.S. Milit. Comm'n, United States Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, Dec. 7-13, 1945) I L. REPT. TRIAL WAR CRIM. 71 (U.N. War Crimes Comm'n, 1947).

523. *Id.* at 74 (Notes On The Case).

524. *Id.*

525. *Id.* at 75-76.

526. Trial of Rear-Admiral Nisuke Masuda and Four Others of the Japanese Navy (Jaluit Atoll Case) (U.S. Milit. Comm'n, United States Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, Dec. 7-13, 1945) I L. REPT. TRIAL WAR CRIM. 71, 76 (U.N. War Crimes Comm'n, 1947).

527. *Id.*

528. *See* Sawada, *supra* note 514, at 2.

factory.<sup>529</sup> The Americans were imprisoned in solitary confinement for fifty-two days and then convicted at a summary trial.<sup>530</sup> In accordance with instructions from Tokyo, three of the Americans were subsequently executed.<sup>531</sup>

The defendants were found to have “exercised no initiative to any marked degree.”<sup>532</sup> High governmental and military officials enacted and circulated the retroactive Enemy Airmen’s Law under which the defendants were prosecuted and punished and also issued special instructions as to the treatment, trial, sentencing and punishment of the airmen.<sup>533</sup>

The Court noted that General Shigeru Sawada was absent during the proceedings, resisted and then acquiesced in the result.<sup>534</sup> He was found to have negligently rather than intentionally and willfully brought about the death of the fliers<sup>535</sup> and was sentenced to the relatively light sentence of five years at hard labor.<sup>536</sup> Lieutenant Yusei Wako served on the three judge panel and, despite his legal training, convicted the defendants based on false and fraudulent confessions and evidence provided by the Military Police in Tokyo.<sup>537</sup> He obeyed the special instructions of his superiors in voting the death penalty.<sup>538</sup> Lieutenant Yusie Okada, lacked legal training, protested at being assigned as a judge, but dutifully complied with orders in voting the death penalty.<sup>539</sup> Although these two defendants participated in a trial in which the defendants were denied due process,<sup>540</sup> their sentences were mitigated and they were punished to nine and five years in prison respectively.<sup>541</sup> There was no evidence that prison warden Sotojiro Tatsuta personally mistreated or executed the prisoners<sup>542</sup> and he was sentenced to five years at hard labor.<sup>543</sup> The Court seemingly

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529. *Id.*

530. *See id.* at 2-3.

531. *Id.* at 4.

532. *Id.* at 7.

533. *See Sawada, supra* note 514.

534. *Id.*

535. *Id.*

536. *Id.* at 8.

537. *Id.* at 7.

538. *See Sawada, supra* note 514.

539. *Id.*

540. *Id.* at 12 (Notes On The Case).

541. *Id.* at 8.

542. *Id.* at 7.

543. *See Sawada, supra* note 514, at 8.



viewed the officials in Tokyo as primarily responsible for the airmen's trial, conviction and execution.<sup>544</sup>

In *Bauer*, Colonel Karl Bauer, in accordance with terms of the the Commando Order, directed Ernst Schrameck to kill three irregular French combatants.<sup>545</sup> Schrameck passed the order on to Herbert Falten whose squad executed the prisoners.<sup>546</sup> Bauer was sentenced to death while Schrameck and Falten were punished by five years imprisonment.<sup>547</sup> The Court presumably credited Schrameck's defense that Bauer's orders were "categorical" and did not admit for "discussion."<sup>548</sup> Falten initially resisted the execution and approached Schrameck to determine whether he desired to revoke the order.<sup>549</sup>

In *Wagner*, a French military tribunal determined that Ludwig Luger, the Public Prosecutor at the Special Court at Strasbourg, followed the instructions of Robert Wagner, Reich Governor of Alsace, in successfully requesting the death penalty for thirteen individuals apprehended while crossing the border into Switzerland.<sup>550</sup> Luger conceded in his final statement that there was no evidence that any of the accused were responsible for shooting a frontier guard killed during the attempted escape.<sup>551</sup> Luger was convicted,<sup>552</sup> but received no punishment based on the fact that he followed superior orders on a matter which was properly within Wagner's competence and responsibility.<sup>553</sup>

The mitigation of punishment in *Jaluit Atoll*, *Sawada*, *Bauer* and *Wagner* all were seemingly based on the fact that the lower-level defendants mechanically carried out orders which provided little opportunity for the exercise of discretion.<sup>554</sup> The Courts seemingly desired to shift primary responsibility to those who

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544. *Id.* at 13 (Notes On The Case).

545. Trial of Carl Bauer, Ernst Schrameck and Herbert Falten (Perm. Milit. Trib., Dijon, Oct. 18, 1945) VIII L. REPT. TRIAL WAR CRIM. 15 (U.N. War Crimes Comm'n, 1949) [hereinafter *Bauer Judgment*]. There was a dispute concerning these troops' entitlement to be recognized as lawful combatants. *See id.* at 16-19.

546. *Id.*

547. *Id.* at 16.

548. *Id.* at 21.

549. *Bauer Judgment*, *supra* note 545.

550. Trial of Robert Wagner, Gauleiter and Six Others (Perm. Milit. Trib. at Strasbourg, 1946, and Ct. of Appeal, July 24, 1946), III L. REPT. TRIAL WAR CRIM. 23, 31 (U.N. War Crimes Comm'n, 1948).

551. *Id.* at 32.

552. *Id.* at 42.

553. *Id.* at 54 (Notes On The Case).

554. *See supra* notes 527, 548, 550 and accompanying text.

planned and implemented the policies.<sup>555</sup> The sentences seemed to overlook the often catastrophic consequences of the defendants' criminal conduct which was undertaken in the cool and calm of the moment rather than during the heat of armed combat.<sup>556</sup>

A number of lower-ranking defendants successfully invoked a mistake-of-fact defense rather than rely on superior orders. They claimed that in acting in accordance with superior orders in executing prisoners, they relied in good faith on the judgment of superiors who presumably were well-informed concerning the requirement of international law.<sup>557</sup> In *Hans*, the Norwegian Supreme Court quashed the conviction of Hauptsturmführer Oscar Hans.<sup>558</sup> The accused complied with orders to execute Norwegians sentenced to death by German courts in Norway.<sup>559</sup> The Court, in acquitting Hans of knowingly killing sixty-eight prisoners without trial, noted that the accused received the execution orders from his superior which "created or helped to create a mistake of fact in the accused's mind" as to the legality of the executions.<sup>560</sup> A post-war West German Court acquitted a member of the criminal police of executing a Polish prisoner of war who allegedly attacked a police sergeant.<sup>561</sup> The Federal Supreme Court concluded that the accused possessed no reason to "distrust" the legality under international law of an execution order emanating from the Gestapo which had been vested with the administration of justice over Poles within the Reich.<sup>562</sup> A British military tribunal, however, rejected the mistake-of-fact defense in *Buck*.<sup>563</sup> The Court noted that the defendants' claim that they believed that the fourteen prisoners of war they executed had been lawfully sentenced was belied by the facts that the killings took place in isolated woods, an effort was made to obliterate all traces of the killings, and the bodies were stripped of

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555. See *supra* notes 537-41, 547, 553 and accompanying text.

556. See *supra* note 546 and accompanying text.

557. See Trial of Karl Adman Golkel and Thirteen Others (Brit. Milit. Ct., Wuppertal, Germany, 1946) V L. REPT. TRIAL WAR CRIM. 45, 49 (U.N. War Crimes Comm'n, 1948) (Notes On The Case) (the defendants were not directly involved in the executions).

558. Trial of Hauptsturmführer Oscar Hans (Eidsivating Lagmannsrett, Jan 1947 and Sup. Ct. Norway, Aug. 1947) V L. REPT. TRIALS WAR CRIM. 82 (U.N. War Crimes Comm'n, 1948).

559. *Id.* at 84-85.

560. *Id.* at 93 (Notes On The Case).

561. Execution of Prisoner of War Case (Fed. Sup. Ct., German Fed. Rep., Dec. 12, 1950), 19 I.L.R. 532.

562. *Id.* at 535.

563. See *Buck*, *supra* note 521, at 43 (Notes On The Case).

identification and buried in a bomb crater.<sup>564</sup> The mistake-of-fact defense had the advantage of permitting courts to acquit, rather than to merely mitigate, the sentences of defendants who dutifully carried out circumscribed commands.<sup>565</sup>

Courts lacked sympathy for defendants who exercised some degree of discretion and did not merely dutifully fulfill the dictates of authority. For instance, defendants who exceeded the scope of their superior orders could not shelter themselves behind the defense.<sup>566</sup> General Anton Dostler was convicted of ordering the summary executions of two American officers and thirteen enlisted men captured in Italy.<sup>567</sup> Dostler pled that Hitler's order characterized the killing of commandos captured in combat as justified acts of reprisal which were required to deter the illegal methods of warfare employed by the Allies.<sup>568</sup> The Tribunal noted that the Americans were executed two days following their apprehension and that Hitler's order required that combatants who were not killed upon capture were to be handed over to the security services.<sup>569</sup> Dostler, in directing his own troops to carry out the executions, failed to follow the terms of the order and could not camouflage his acts by invoking the Fuhrer's command.<sup>570</sup>

Police chief Albert Bury ordered his subordinate, Wilhem Hafner, to immediately execute a captured American pilot.<sup>571</sup> Although Bury's order was in accord with German policy, a United States military court determined that he possessed discretion in determining whether a specific flyer should be killed and that there was no necessity to expeditiously execute the pilot.<sup>572</sup> Both were sentenced to death.<sup>573</sup> In *Moehle*, the accused was a Korvetten Kapitän in the German Navy and, from September, 1942 to May, 1945, commanded the 5th U-boat Flotilla at Kiel.<sup>574</sup> He was convicted of verbally conveying a standing order to U-boat

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564. *Id.*

565. *Id.* at 564-71.

566. See Trial of General Anton Dostler, Commander of the 75th German Army Corps (U.S. Milit. Comm'n, Rome, 1945) I L. REPT. TRIAL WAR CRIM. 22 (U.N. War Crimes Comm'n, 1947) [hereinafter Dostler].

567. *Id.* at 22-23.

568. *Id.* at 33 (Notes On The Case).

569. *Id.*

570. *Id.*

571. Albert Bury and Wilhelm Hafner (U.S. Milit. Comm'n, Freising, Germany, 1945), III L. REPT. TRIAL WAR CRIM. 62, 63 (U.N. War Crimes Comm'n, 1948).

572. *Id.* at 64 (Notes On The Case).

573. *Id.* at 62.

574. Trial of Karl-Heinz Moehle (Brit. Milit. Ct., Hamburg, Germany, 1946), IX L. REPT. TRIAL WAR CRIM. 75 (1949).

commanders in a fashion that strongly suggested that German policy was to kill the survivors of sunken ships rather than merely to avoid rescue in those instances in which a U-boat would be placed at risk.<sup>575</sup>

A defendant could not plead a superior order as a defense which he knew or should have known had been rescinded. First Lieutenant Gerhard Grumpelt received an order issued in anticipation of the cessation of hostilities and surrender to scuttled U-boats.<sup>576</sup> The command was immediately rescinded, but Grumpelt nevertheless proceeded to scuttle two submarines.<sup>577</sup> He contended that the countermanding order had not been issued by an officer with the requisite authority and that he had been unaware that the other U-boat commanders had pledged to respect the armistice and not to scuttle their ships.<sup>578</sup> He further explained that the original order was consistent with his training that he possessed a duty to prevent vessels from falling into enemy hands.<sup>579</sup> The Court determined that the Grumpelt was aware that the order to scuttle the submarines had been retracted<sup>580</sup> and sentenced him to seven years in prison.<sup>581</sup>

The defense of duress also generally was dismissed.<sup>582</sup> General Nickolaus von Falkenhorst, Commander-in-Chief of the Armed forces in Norway, in 1942, passed on the Commando Order to his subordinates.<sup>583</sup> In June, 1943, von Falkenhorst republished and amended the order to provide for the execution within twenty-four hours of detainees subjected to interrogation.<sup>584</sup>

The notes to the case observed that the last paragraph of the Fuhrer Order threatened to court martial officers who failed to carry out the command.<sup>585</sup> This certainly was to be taken seriously

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575. *Id.* at 75-78.

576. Trial of Oberleutenant Gerhard Grumpelt (The Scuttled U-boats Case) (Brit. Milit. Ct., Hamburg, Germany, 1946), I L. REPT. TRIAL WAR CRIM. 55, 56 (1947).

577. *Id.* at 56.

578. *Id.* at 60.

579. *Id.*

580. *Id.* at 69-70 (Notes On The Case).

581. *Id.* at 65.

582. See Trial of Otto Sandrock and Three Others (The Alemlo Trial) (Brit. Milit. Ct., Almelo, Holland, 1945) I L. REPT. TRIAL WAR CRIM. 35, 37 (1947).

583. Trial of General oberst Nickolaus Von Falkenhorst (Brit. Milit. Ct., Brunswick, 1946), XI L. REPT. TRIAL WAR CRIM. 18, 22 (1949) [hereinafter Falkenhorst Judgment].

584. *Id.*

585. *Id.* at 24 (Notes On The Case).

given the Fuhrer's legal authority and physical power.<sup>586</sup> Nevertheless, the notes observed that the accused had not confronted the immediate infliction of death or grievous bodily harm.<sup>587</sup> Falkenhorst's situation was remote from the dilemma which was faced by an inmate of a concentration camp forced at gun point to commit an atrocity against another prisoner.<sup>588</sup> In *Leopold L.*, the Austrian Supreme Court clarified that duress required physical or psychic coercion, "the overcoming of which would require unusual powers of resistance or exceptional heroism, and which therefore overcomes the contrary will of the person under coercion, in view of 'considerable danger' threatening life, freedom or property."<sup>589</sup> The Court affirmed the defendant's conviction, noting that he had not alleged that he confronted a conflict of conscience which caused him to resist carrying out the clearly illegal order to kill Jewish and Polish prisoners.<sup>590</sup>

There was continuing controversy over whether individuals who defied orders, in fact, risked retribution. In *Dostler*, a high-ranking officer in the Wehrmacht, General von Saenger, testified on behalf of the accused that he knew of one case of retribution and a second which was rumored to have occurred.<sup>591</sup> However, he alleged that he was not aware of an instance in which an individual had been executed for failure to carry out the Commando Order.<sup>592</sup> Von Saenger also testified that officers pledged loyalty to the Fuhrer, Adolf Hitler, and believed that they were obligated to obey all orders and to fulfill their military obligation.<sup>593</sup> In those instances in which Hitler's orders appeared to contravene international law, von Saenger conceded that it was commonly believed that Hitler arranged with enemy governments to immunize German combatants from legal liability.<sup>594</sup> In *Bruns*, the three accused were variously charged with the murder and torture of Norwegian prisoners.<sup>595</sup> The latter involved cold baths, kicks, blows and leg

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586. *Id.* at 24-25.

587. *Id.* at 25.

588. *Id.*

589. Public Prosecutor v. Leopold L. (Austria, Sup. Ct., 1967), 47 I.L.R. 464, 471.

590. *Id.* at 469.

591. Dostler, *supra* note 566, at 27.

592. *Id.*

593. *Id.* at 28.

594. *Id.* at 27-28.

595. Trial of Kriminalsekretar Richard Wilhelm Hermann Bruns and Two Others (Eidsivating Lagmannsrett and the Supreme Court of Norway, 1946), III L. REPT. TRIAL WAR CRIM. 15 (U.N. War Crimes Comm'n, 1948)

screws.<sup>596</sup> The defendants claimed that they would have been subject to retribution had they refused to carry out acts of torture.<sup>597</sup> The Norwegian lower court, however, refused to accept that even the Nazi regime could force defendants to involuntarily engage in such “brutal and atrocious acts.”<sup>598</sup>

A Dutch Court seemingly recognized the doctrine of military necessity in acquitting two members of the Dutch resistance of executing four prisoners.<sup>599</sup> The resistance was fighting alongside French parachute troops and was surrounded and under siege by German troops.<sup>600</sup> Fearful that the detainees would impede their defense, the Dutch and French commander conferred and ordered Van E. to execute the prisoners.<sup>601</sup> The Court determined that Van E. was entitled to assume in good faith that he was obligated to carry out this command which had been issued under conditions of extreme stress and danger.<sup>602</sup>

In *Falkenhorst*, the case notes indicate that that superior orders “becomes a more complicated matter” when joined with reprisals.<sup>603</sup> The text noted that “there is no more difficult subject in the ambit of the law relating to war crimes” than determining whether a defendant who carried out an otherwise illegal order should be exonerated based on the fact that the defendant believed that the crimes constituted a lawful act of reprisal.<sup>604</sup> Von Falkenhorst claimed that he was entitled to assume that the proper legal considerations had been weighed and balanced by his superiors in the Nazi regime prior to characterizing the Commando Order as a lawful reprisal.<sup>605</sup> The Court noted that while a senior soldier such as Falkenhorst would be expected to know the rules of warfare and humanity after twenty years of service that he would not necessarily be well-versed in the factual foundation of the claim of reprisal.<sup>606</sup>

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596. *Id.* at 16-17.

597. *Id.* at 18.

598. *Id.* The Supreme Court was in possession of two documents indicating that defendants engaging in torture would have been punished by German authorities. *Id.* at 19-20.

599. *Military Prosecutor v. B. and Van E.* (Court Martial, Holland, 1951), 18 I.L.R. 536.

600. *Id.*

601. *Id.*

602. *Id.* at 536-37. B., the Dutch commander, was determined to have been under a genuine misapprehension concerning the lawfulness of his actions. *Id.* at 537.

603. *See Falkenhorst Judgment, supra* note 583, at 25 (Notes On The Case).

604. *Id.* at 27 (Notes On The Case).

605. *Id.* at 26.

606. *Id.*

The notes to the case, however, indicated that there were no facts suggesting that the accused actually believed that the order was in reprisal for the acts of the Allies.<sup>607</sup>

The Federal Supreme Court of Germany in the *Preventive Murder Case* affirmed the accused's conviction for following orders to execute foreign nationals employed as forced laborers.<sup>608</sup> The defendant unsuccessfully relied on the defense of *tu quoque*.<sup>609</sup> The Court, however, failed to find a sufficiently close connection between Allied air attacks or acts of violence by Soviet troops in the German eastern territories and the execution of defenseless foreign workers.<sup>610</sup> The Supreme Court ruled that the accused could not reasonably believe that the defense of *tu quoque* applied.<sup>611</sup>

The Control Council Law cases shifted the focus to lower-level combatants and illustrated the variety of factual circumstances in which the superior orders defense was invoked.<sup>612</sup> The Courts adopted both a subjective and objective standard in imputing knowledge of an order's illegal character.<sup>613</sup> This standard did not vary in accordance with the cultural context of the alleged criminal conduct.<sup>614</sup> These domestic tribunals demonstrated sympathy for lower-level combatants, mitigating the punishment of individuals who carried out narrowly-cast and configured commands.<sup>615</sup> The courts seemingly overlooked the fact that these defendants knew or should have known that their often calamitous conduct was violative of international law.<sup>616</sup> In other instances, courts recognized a mistake of fact defense in acquitting lower-ranking defendants who were determined to have acted in good faith in implementing facially legal orders.<sup>617</sup> The latter cases suggested that lower-level combatants directed to carry out narrowly-tailored

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607. *Id.* at 26-27.

608. War Crimes (Preventive Murder) (Germany) Case (Fed. Rep. Germany, Fed. Sup. Ct., 1960), 32 I.L.R. 563.

609. *Id.* at 564. This doctrine provides that "no State may accuse another State of violations of international law and exercise criminal jurisdiction over the latter's citizens in respect of such violations if it is itself guilty of similar violations against the other State or its allies. The right and duty of a State to hold its own citizens responsible, in accordance with its municipal criminal law, for violations of international law is not affected by this rule." *Id.*

610. *Id.* at 564-65. The rationale was to eliminate any threat that these workers may pose in the future and to improve food supplies. *Id.* at 565.

611. *Id.* at 565.

612. See *supra* notes 522-25 and accompanying text.

613. See *supra* note 521 and accompanying text.

614. See *supra* notes 522-25 and accompanying text.

615. See *supra* notes 526-53 and accompanying text.

616. See *supra* notes 534-43 and accompanying text.

617. See *supra* notes 557-65 and accompanying text.

orders were not required to examine the factual foundation of the commands.<sup>618</sup> The superior orders defense was not recognized in those instances in an accused exercised a degree of discretion or augmented the details of orders.<sup>619</sup> Defendants also were unable to establish the requisite degree of coercion to establish the defense of duress,<sup>620</sup> despite claims that resistance would have resulted in retribution.<sup>621</sup> Courts continued to be bedeviled by claims that a defendant reasonably believed that an otherwise illegal order was a lawful reprisal.<sup>622</sup> The plea of *tu quoque* was potentially troubling in that it might lead to acquittal for criminal acts which also were engaged in by enemy belligerents.<sup>623</sup>

#### IV. Vietnam

##### A. *My Lai*

The contemporary United States standard for superior orders under military law was set forth in *United States v. Kinder*.<sup>624</sup> Kinder, an Air Force police officer, “apprehended a Korean [national] in a bomb dump.”<sup>625</sup> Kinder turned the intruder over to the Sergeant of the Guard, Robert Toth, who pistol whipped and bloodied the detainee.<sup>626</sup> In an apparent effort to conceal the beating, Kinder later was ordered and complied with the command of Air Police Officer George C. Schreiber to transport the prisoner back to the bomb dump and kill him.<sup>627</sup> Schreiber explained that this would serve to deter other intruders.<sup>628</sup> Kinder also followed instructions to file a false report that the prisoner had been shot while resisting arrest.<sup>629</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

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618. See *supra* notes 537-65 and accompanying text.

619. See *supra* notes 566-75 and accompanying text.

620. See *supra* notes 582-90 and accompanying text.

621. See *supra* notes 591-94 and accompanying text.

622. See *supra* notes 603-07 and accompanying text.

623. See *supra* notes 608-11 and accompanying text.

624. *United States v. Kinder*, 14 C.M.R. 742 (1953).

625. *Id.* at 753.

626. *Id.*

627. *Id.* at 755.

628. *Id.* at 759.

629. *Kinder*, 14 C.M.R. at 757.



ordinary sense and understanding."<sup>630</sup> The Board of Review stressed that in imputing knowledge to the accused that it considered his twenty-year old age, eleventh grade education and relatively brief two years experience in the United States military.<sup>631</sup> The Board noted that Kinder's criminal intent was substantiated by the fact that he resorted to a subterfuge to conceal and to justify the killing.<sup>632</sup>

The defense contention that Kinder mistakenly believed that he was obligated to obey every order was dismissed as "unreasonable," "absurd" and "unbelievable."<sup>633</sup> The Board queried whether the accused would feel a duty to obey an order to commit rape, to steal or cut off his own head?<sup>634</sup> The defendant also could not convincingly claim that he mechanically carried out superior commands and therefore lacked criminal intent.<sup>635</sup> Subordinate soldiers were deemed to be reasoning agents who were under a duty to exercise judgment and to avoid compliance with orders that would be "palpably illegal on their face" to an individual of ordinary sense and understanding.<sup>636</sup> The Board of Review approved the discretionary decision of the military command to reduce the court martial's sentence from life to two years.<sup>637</sup>

In 1973 Lieutenant William Calley "was convicted by a general court martial . . . of premeditated murder and . . . assault with intent to commit murder."<sup>638</sup> Calley's platoon was assigned to participate in a March 16, 1968, assault against the elite 48th Viet Cong Battalion.<sup>639</sup> His troops swept through the hamlet of My Lai (4) and then joined other units in encircling the Viet Cong.<sup>640</sup> An investigation later revealed that while in My Lai, Calley supervised and participated in the execution of Vietnamese civilians<sup>641</sup> and also shot and killed an elderly Vietnamese monk<sup>642</sup> and a young child.<sup>643</sup>

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630. *Id.* at 774.

631. *Id.*; see also, *id.* at 761.

632. *Id.*

633. *Id.* at 775.

634. Kinder, 14 C.M.R. at 775.

635. *Id.*

636. *Id.* at 776.

637. *Id.* at 786.

638. United States v. Calley, 46 C.M.R. 1131, 1138 (A.C.M.R. 1973), *aff'd* 22 C.M.A. 534, 48 C.M.R. 19 (A.C.M.R. 1973), *rev'd sub nom.* Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), *verdict reinstated*, 519 F.2d 194 (5th Cir. 1975) *cert. denied*, 425 U.S. 911 (1976).

639. See Calley, 46 C.M.R. at 1164.

640. *Id.* at 1167.

641. *Id.* at 169-72.

642. *Id.* at 1173.

Calley's principle defense was that he acted in accordance with superior orders and lacked a criminal intent.<sup>644</sup> He contended that on five separate occasions that Captain Ernest Medina ordered him to "waste" the villagers.<sup>645</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>646</sup>

The Court of Military Review determined that had the jury determined that an order had not been issued that this would have had "abundant support in the record."<sup>647</sup> On the other hand, the court martial also would have been justified in determining that a claim of superior orders was inapplicable based on the fact that this was an order which an individual of ordinary sense and understanding would know to be unlawful or was actually known by the accused to be unlawful.<sup>648</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>649</sup> The interests of the accused certainly should be considered, but that this must be balanced against the fact that a subjective standard

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643. *Id.* at 1173.

644. *See* Calley, 46 C.M.R. at 1180. The court-martial returned a general verdict and the Court of Military Review was unable to determine whether the Court found that no such orders had been given or, alternatively, determined that orders were issued that were clearly contrary to the law of war. *Id.*

645. *Id.* at 1181. These orders were issued in the company and platoon leaders' briefings the night before the engagement, in the morning prior to the helicopter lift-off and twice while in the village through radio transmissions. *Id.* Three defense witnesses confirmed that Medina instructed that women and children were to be treated as the enemy. Roughly twenty prosecution and defense witnesses had no recollection of a directive to kill women and children. *Id.* at 1182.

646. Calley, 46 C.M.R. at 1182. Captain Medina testified that he admonished C Company that they would be out-numbered two to one and that the incursion into the village would be preceded by artillery fire in order combat enemy forces. Medina also informed the troops that civilians would be absent at the market. In answer to a question, Medina stated that women and children were not to be killed unless they possessed a weapon and threatened American troops. He later added that the village was to be destroyed by burning the hootches, killing the livestock, closing the wells and destroying food crops. Medina conceded that prior to the lift-off that he instructed Calley to lead prisoners through the mine fields. Medina denied knowledge that women and children had been detained by American troops in My Lai and claimed that he had not ordered the killing of civilians. Medina's radio operators had no recollection that such orders had been issued. *Id.* at 1181-82.

647. *Id.* at 1182.

648. *Id.* at 1183.

649. *Id.* at 1184.

would risk subverting the constraints which curtail barbarism in warfare.<sup>650</sup>

The Court of Military Appeals affirmed that the “man of ordinary sense and understanding” under the circumstances test for superior orders issued by the presiding judge was in conformity with the prevailing legal standard.<sup>651</sup> Calley had claimed that this test was too strict and that it would be more equitable and fair to determine “whether the order was so palpably or manifestly illegal that a person of ‘the commonest understanding’ would be cognizant of its illegality.”<sup>652</sup> This was intended to provide a more generous standard for imputing knowledge of a command’s criminal character.<sup>653</sup> The Court of Appeals, however, determined that “[w]hether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved her.”<sup>654</sup>

Judge William H. Darden, in his dissent, argued that the majority standard was too strict.<sup>655</sup> This permitted the punishment of individuals whose attitude, aptitude or training ill-equipped them to make reasoned judgments or to comfortably challenge authoritative commands.<sup>656</sup> Judge Darden contended that adherence to superior orders was an essential ingredient of discipline and should constitute a defense unless the commands would be recognized as illegal by persons of minimal intelligence and experience.<sup>657</sup> A combatant ought not to be subject to punishment based on a retrospective determination that the evidence supported a finding of “simple negligence on his part.”<sup>658</sup> In contrast, a test calibrated on the commonest understanding would impute knowledge to an accused based on the circumstantial concept that “almost anyone in the armed forces would have immediately recognized that the order was palpably illegal.”<sup>659</sup>

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650. Calley, 46 C.M.R. at 1184.

651. Calley, 48 C.M.R. at 27-29.

652. *Id.* at 27.

653. *Id.*

654. *Id.* at 29. The Court of Military Review observed that “Calley’s judgment, perceptions and stability were lesser in quality than the average lieutenant’s and these deficiencies are mitigating to some extent. However, the deficiencies did not even approach the point of depriving him of the power of choice.” Calley, 46 C.M.R. at 1196.

655. Calley, 48 C.M.R. at 31.

656. *Id.* at 31.

657. *Id.*

658. *Id.*

659. *Id.* at 32

Judge Darden recognized that humanitarian considerations must be calibrated in formulating the superior orders defense, but argued that the primary emphasis should be on insuring fairness to the unsophisticated and least intelligent combatant.<sup>660</sup> A relaxed standard based on “palpable illegality to the commonest understanding” also had the advantage of enhancing discipline by protecting combatants who through training and attitude were inclined to adhere to superior orders.<sup>661</sup>

Darden concluded that it was not at all certain that Calley would be convicted under this more generous standard<sup>662</sup> Medina allegedly instructed by Calley to kill the villagers and to move expeditiously through the hamlet in order to engage the main force of the 48th Battalion.<sup>663</sup> Calley also had been informed that the individuals in the villages were either members of enemy forces or enemy sympathizers and reasonably feared that villagers who were left behind would pose a threat.<sup>664</sup> Thus, “the circumstances that could have obtained there may have caused the illegality of alleged orders to kill civilians to be much less clear than they are in a hindsight review.”<sup>665</sup>

The Pentagon Peers Report concluded that although Medina may not have ordered the extermination of civilians that he roused the troops to exact revenge for the company’s casualties.<sup>666</sup> This was compounded by the fact that Calley was ill-equipped to assume a leadership position<sup>667</sup> and his troops were thrust into combat without adequate training.<sup>668</sup> Calley easily could have concluded that his actions in My Lai were fully consistent with American strategies in Vietnam such as free fire zones, carpet bombings and selective assassination.<sup>669</sup> Analysts also have argued that his crimes were a predictable psychological response to the pressures placed on his platoon.<sup>670</sup> In the end, only Calley stood convicted for the

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660. Calley, 48 C.M.R. at 32. The Court should apply this standard in light the defendant’s age, grade, intelligence, experience and training. *Id.*

661. *Id.*

662. *Id.* at 33.

663. *Id.* at 33.

664. Calley, 48 C.M.R. at 33.

665. *Id.*

666. UNITED STATES ARMY, I REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT 8-14 (1970) [hereinafter Peers Report]; *see also* 8-4-8-5.

667. *Id.* at 8-8.

668. *Id.* at 8-13.

669. *See* Matthew Lippman, *War Crimes: The My Lai Massacre and the Vietnam War*, 2 SAN DIEGO JUST. J. 295, 357-59 (1993).

670. *See id.* at 344-46.

events at My Lai and ultimately was paroled after serving one-third of his sentence.<sup>671</sup>

### B. Other Prosecutions

In *United States v. Griffen*, Sergeant Walter Griffen overheard a radio conversation in which his platoon leader was informed by the company commander that an enemy prisoner apprehended by Griffen's platoon should be shot.<sup>672</sup> Griffen was ordered to carry out the killing which he believed was designed to safeguard the platoon.<sup>673</sup> The Americans had been detected by the enemy, and several months earlier members of the platoon had been killed and wounded in the same general area following the observation of their position.<sup>674</sup>

The Army Board of Review affirmed that the court martial properly refused to issue a jury instruction on the superior orders defense since the command was "obviously beyond the scope of authority of the superior officer 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>675</sup> The Board of Review, however, reduced Griffen's sentence from ten to seven years, according mitigating weight to the fact that the accused acted in a rapidly moving sequence of events "without reflection and in honest obedience of a superior's orders."<sup>676</sup> The mitigation of Griffen's sentence undoubtedly was influenced by the fact that the order had been issued by the company commander as well as by Griffen's relatively low rank and eight years of meritorious service in the military.<sup>677</sup>

These facts resemble those in *United States v. Kennan*.<sup>678</sup> Private Charles Keenan was sentenced to five years by the Army Board of Review as a result of his compliance with orders to shoot two Vietnamese civilians.<sup>679</sup> Squad leader, Corporal Stanley J.

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671. See *id.* at 317-19. See generally *Koster v. United States*, 685 F.2d 407 (Ct. Cl. 1982).

672. *United States v. Griffen*, 39 C.M.R. 586, 587-88 (A.B.R. 1967).

673. *Id.* at 588. Griffen also assumed that the order was legal since his former platoon leader had been relieved when a prisoner loosened his teather and escaped. *Id.*

674. *Id.*

675. *Id.* at 590.

676. *Id.* at 591. The accused also testified against another soldier involved in the incident and was adjudged to be remorseful and to possess a desire to be rehabilitated. *Id.*

677. *Id.* at 726-33.

678. *United States v. Keenan*, 39 C.M.R. 108 (1969).

679. *Id.* at 110.

Luczko fired three shots at close range at a Vietnamese female apprehended by his troops.<sup>680</sup> Keenan was ordered to “finish her off.”<sup>681</sup> The accused testified that he believed that the woman already was dead,<sup>682</sup> a claim which later was supported by the Army Board of Review.<sup>683</sup> Keenan then watched as Luczko burned the body.<sup>684</sup> Luczko and the squad later re-encountered an unarmed male on a trail adjacent to the camp. The defendant’s identification papers were once again determined to be in order and there was no evidence that he was acting in a suspicious fashion.<sup>685</sup> The man allegedly started to walk away and Luczko fired and turned to Keenan and hollered “[f]ire damn it, fire.”<sup>686</sup> Keenan testified that he shot because he was “trained to obey” orders “without asking any questions.”<sup>687</sup> The Court of Military Appeals determined that there was “manifestly no reason to fire at him [the man on the trail] with an automatic weapon from a distance of about two feet.”<sup>688</sup> The Court concluded that “a homicide committed in obedience to a lawful order is justified, but one in execution of a patently illegal order is not.”<sup>689</sup>

*Schultz* was a third case in which the superior orders defense was rejected.<sup>690</sup> Lance Corporal Frank C. Schultz headed a four-man patrol ordered to ambush and kill Viet Cong.<sup>691</sup> Schulz observed an illuminated house which he believed to be occupied by the Viet Cong.<sup>692</sup> He entered the dwelling, removed a male occupant, and shot the detainee in the head.<sup>693</sup> Witnesses testified that the victim was a farmer who was not associated with the Viet Cong.<sup>694</sup> The Court of Military Appeals accused the superior orders defense, holding that the issuance or execution of an order to kill under the circumstances of this case is “unjustifiable under the laws

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680. *Id.* at 112.

681. *Id.*

682. *Id.*

683. Keenan, 39 C.M.R. at 110.

684. *Id.* at 112.

685. *Id.* at 114.

686. *Id.*

687. *Id.*

688. Keenan, 39 C.M.R. at 117.

689. *Id.* at 118. Corporal Luczko was acquitted of complicity in connection with the death of the male victim. There apparently was no evidence that Luczko’s shots inflicted a fatal injury. *Id.* at 119.

690. United States v. Schultz, 39 C.M.R. 133 (1969).

691. *Id.* at 135.

692. *Id.*

693. *Id.*

694. *Id.*

of this nation, the principles of international law, or the laws of land warfare. Such an order would have been beyond the scope of authority for a superior to give and would have been palpably unlawful.”<sup>695</sup>

Finally, in *United States v. Schwarz*, Marine Private Michael Schwarz was operating in a five man roving ambush patrol charged with searching out and destroying enemy forces.<sup>696</sup> The patrol was instructed by a lieutenant to “shoot first and ask questions later” and were admonished that “I want you to pay these little bastards back” for the marines who had been killed in the last week.<sup>697</sup>

The squad surrounded a hootch and seized two women and two young children. One of the women ran and was felled with a shot from Private Herrod, who was in charge of the mission.<sup>698</sup> Schwarz was ordered to “go over and finish . . . [her] off.”<sup>699</sup> Herrod then proclaimed that he had been ordered by the company commander to kill detainees and ordered the squad to open fire.<sup>700</sup> Schwarz was acquitted of the killings at the hootch based on a lack of evidence.<sup>701</sup>

The squad then encountered a twenty-year-old woman and five young children and was ordered to open fire. Private Schwarz joined the shooting, but his rifle jammed.<sup>702</sup> The squad then entered a third hootch and encountered two Vietnamese women and four children.<sup>703</sup> Herrod again ordered the squad to open fire and Private Schwarz testified that he only shot his pistol after spotting muzzle flashes from enemy weapons in the trees to the rear of the detainees.<sup>704</sup> The Court of Military Review determined that the court-martial “necessarily found as a matter of fact that the accused could not have honestly and reasonably believed that Herrod’s order to kill the apparently unarmed women and children was

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695. Schultz, 39 C.M.R. at 136. The accused was sentenced to twenty-five years in prison. *Id.* at 135.

696. *United States v. Schwarz*, 45 C.M.R. 852, 856 (1971).

697. *Id.* at 857. A Sergeant later cautioned Private Herrod, who was in charge of the admission, “not to go out there and just kill anything that moved, just go out and do [his] job and get some.” *Id.*

698. *Id.*

699. *Id.*

700. *Id.* at 858.

701. Schwarz, 45 C.M.R. at 852.

702. *Id.*

703. *Id.*

704. *Id.*

legal.”<sup>705</sup> His life sentence was commuted to one year in prison by military authorities.<sup>706</sup>

These four prosecutions all involved the killing of civilians by low-level combatants.<sup>707</sup> In each instance, civilians who posed no clear threat were killed during military operations conducted within hostile territory.<sup>708</sup> Judicial authorities appear to have recognized the difficulty of resisting orders in such situations and, as a result, generally meted out relatively light sentences.<sup>709</sup> The modest punishment imposed on these defendants undoubtedly reflected the reluctance of American military courts to sanction long-serving and loyal subordinate soldiers.<sup>710</sup>

The superior orders defense was unsuccessfully invoked by individuals who objected to service in Vietnam. In *Switkes v. Laird*, in 1970, the United States District Court rejected the claim of a psychiatrist that an order requiring him to serve in Vietnam was illegal because American actions in Indochina were being conducted in violation of United States and international law.<sup>711</sup> These illegal strategies and tactics included the indiscriminate killing of noncombatants, the utilization of chemical warfare, saturation bombing and the destruction of food and medicine.<sup>712</sup> Switkes contended that in the event that he was sent Vietnam that he would be an accomplice to these war crimes.<sup>713</sup> The Court avoided this claim, ruling that Switkes’ involvement in illicit actions was “so unlikely as to require rejection” while significantly noting that “[i]f he were a combat soldier or combat officer, the matter would stand differently.”<sup>714</sup>

Three years later, the Third Circuit Court of Appeals reviewed the conviction of Captain Howard Levy for disobedience of a direct order to establish and operate a dermatological training program

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705. *Id.* at 860. The appellate court also ruled that the court-martial was properly instructed that the accused must be acquitted unless they determined beyond a reasonable doubt that he did not honestly believe that he was being engaged by the enemy. Schwarz, 45 C.M.R. at 862.

706. *Id.* at 854.

707. *See supra* notes 672, 679, 691 and accompanying text.

708. *See supra* notes 672-73, 685, 694-95 and accompanying text.

709. *See supra* notes 676-77, 687-89, 704-06 and accompanying text. On war crimes and crimes against humanity in Vietnam, see generally Matthew Lippman, *Vietnam: A Twenty Year Retrospective*, 11 DICK. J. INT’L L. 325 (1993).

710. *See supra* 677 and accompanying text.

711. *Switkes v. Laird*, 316 F. Supp 359 (S.D.N.Y. 1970).

712. *Id.* at 364-65.

713. *Id.* at 365.

714. *Id.*



for Special Forces Personnel in Vietnam.<sup>715</sup> Levy contended that these troops were committing war crimes and that his obedience to this order would violate medical ethics, the Hippocratic oath, and would constitute participation in criminal conduct.<sup>716</sup> The Third Circuit Court of Appeal dismissed Levy's claim, ruling that he failed to demonstrate that the medical training which he was ordered to provide was related to the perpetration of war crimes.<sup>717</sup> There was no evidence that the Special Forces medical men as a "group engaged systematically in the commission of war crimes by prostituting their medical training."<sup>718</sup> The Court also held that Levy failed to establish beyond a reasonable doubt that the sole purpose of issuing him an order to report for service in Vietnam was to punish him for his publicly articulated opposition to the conflict.<sup>719</sup>

## V. Other Domestic Prosecutions

### A. *Israel and Germany*

Other domestic military courts also have exhibited leniency towards combatants. In *Malinki*, an Israeli Military Court of Appeal, affirmed, in part, a district military court's conviction of eight policemen charged with killing forty-three Arab residents of Israel.<sup>720</sup> These killings arose out of nine incidents during a curfew imposed on the village of Kafr Qassem.<sup>721</sup>

Major Shmuel Malinki was ordered by the brigade commander, Colonel Issachar Shadmi, to shoot individuals violating the curfew order imposed on eight Arab villages, even those returning to the villages who were unaware of the restriction.<sup>722</sup> Shadmi purportedly admonished Malinki that "I don't want sentimentality and I don't want any arrests, there will be no

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715. *Levy v. Parker*, 478 F.2d 772, 797 (3d Cir. 1973), *aff'd sub nom. Parker v. Levy*, 471 U.S. 733 (1973).

716. *Id.* at 797.

717. *Id.* The court conceded that war crimes had been committed by isolated members of the Special Forces. *Id.*

718. *Id.*

719. *Parker*, 478 F.2d at 797. There were few prosecutions for violation of orders and regulations in an effort to conceal the commission of war crimes. *But see United States v. Goldman*, 43 C.M.R. 711 (1970).

720. Chief Military Prosecutor v. Malinki (Military Court of Appeal, 1959), II PALESTINE Y.B. INT'L L. 69, 77 (1985) [hereinafter *Malinki*].

721. *Id.* at 78.

722. *Id.* at 88.

arrests.”<sup>723</sup> Malinki immediately conveyed Shadmi’s instructions to his six company commanders and replied in response to a question that the curfew applied equally to women and children.<sup>724</sup> He also conceded that he informed the commanders that hurting a few people might make it clear that the Israeli security forces were to be treated with respect.<sup>725</sup> Malinki later explained that he intended to indicate, but did not articulate, that only individuals deliberately violating the order, or acting suspiciously, were to be shot.<sup>726</sup> The Court of Appeals determined that while Malinki did not exceed Shadmi’s command that he provided a “cruel interpretation” since it should have been his “basic human instinct to exclude at least women and children from such a lethal order.”<sup>727</sup>

Lieutenant Gabriel Dahan was the only commander who strictly and fully implemented the curfew.<sup>728</sup> Others apparently moderated the harshness and inhumanity of the command and as a result similar slaughters were avoided in adjoining villages.<sup>729</sup> Malinki, immediately upon learning of the killings, issued an order restricting the use of weapons to situations involving resisting arrest, assault and flight.<sup>730</sup>

The Court of Appeals ruled that an order to kill peaceful and innocent citizens who were returning home from work on the grounds that this was required to maintain a curfew “is an order to commit a crime of murder.”<sup>731</sup> Israeli law significantly recognized that an individual was not criminally responsible for an act or omission carried out in accordance with a superior’s orders unless the command was manifestly unlawful.<sup>732</sup> The Court observed that the values of discipline and the rule of law collided when a soldier was required to obey an illegal order and that this “creates an excruciatingly difficult dilemma” for both the legislature which was charged with creating standards and for the combatant compelled to choose between insubordination and contravention of criminal

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723. *Id.*

724. *Id.* at 87.

725. Malinki, *supra* note 720, at 98. He also resisted a commander who approached him to lessen the severity of the orders. *Id.*

726. *Id.* Malinki also alleged that he admonished the commanders that “[w]e shall preserve our soldier’s honour and not commit murder.” *Id.* at 88.

727. *Id.* at 91.

728. Malinki, *supra* note 720, at 93.

729. *Id.* at 95-96.

730. *Id.* at 93.

731. *Id.* at 104. The Court held that this was a matter to be adjudged in accordance with domestic rather than international law. *Id.* at 105-06.

732. Malinki, *supra* note 720, at 103.

law.<sup>733</sup> In a significant section, the Court noted three possible solutions to this dilemma. The imposition of strict liability had the disadvantage of compelling subordinates to examine and explore every command and undermined order and discipline.<sup>734</sup> The recognition of superior orders as a justification would insulate every excess from legal sanction and limit liability to those in command.<sup>735</sup> The preferable position recognized the difficulty of reconciling these competing considerations and struck an intelligent balance by affirming the obligation of soldiers to obey all but manifestly unlawful orders.<sup>736</sup> The Court noted that the illegal character of these clearly criminal commands must “wave like a black flag” and do not require the subtle and nuanced judgment of the trained legal expert.<sup>737</sup> This was an objective standard based on the perception of a reasonable combatant; the subjective belief of the defendant as well as the belief of other witnesses as to the legality of an order are not strictly relevant.<sup>738</sup> In applying this test, a court should consider evidence concerning the circumstances under which a defendant carried out an order, including his knowledge, beliefs, and honest and reasonable mistakes which might have influenced his behavior.<sup>739</sup>

This recognition that the manifest illegality of an order was, in part, dependent on the context as well as the content of the command constituted a significant contribution to the jurisprudence of superior orders.<sup>740</sup> The Military Court of Appeal affirmed the acquittal of Privates Mahluf Haroush and Eliahu Avraham for killing civilians on the grounds that the order was “sudden and unexpected” and that they had not been afforded sufficient time to

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733. *Id.* at 106.

734. *Id.* at 107.

735. *Id.* at 107-08.

736. *Id.* at 108.

737. Malinki, *supra* note 720. Among the factors a court should take into account in deciding whether an order is manifestly illegal are: the difference in rank between the issuer and recipient of the order; whether the receiver had grounds for believing that the issuer had access to facts unknown to the receiver; whether the receiver had time to clarify to himself whether the order was lawful; was the order issued in times of normality or emergency; did the receiver have a reasonable basis for believing that he would suffer death or great bodily harm in the event that he refused to execute the order. In addition, a defendant is to be provided with the benefit of the doubt as to any honest and reasonable mistake as to the facts which led him to execute the order. *Id.* at 109-10.

738. *Id.* at 111. The defendant must demonstrate that he acted in accordance with an order issued by an authorized authority and the prosecution then bears the burden of proof in establishing manifest illegality. *Id.* at 112.

739. *Id.*

740. *See supra* note 739 and accompanying text.

weigh and balance the legality of the command.<sup>741</sup> The Court, however, determined that Corporal Gabriel Uliel, Privates Albert Fahima and Edmund Nahmani possessed a brief, but sufficient period to reflect on the killing of seventeen individuals.<sup>742</sup> They witnessed Lance Corporal Shalom Ofer order women from a car, heard the individuals beg for their lives, and then complied with an order to open fire.<sup>743</sup>

The Court concluded that the “brutal and inhuman nature” of the curfew orders should have aroused the conscience of the appellants, including the lowest-ranking combatants, despite the “special circumstances” that prevailed.<sup>744</sup> On the other hand, the appellants could have reasonably believed that orders emanating from the high command on the eve of the 1956 Sinai campaign had been closely considered by knowledgeable authorities.<sup>745</sup> The defendants also functioned as mere “conveyors” or “executors” of the order and acted out of a sense of military “duty” rather than “personal gratification.”<sup>746</sup> The Court later invoked these special circumstances in mitigating the punishment of the privates and Uliel to three years in prison.<sup>747</sup> Ofer bore responsibility for ordering the killing of seventeen women and children and, despite his relatively low rank of corporal, was sentenced to ten years.<sup>748</sup> Malinki closely conveyed the orders of his superior and was not found to have intended to cause such a large-scale slaughter. He nevertheless was charged with primary responsibility and was sentenced to fourteen years in prison.<sup>749</sup> Dahan implemented the order in the village, participated in the killings, and was sentenced to ten years.<sup>750</sup> The military court stressed that the spiritual superiority of Israel primarily was based on the “moral values of our State, its army and all its citizens.”<sup>751</sup> The sentences of Ofer,

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741. See Malinki, *supra* note 720, at 112 (emphasis omitted).

742. *Id.* at 114.

743. *Id.*

744. *Id.* at 114.

745. *Id.* at 113.

746. Malinki, *supra* note 720, at 114.

747. *Id.* These included the imminent 1956 Sinai campaign and the uncertainty as to whether the troops would find themselves on the frontline in the event of an attack from Jordan; the harsh and repeated discipline imposed on this Border Police battalion attached to the military; the admonitions issued by Malinki; and the fact that the curfew orders emanated from the top command and were passed on by Major Malinki. *Id.* at 113.

748. *Id.* at 115.

749. *Id.*

750. Malinki, *supra* note 720.

751. *Id.* at 116.

Malinki and Dahan subsequently were administratively reduced and Shadmi was released with a reprimand and inconsequential fine.<sup>752</sup>

*Malinki* contributed to the jurisprudence of command responsibility by providing a memorable metaphor for evaluating the manifest illegality of an order<sup>753</sup> and by clarifying that the manifest illegality of an order was to be evaluated in light of the reactions of a reasonable person under the circumstances and context of the command.<sup>754</sup> These same factors then might be weighed in mitigation of punishment<sup>755</sup>. This insured that lower-ranking combatants in the field benefited from a generous and flexible standard of guilt and punishment.<sup>756</sup> The decision also demonstrated the inclination of national tribunals to treat domestic defendants with understanding and leniency.<sup>757</sup>

In the *Border Guards Prosecution Case*, two former German Democratic Republic (GDR or East Germany) border guards were convicted of unlawful homicide by the Juvenile Chamber of a Regional Court of the Federal Republic of Germany.<sup>758</sup> Defendant W was sentenced to youth custody for eighteen months and H to a term of imprisonment of twenty-one months, both sentences were suspended and the defendants were placed on probation.<sup>759</sup>

The two shot and killed S, a twenty year old citizen of the GDR as he ascended a ladder and placed his hand on the top of a wall separating East from West Berlin.<sup>760</sup> S was not taken to a police hospital for two hours and died an hour later; he would have

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752. See *id.* The Chief of Staff reduced Malinki's term to ten years and Dahan's and Ofer's to eight years. The President of the State of Israel reduced the terms of Malinki and Dahan to five years. The Committee for the Release of Prisoner's ordered the remission of one third of the prison sentences. *Id.*

753. See *supra* notes 737-39 and accompanying text.

754. See *supra* notes 740-43 and accompanying text.

755. See *supra* note 747 and accompanying text.

756. See *supra* notes 748-52 and accompanying text.

757. See *supra* note 802-07 and accompanying text. The most prominent Israeli case involving superior orders was the prosecution of Nazi war criminal, Adolf Eichmann. See *Israel v. Eichmann* (Dist. Ct., Dec. 12, 1961), 36 I.L.R. 18 (1961) *aff'd* 36 I.L.R. 277 (Sup. Ct., May 29, 1962). Eichmann's principle defense was that he was trained and obligated to serve as an obedient and unquestioning subordinate who was expected to carry out every command, regardless of whether the order required repression or murder. *Id.* at 254. The District Court determined that Eichmann knowingly and enthusiastically pursued a clearly criminal course of conduct. *Id.* at 258, 270. The Supreme Court judgment contains a particularly useful discussion of superior orders. See *id.* at 313-14.

758. *Border Guards Prosecution Case* (Fed. Sup. Ct., Fed. Repub. Germany, Nov. 3, 1992), 100 INT'L L. REPT. 366 (1997).

759. *Id.* at 369.

760. *Id.* W was a non-commissioned officer; H was a private. *Id.*

survived had treatment been immediately provided.<sup>761</sup> The two guards were under orders to prevent escape and, if necessary, to kill escapees.<sup>762</sup> Instead of firing single shots as required, both fired their weapons on automatic; H fired twenty-five cartridges, and W twenty-seven, within a five second period.<sup>763</sup> The defendants aimed at the escapee's legs with full knowledge that rapid fire increased the risk of a fatal shot.<sup>764</sup>

The orders issued to border guards authorized the use of firearms as a last resort in order to preserve the "inviolability" of the border.<sup>765</sup> In this effort, the life of the escapee, "where possible," was to be spared.<sup>766</sup> At the same time, the guards were admonished that "all means "were to be deployed to prevent a fugitive from reaching West Berlin."<sup>767</sup> This included the "deliberate killing "of fugitives in those instances in which there was no other effective and more lenient alternative."<sup>768</sup> The guiding principle was that it was better that an individual die than escape.<sup>769</sup> The admonition regularly repeated to guards was that "[i]n no event are breaches of the border to be permitted. A person violating the border is to be caught or destroyed."<sup>770</sup> A border guard who killed an escapee was decorated and rewarded rather than punished.<sup>771</sup>

The Federal Supreme Court concluded that the prevention of border crossings was of "overwhelming importance" for the GDR and that the life of the escapee was of secondary significance.<sup>772</sup> The Court accordingly determined that firing on automatic without first aiming single shots at the legs would not have been regarded as contrary to prevailing practice and unlawful in East Germany at the material time.<sup>773</sup> The guards likely realized that the deceased was at

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761. *Id.*

762. *Id.* at 369. The following steps were to be followed: challenge to the fugitive; attempt to apprehend the fugitive on foot; fire a warning shot; a single shot, or if necessary shots aimed at the legs; continuous shooting if necessary with "fatal effect until the escape is prevented." Border Guards Prosecution Case, 100 INT'L L. REPT. at 370.

763. *Id.* at 369.

764. *Id.* at 369.

765. *Id.* at 376.

766. Border Guards Prosecution Case, 100 INT'L L. REPT. 366.

767. *Id.* at 377.

768. *Id.*

769. *Id.*

770. *Id.*

771. Border Guards Prosecution Case, 100 INT'L L. REPT. 366.

772. *Id.* at 378.

773. *Id.*

the top of the wall and single shots could not have been fired in a sufficiently rapid manner to prevent his escape.<sup>774</sup>

The Supreme Court noted that the defense of superior orders under East German law was inapplicable in those instances in which the command "represents a manifestly gross violation of fundamental concepts of justice and humanity."<sup>775</sup> East as well as West Germany had acceded to the International Covenant on Civil and Political Rights.<sup>776</sup> In the view of the Supreme Court, East Germany's harsh policy towards escapees contravened the Covenant's provisions pertaining to freedom of movement across borders and the arbitrary deprivation of life.<sup>777</sup>

The Supreme Court clarified that interpreting the Border Law in accordance with human rights principles would permit the use of firearms to prevent an escape, but this would not pertain in the case of an unarmed individual who posed no threat to the guards or to others.<sup>778</sup> The Tribunal noted that it was not bound by the interpretation which had been accorded to the statute in the GDR; and that it did not constitute retroactive punishment to adjudge the lawfulness of the defendant's actions in accordance with what would have been the law had the statute been "correctly applied" at the time of the defendants' acts.<sup>779</sup> The Court determined that the defendants were guilty of unlawful homicide while acting under orders.<sup>780</sup> The fact that the defendants were not aware of the manifestly illegal nature of the order was not controlling.<sup>781</sup>

The Supreme Court recognized the difficulty of applying the test of manifest illegality under these conditions. The political leadership of East Germany condoned the killings of escapees.<sup>782</sup> The defendants, in light of their training and experience, could not be faulted for countenancing and carrying out the illegal command.<sup>783</sup> Despite the "horror" of this killing, which was "devoid of any reasonable justification,"<sup>784</sup> the Supreme Court held that the

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774. *Id.*

775. *Id.* at 380.

776. Border Guards Prosecution Case, 100 INT'L L. REPT. at 380-81.

777. *Id.* at 380-83.

778. *Id.* at 387.

779. *Id.* at 390.

780. *Id.* at 391.

781. Border Guards Prosecution Case, 100 INT'L L. REPT. 366.

782. *Id.* at 392.

783. *Id.* The Court credited defendant H with recognizing that his conduct was inhumane, indicating a stirring of his conscience. *Id.*

784. *Id.*

Juvenile Chamber properly mitigated the defendants' punishment.<sup>785</sup>

In the *Borders Guards Prosecution Case*, the defendants were found to have strictly complied with the requirements of East German law.<sup>786</sup> The German Federal Supreme Court, however, retroactively construed East German legislation in accordance with human rights principles and ruled that the defendants carried out the command in a manifestly illegal fashion.<sup>787</sup> The lenient sentences recognized that the youthful defendants were ill-equipped and poorly positioned to analyze and to resist the order.<sup>788</sup> *The Border Guards Prosecution Case* seems to have been motivated by a desire to demonstrate the depredations of the former East German communist regime and leadership.<sup>789</sup>

### B. Canada

The Canadian case of *Regina v. Finta* continued the judicial trend towards considering the context in conjunction with the content of superior orders.<sup>790</sup> Imre Finta served as a captain in the Royal Hungarian Gendarmerie and was posted to Szeged by the Nazi controlled regime.<sup>791</sup> Finta was charged with carrying out the so-called "Baky Order" and allegedly supervised the isolation, ghettoization, and deportation of 8,617 Hungarian Jews to Auschwitz where they were subjected to forced labor and extermination.<sup>792</sup> Finta eventually emigrated to Canada where he was charged and acquitted of crimes against humanity and war crimes.<sup>793</sup>

The Supreme Court, in 1994, affirmed that the trial court instructions on superior orders were consistent with the relevant legal standard.<sup>794</sup> The Appellate Court recognized that military

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785. *Border Guards Prosecution Case*, 100 INT'L L. REPT. at 393.

786. *See supra* notes 760-71 and accompanying text.

787. *See supra* notes 778-81 and accompanying text.

788. *See supra* notes 782-85 and accompanying text.

789. *See supra* note 777 and accompanying text.

790. *Regina v. Finta* [1994] 1 S.C.R. 701 [hereinafter *Finta*].

791. *Id.* at 725.

792. *Id.*

793. *Id.* at 726. Canadian law permitted prosecution for conduct outside Canada in those instances in which such conduct constituted a war crime or crime against humanity and would have been a crime at the time had it been committed in Canada. *Id.*

794. *See Finta*, 1 S.C.R. at 841. The judge instructed the jury to determine whether a reasonable person in Finta's position would have found the order manifestly illegal and whether Finta had the choice whether to obey the order. *Id.* at 841.



organizations depend upon immediate, instantaneous and unhesitating obedience to superior orders.<sup>795</sup> This has “through the centuries led to the concept that acts done in obedience to military orders will exonerate those who carry them out.”<sup>796</sup> Judge Peter Cory, however, noted that this rule has been disregarded in the case of manifestly illegal orders.<sup>797</sup> These are commands which offend the conscience of “any reasonable, right-thinking person; it is an order which is obviously and flagrantly wrong.”<sup>798</sup> The order cannot be in a “grey area or be merely questionable; rather it must patently and obviously be wrong.”<sup>799</sup>

The Court noted that the moral choice test utilized by the Nuremberg Tribunal was adopted to insure equity and fairness in those instances in which subordinates were involuntarily compelled to carry out manifestly illegal orders.<sup>800</sup> In the absence of moral choice, individuals were deemed to lack the requisite criminal intent.<sup>801</sup> Judge Cory observed that the lower a subordinate’s rank, the greater the sense of compulsion and the less likelihood that the individual was able to exercise discretion.<sup>802</sup> The defense of compulsion was consistent with the view that superior orders were merely a factual element which, like mistake of law, was to be considered in determining whether a defendant possessed the requisite criminal intent.<sup>803</sup>

Judge Cory held that despite the fact that Finta did not take the stand that the trial judge possessed the discretion to issue an instruction on superior orders based on his conclusion that there was sufficient evidence for a reasonable jury properly instructed to acquit.<sup>804</sup> Cory then enumerated various factors which supported the claim that the defendant reasonably believed that the order to detain and to deport Jews was legally proper and prudent.<sup>805</sup> These included a state of war, the imminent invasion by the Soviet army, the public perception that the Jews were subversive and disloyal and should be deported, the involvement and the endorsement of

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795. *Id.* at 828-29.

796. *Id.* at 829.

797. *Id.* at 829, 834.

798. Finta, 1 S.C.R. at 834.

799. *Id.*

800. *Id.* at 838.

801. *Id.*

802. *Id.*

803. Finta, 1 S.C.R. at 839.

804. *Id.* at 846.

805. *Id.* at 847.

deportation and confiscation of property by the German and Hungarian regimes and populations.<sup>806</sup>

In *Malinki* and the *German Border Guards Prosecution Case* the courts determined that orders to kill defenseless civilians were manifestly illegal.<sup>807</sup> In *Finta*, the Canadian Supreme Court determined that a Canadian court properly instructed a jury to consider whether a defendant Finta reasonably believed that an order to cleanse a city of Jews and to confiscate their property was legally justified.<sup>808</sup> Judge Cory's argument that the order might have reasonably appeared lawful in light of the circumstances and context of German occupied Hungary<sup>809</sup> seemingly overlooks the cruel and callous conditions of the Jews jammed into boxcars destined for the death chambers at Auschwitz.<sup>810</sup>

## VI. The International Criminal Tribunal for the Former Yugoslavia

### A. *Statutory Provisions*

The statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) specifically recognized the defense of superior orders.<sup>811</sup> Article 7(4) adopted the familiar standard that the fact that an accused acted pursuant to an order of a "Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."<sup>812</sup> Article 7(3) clarified that a superior is not relieved of criminal responsibility in the event that he "knew or had reason to know" of a subordinate's criminal conduct.<sup>813</sup> The commentary clarified that superior orders cannot absolve an individual of criminal responsibility and should not be considered a defense to criminal liability.<sup>814</sup> Obedience to commands, however, may be recognized in mitigation

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806. *Id.* at 847-48. *See also id.* at 841.

807. *See supra* notes 744, 798 and accompanying text.

808. *See Finta*, 1 S.C.R. at 804.

809. *Id.* at 841.

810. *Id.* at 791.

811. *See* United Nations Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia, 32 I.L.M 1159 (1993) [Report on Former Yugoslavia].

812. *Id.* art. 7(4).

813. *Id.* art. 7(3).

814. *Id.* art. 6(57).

of punishment in connection with other defenses “such as coercion or lack of moral choice.”<sup>815</sup> The latter suggests that superior orders is not an independent defense and is to be viewed as a factual factor relevant to a lack of criminal intent.<sup>816</sup> A similar provision was incorporated into the statute of the International Criminal Tribunal for Rwanda (ICTR).<sup>817</sup>

A superior orders provision also was incorporated into the statute of the newly-established international criminal court (ICC).<sup>818</sup> Article 33 provided that the fact that a crime within the jurisdiction of the Court has been committed pursuant to an order of a government or of a superior shall not relieve an individual of criminal responsibility “unless:”<sup>819</sup> the individual was under a legal obligation to obey the order;<sup>820</sup> the person did not know that the order was unlawful;<sup>821</sup> and the order was not manifestly unlawful.<sup>822</sup> The Article appears to permit superior orders in mitigation of punishment as well as a defense to criminal liability.<sup>823</sup> This, however, is qualified in Article 33(2) which stipulated that “orders to commit genocide or crimes against humanity are manifestly unlawful.”<sup>824</sup>

#### *B. International War Crimes Tribunal for the Former Yugoslavia: Erdemovic Sentencing*

In May 1996, Drazen Erdemovic pled guilty to participation in the killing of Muslim civilians.<sup>825</sup> Erdemovic was a twenty-three year-old Croatian veteran of the police and military who, in 1991, joined the multi-ethnic 10th Sabotage Detachment of the Bosnian

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815. *Id.* art. 6(57).

816. Report on Former Yugoslavia *supra* note 811, art. 6(57).

817. See U.N.S.C. Res. 955 (1994) 33 I.L.M. 1598, art. 6(4) (1994).

818. See Rome Statute, *supra* note 38.

819. *Id.* art. 33(1).

820. *Id.* art. 33(1)(a).

821. *Id.* art. 33(1)(b).

822. *Id.* art. 33(1)(c).

823. See Rome Statute, *supra* note 38, art. 33(1). Article 33 does not fully clarify whether to hold an individual liable for adhering to superior orders requires satisfaction of both a subjective and objective standard. See *id.* art. 33.

824. *Id.* art. 33(2). Article 31(1)(d) provides for the defense of duress. See *id.* art. 31(1)(d). Article 31(3) authorizes the Court to consider any ground for excluding criminal responsibility which is recognized by the law to be applied by the Tribunal. See *id.* art. 31(1)(3). The applicable law is set forth in Article 21. See *id.* art. 21.

825. Prosecutor v. Erdemovic, IT-96-22-T (sentencing) (Int'l Crim. Trib. Yug., Trial Chamber I, 1996), 108 I.L.R. 180 (1998), available at <http://www.un.org/icty> (last visited Oct. 4, 2001).

Serb army.<sup>826</sup> He was ordered, in July 1995, to report to the Branjevo farm where his unit was directed to massacre hundreds of Muslims men seized as a result of the Serb incursion into United Nations safe area of Srebrenica.<sup>827</sup> Erdemovic claimed to have refused and was warned that “[i]f you don’t wish to do it, stand in the line with the rest of them and give others your rifle so they can shoot you.”<sup>828</sup> He was certain that this was a serious threat and that his wife and child also would be subject to retribution.<sup>829</sup> The roughly 1,200 detainees were led in groups of ten before Erdemovic’s unit and executed.<sup>830</sup> He later successfully resisted participation in the killing of an additional five hundred Muslims.<sup>831</sup> Erdemovic subsequently claimed that he was targeted for assassination in retribution for his protests.<sup>832</sup> On May 31, 1996, Erdemovic pled guilty to crimes against humanity; the alternative count of war crimes was dismissed.<sup>833</sup>

The Trial Chamber, as a matter of fairness and equity, examined Erdemovic’s plea to determine whether the accused’s claim of superior orders and duress constituted a defense which negated his criminal intent and plea of guilty.<sup>834</sup> The Tribunal noted that while the statute provided that superior orders might be considered in mitigation that guidance was not provided in the case of superior orders accompanied by physical or moral duress.<sup>835</sup> In reviewing the case law from World War II, the Trial Chamber concluded that “while the complete defense based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application were particularly strict.”<sup>836</sup>

The order issued to Erdemovic to kill the detainees was manifestly illegal and his duty was to disobey.<sup>837</sup> This obligation only could be compromised when confronted with “the most

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826. *Id.* ¶¶ 2, 79.

827. *Id.* ¶ 80.

828. *Id.* ¶ 80.

829. *Id.*

830. Erdemovic, 108 I.L.R. ¶¶ 2, 77. Erdemovic claimed that he attempted to save a detainee, but that he was told that there were to be no witnesses to the shootings. *Id.* ¶ 80.

831. *Id.* ¶ 81.

832. *Id.*

833. *Id.* ¶ 3.

834. Erdemovic, 108 I.L.R. ¶ 14.

835. *Id.* ¶ 16.

836. *Id.* ¶ 19.

837. *Id.* ¶ 18.

extreme duress.”<sup>838</sup> The latter was to be determined on a case-by-case basis in light of a strict and stringent analysis as to whether the accused possessed a moral choice.<sup>839</sup> The Chamber ruled without discussion that the accused failed to present the requisite proof required for full exoneration.<sup>840</sup> The judgment did suggest a lack of equivalence between the threatened harm to the accused and the consequences of his criminal activity when it noted that “[a]s opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole.”<sup>841</sup>

The Tribunal concluded that the defense of duress accompanying superior orders would be taken into consideration along with other factors in mitigation.<sup>842</sup> In considering aggravating and mitigating circumstances, the Trial Chamber noted that the heinous nature of crimes against humanity made it unnecessary to consider aggravating circumstances.<sup>843</sup> In weighing mitigating circumstances, the Chamber noted that the Nuremberg Tribunal did not accept superior orders as mitigating the sentences of any of the high-ranking defendants.<sup>844</sup> The Chamber, however, observed that other post-World War II prosecutions recognized superior orders in mitigation of punishment in regards to low-ranking defendants in those instances in which the order influenced an accused who otherwise was not “prepared” to undertake the criminal conduct.<sup>845</sup> Courts were inclined to recognize duress in mitigation even in those instances in which there was “doubt” whether the accused’s obedience was in response to a threat of serious harm to him or to his family.<sup>846</sup> The Court, however, was unable to corroborate Erdemovic’s rendition of events and refused to consider his plea of extreme necessity in mitigation.<sup>847</sup> The Trial

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838. *Id.* ¶ 18.

839. Erdemovic, 108 I.L.R. ¶ 19. This was dependent on the imminence and nature of the threat, the rank of the accused, and the voluntariness of the accused’s participation in the enterprise. *Id.* ¶¶ 18-19.

840. *Id.* ¶ 20.

841. *Id.* ¶ 19.

842. *Id.* ¶ 20.

843. Erdemovic, 108 I.L.R. ¶ 45.

844. *Id.* ¶ 50.

845. *Id.* ¶ 53.

846. *Id.* ¶ 54. The Court identified the purposes of punishment as public reprobation, stigmatization and rehabilitation. Stigmatization of the most serious violations of international humanitarian law was deemed the primary purpose. *Id.* ¶ 63.

847. Erdemovic, 108 I.L.R. ¶ 91. The issues which required evidentiary support included whether the accused could have avoided the situation; confronted a

Chamber did indirectly recognize superior orders in mitigation by noting that at the time of the executions that Erdemovic did not occupy a “position of authority.”<sup>848</sup> The latter was considered in mitigation along with the accused’s age, character, remorse, lack of dangerous disposition and the fact that his sentence was to be served in a prison far from his own country.<sup>849</sup> The Court sentenced Erdemovic’ to ten years in prison.<sup>850</sup>

### C. *Erdemovic: Appellate Chamber*

The Appellate Chamber determined that although Erdemovic’s guilty plea was voluntary<sup>851</sup> that it was not an informed choice.<sup>852</sup> He was deemed to have lacked an understanding of the nature of the charges and the distinction between the alternative counts as well as the consequence of pleading guilty to crimes against humanity rather than war crimes.<sup>853</sup> The case was accordingly remitted in order to afford Erdemovic the opportunity to replead to the charges.<sup>854</sup>

Judges Gabrielle Kirk McDonald and Lal Chand Vorah, however, in a separate opinion, dismissed Erdemovic’s claim that his guilty plea was equivocal in light of his plea of duress.<sup>855</sup> The judges clarified that superior orders and duress were conceptually distinct and separate issues.<sup>856</sup> Superior orders did not constitute a complete legal defense, but might be considered as a factual element in adjudging whether the defenses of duress or mistake of fact were established.<sup>857</sup> Duress, of course, also may exist absent superior orders.<sup>858</sup> The judges observed that the *Einsatzgruppen* was the only post-World War II international decision which supported the proposition that duress was a defense to the killing of

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command which he could not circumvent; faced a threat of immediate death to himself or to his family; and possessed the “moral freedom” to oppose the order.  
*Id.* ¶ 89.

848. *Id.* ¶ 95.

849. *Id.* at 102-11.

850. *Id.* (Disposition).

851. Prosecutor v. Erdemovic, ¶¶ 12-13, IT-96-22-T (sentencing appeal) (Int’l Crim. Trib.Yug., App. Chamber, 1997), 111 I.L.R. 298 (1998), available at <http://www.un.org/icty> (last visited Oct. 4, 2001) (separate opinion of McDonald J. & Vorah J.) [hereinafter Erdemovic Appeal].

852. *Id.* ¶ 27.

853. *Id.*

854. *Id.*

855. *Id.* ¶¶ 28-29.

856. Erdemovic Appeal, *supra* note 851, ¶ 34.

857. *Id.*

858. *Id.* ¶ 35.

innocent civilians.<sup>859</sup> The American judges in *Einsatzgruppen*, however, were unable to cite supporting authority<sup>860</sup> for this proposition which, in the view of Judges McDonald and Vohrah, was in “discord with the preponderant view of international authorities.”<sup>861</sup> The two also noted that a survey of the decisions of domestic World War II military tribunals and national courts failed to reveal a “consistent and uniform State practice” as to whether duress constituted a defense to war crimes and crimes against humanity.<sup>862</sup>

Judges McDonald and Vohrah, having concluded that there was no customary practice, examined whether the duress defense was accepted under international law as a general principle of law recognized by civilized nations.<sup>863</sup> Civil law countries generally recognized duress as a defense to the killing of innocents while common law countries rejected the doctrine.<sup>864</sup> Several civil law countries, however, explicitly or implicitly rejected the defense in regards to war crimes.<sup>865</sup> Judges McDonald and Vohrah thus concluded that there was no “consistent concrete rule” as to whether duress was a defense to the killing of innocents.<sup>866</sup>

The two judges turned their attention to the public policy rationale underlying the formation of the international tribunal<sup>867</sup> and noted that the court’s jurisdiction extended to the most heinous war crimes committed on a mass scale against innocent civilians.<sup>868</sup> Recognition of duress would be contrary to the humanitarian instinct animating the ICTY statute and the code of armed conflict.<sup>869</sup> This was not of mere academic concern since the history of warfare was characterized by countless examples of combatants being compelled to commit crimes.<sup>870</sup> The protection of the

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859. *Id.* ¶ 43. See *supra* notes 338-43 and accompanying text.

860. Erdemovic Appeal, *supra* note 851, ¶ 43.

861. *Id.* ¶ 44.

862. *Id.* ¶ 55.

863. *Id.* ¶¶ 56-57.

864. *Id.* ¶¶ 59-60.

865. Erdemovic Appeal, *supra* note 851, ¶¶ 67-69. Various civil law courts excluded the defense in cases of a lack of proportionality between the threat and the criminal conduct or based on the special status of the offender. *Id.* ¶¶ 68-69.

866. *Id.* ¶ 72.

867. *Id.* ¶ 72. “We are of the opinion that this separation of law from social policy is inapposite in relation to the application of international humanitarian law to crimes occurring during times of war.” *Id.* ¶ 78.

868. Erdemovic Appeal, *supra* note 851, ¶ 75.

869. *Id.*

870. *Id.* ¶ 76.

innocent dictated a dismissal of duress as a defense to the killing of civilians.<sup>871</sup>

The strong policy of protecting the innocent articulated by Judges McDonald and Vohrah extended to situations in which the accused confronted a choice between his own death and obeying an order to kill which inevitably would be carried out by others regardless of the decision of the accused.<sup>872</sup> They stressed that the ordinary soldier was trained for combat, assumed the risk of death, and should be not permitted to take the lives of innocents under the plea of duress.<sup>873</sup> At the same time, the law was not imposing an impossibly heroic burden on combatants since deference was displayed towards the human impulse towards survival and self-protection through the “sophisticated and flexible tool” of mitigation of punishment.<sup>874</sup> In remitting the case based on the fact that Erdemovic’s guilty plea was not informed, Judges McDonald and Vohrah also ruled that the trial court had improperly refused to consider the defendant’s uncorroborated claim of duress in mitigation of punishment.<sup>875</sup>

Judge Haopei Li, in a separate and dissenting opinion, noted that the national laws and practices of various States in regards to duress did not reveal a general principle of law universally recognized by civilized nations.<sup>876</sup> Judge Li’s survey of international military tribunals revealed that duress could constitute a complete defense under certain circumstances.<sup>877</sup> The defense, however, only was available in mitigation in the case of serious crimes such as the killing of innocent civilians or prisoners of war.<sup>878</sup> A recognition of duress as a defense under the latter circumstances would encourage rather than deter the killing of innocents and facilitate the implementation of illegal orders.<sup>879</sup> “Such an anti-human policy” could not be countenanced under the international law.<sup>880</sup> As for the

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871. *Id.* ¶ 80.

872. *Id.* ¶¶ 79-80.

873. Erdemovic Appeal, *supra* note 851, ¶ 84.

874. *Id.* ¶ 85.

875. *Id.* ¶ 90. Judges McDonald and Vohrah ruled that there was no requirement of corroboration for a plea of duress to be considered in mitigation. *Id.* ¶ 90.

876. *Id.* ¶ 3.

877. *Id.* ¶ 5. The following requirements were to be met. The act committed to avoid a serious, irreparable and imminent danger; there was no adequate means of escape; and the remedy was not disproportionate to the evil. Erdemovic Appeal, *supra* note 851, ¶ 5.

878. *Id.*

879. *Id.* ¶ 8.

880. *Id.*



argument that the Muslim victims would have been executed absent Erdemovic's participation, this would provide a justification for each and every member of the unit who participated in the collective massacre of the innocent victims.<sup>881</sup>

Judge Sir Ninian Stephen, in a separate and dissenting opinion, argued that the Trial Chamber mistakenly accepted the defendant's guilty plea.<sup>882</sup> Erdemovic was under no obligation to corroborate his claim of duress at the point of entering a plea.<sup>883</sup> The absence of such evidence at this stage did not provide grounds for considering his plea unequivocal,<sup>884</sup> particularly given the fact that the trial chamber was not in possession of evidence which undermined Erdemovic's claim.<sup>885</sup> The issue of proportionality likewise should have been determined at trial.<sup>886</sup> This was not a question of weighing one life against another.<sup>887</sup> The death of the Croat Erdemovic likely would have had little impact on the Serb soldiers' extermination expedition.<sup>888</sup> Judge Stephen concluded that recognition of duress as a complete defense under such circumstances was consistent with the general principles of law recognized by civilized nations.<sup>889</sup> The Trial Chamber, at this initial stage of the proceedings, should have entered a plea of not guilty and engaged in a precise and prudent examination of the evidence at trial.<sup>890</sup> Judge Stephen accordingly determined that Erdemovic's plea was equivocal and remitted the case to provide the appellant with the opportunity to replead with full awareness of the consequences.<sup>891</sup>

Judge Antonio Cassese, in a separate and dissenting opinion, concluded that in exceptional circumstances that duress may be urged as a defense to crimes against humanity or war crimes and that the appellant's guilty plea, as a consequence, was equivocal.<sup>892</sup> He accordingly would have remitted the case to the Trial Chamber for entry of a non-guilty plea and a determination of the issue whether or not the appellant was acting under duress.<sup>893</sup>

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881. *Id.* ¶ 11.

882. Erdemovic Appeal, *supra* note 851, ¶ 18.

883. *Id.*

884. *Id.*

885. *Id.* ¶¶ 20-21.

886. *Id.* ¶ 19.

887. Erdemovic Appeal, *supra* note 851.

888. *Id.*

889. *Id.* ¶¶ 64-67.

890. *Id.* ¶ 22.

891. *Id.* ¶ 69.

892. Erdemovic Appeal, *supra* note 851, ¶ 50.

893. *Id.* Judge Cassese stressed that the Trial Court must determine whether when the appellant joined the Sabotage Unit was aware of the plan to violate the

Judge Cassese exhaustively surveyed the case law of international military tribunals and of common law countries.<sup>894</sup> In contrast, to the majority of his brethren, Cassese argued that in the absence of a clear consensus that duress was to be applied on a case-by-case basis to all categories of crime.<sup>895</sup> He recognized that the proportionality requirement of the defense of duress meant that the defense rarely would be applicable in those instances in which an individual endeavored to save his own life at the expense of an innocent victim.<sup>896</sup> This, however, was a matter for a court in weighing and balancing the facts and circumstances of a specific case in light of the elements of the defense.<sup>897</sup> A court might credit the fact that an accused took all possible measures to save the victims before yielding to duress or that the victims would have died in any event.<sup>898</sup> Judge Cassese, in fact, argued that there was some indication that duress was admissible as a defense in those instances in which it was highly probable, if not certain, that if the individual acting under duress refused to commit the crime that the delict would have been successfully carried out by others.<sup>899</sup>

Judge Cassese stressed that the value placed upon human life dictated a strict analysis of the facts in the killing of innocents under the claim of duress.<sup>900</sup> In evaluating the factual circumstances, a court should consider that the lower the rank of the individual, the less likely that he exercised a moral choice, particularly in those instances in which the accused was a member of an execution squad.<sup>901</sup> A trial chamber also must consider whether the individual pleading duress shared the intent to carry out the crime and inquire into whether the accused confessed and denounced his criminal

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humanitarian law of war or later learned of this and nevertheless failed to leave the unit. Duress was not available to a defendant who voluntarily placed himself in a situation which he knew would entail the unlawful execution of civilians. *Id.* ¶ 50.

894. *See id.* ¶¶ 21-39.

895. *Id.* ¶ 41. The four criteria were a severe threat to life or limb; no adequate means to escape the threat; proportionality in the means taken to avoid the threat; the situation of duress should not have been self induced. Erdemovic Appeal, *supra* note 851.

896. *Id.* ¶ 42. Judge Cassese presented the hypothetical situation of an inmate of concentration camp who was starved and beaten for months and then told after a brutal beating that if he does not kill another inmate that his eyes will be gouged out. The inmate who is to be killed already has been beaten with metal bars and likely will be killed in any event. *Id.* ¶ 47.

897. *Id.* ¶ 42.

898. *Id.*

899. Erdemovic Appeal, *supra* note 851, ¶ 44.

900. *Id.*

901. *Id.* ¶ 45.

conduct at the earliest possible opportunity.<sup>902</sup> Concealment and cover-up was consistent with an inference that the perpetrator acquiesced in the act which he allegedly perpetrated under duress.<sup>903</sup>

The Trial Court, in the view of Judge Cassese, should have entered a plea of not guilty and conducted a trial to examine the merits of Erdemovic's claim of duress.<sup>904</sup> Cassese argued that denying the defense under conditions in which the accused could not have saved the victims by sacrificing his own life was establishing an unrealizable standard of behavior which required individual martyrdom.<sup>905</sup> The majority sought to avoid making difficult decisions by limiting duress to mitigation and moderating the sentence.<sup>906</sup> This avoided addressing the core question whether there were circumstances in which an individual who sought to save his own life had acted in a morally and legally justifiable fashion.<sup>907</sup> Absent transnational standards, Judge Cassese argued that his brethren should have properly applied the law of the former Yugoslavia which recognized the total defense of duress rather than deny the defense in the ill-defined interests of international public policy.<sup>908</sup>

#### *D. Trial Chamber: Erdemovic Re-Sentencing*

The Appeals Chamber remitted the case to another trial chamber and directed that Erdemovic be afforded the opportunity to replead with full knowledge of both the nature of the charges and consequences of his plea.<sup>909</sup> On January 14, 1998, Erdemovic pled guilty to violating the laws and customs of war.<sup>910</sup> The prosecutor withdrew the alternative charge of crimes against humanity.<sup>911</sup>

Erdemovic declined to offer oral testimony, relied on his previous statements and agreed that the events alleged in the indictment were accurate.<sup>912</sup> Although Erdemovic admitted

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902. *Id.* ¶ 46.

903. *Id.*

904. Erdemovic Appeal, *supra* note 851, ¶ 50.

905. *Id.* ¶ 47.

906. *Id.* ¶ 48.

907. *Id.*

908. *Id.*

909. Prosecutor v. Erdemovic, IT-96-22-T, ¶ 7 (sentencing judgment) (Int'l Crim. Trib. Yug., Trial Chamber II, 1998), 37 I.L.M. 1182 (1998), available at <http://www.un.org/icty> (last visited Oct. 4, 2001).

910. *Id.*

911. *Id.* ¶ 8.

912. *Id.* ¶ 13.

participating in the killing of hundreds of Bosnian male civilians, the Trial Chamber accepted that the accused committed these offenses under the threat of death.<sup>913</sup> The Trial Chamber, having determined that there was duress, applied the ruling of the Appellate Chamber that duress does not afford a complete defense to a soldier charged with a crime against humanity or war crime involving the killing of innocent human beings, but may be considered in mitigation.<sup>914</sup>

In considering factors aggravating Erdemovic's punishment, the Trial Chamber estimated that the accused killed as many as one hundred individuals.<sup>915</sup> The Chamber ruled that the "magnitude" and the "scale" of the crime and the role of the accused were aggravating circumstances to be taken into account in sentencing.<sup>916</sup> On the other hand, the Trial Chamber recognized in mitigation that the accused only was twenty-three at the time of the killings,<sup>917</sup> and had been a low-ranking combatant who elected to serve in the Sabotage Unit precisely because it was not engaged in combat on the frontlines.<sup>918</sup> He was said to be tolerant and friendly towards all ethnic groups and, in fact, married a Serbian women.<sup>919</sup> Erdemovic voluntarily admitted his guilt and assisted the prosecution in this and other cases.<sup>920</sup> He also suffered from post-traumatic stress and extreme sorrow and remorse as a result of his involvement in the killings.<sup>921</sup>

Investigator Jean Rene' Ruez addressed the issue of duress during the sentencing hearing and testified concerning the viciousness of the war, the brutality of the siege of Srebrenica, the pervasive orders to commit atrocities, the accused's vulnerable position as a Bosnian Croat in the Serbian army and his disagreements with his superior officers and subsequent demotion to private.<sup>922</sup> Ruez affirmed that had Erdemovic refused to shoot that "most certainly, he would get into very deep trouble."<sup>923</sup>

The Trial Chamber noted that although Erdemovic displayed a persistent psychological predisposition to feel overwhelmed and

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913. *Id.* ¶ 14.

914. Erdemovic, 37 I.L.M. 1182.

915. *Id.* ¶ 15. Erdemovic estimated that he had killed seventy persons. *Id.* ¶ 15.

916. *Id.*

917. *Id.* ¶ 16.

918. Erdemovic, 37 I.L.M. 1182.

919. *Id.*

920. *Id.*

921. *Id.*

922. *Id.*

923. Erdemovic, 37 I.L.M. 1182.

helpless that the evidence revealed the “extremity of the situation” faced by the defendant.<sup>924</sup> There was a “real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realized that he had no choice in the matter: he had to kill or be killed.”<sup>925</sup>

In setting the sentence in light of the aggravating and mitigating circumstances, the Trial Chamber stressed the terror, violence and certainty of death experienced by the victims as well as the accused’s reluctance to participate and his remorse over his involvement.<sup>926</sup> In the end, the Court placed considerable weight on Erdemovic’s open and cooperative attitude and sentenced him to five years in prison.<sup>927</sup>

In summary, in *Erdemovic*, duress was recognized as distinct from superior orders.<sup>928</sup> However, the appellate court recognized that a plea of duress typically was entered in situations in which an individual was coerced into complying with a manifestly illegal order.<sup>929</sup> The claim of duress in the killing of innocent civilians in which the death of the victims was inevitable was limited to a plea in mitigation in which certain requisite conditions were satisfied.<sup>930</sup> In applying the duress in mitigation, the Trial Chamber considered a broad-range of circumstances which might have led to Erdemovic feeling compelled and coerced into participating in the slaughter.<sup>931</sup> The imminence and severity of the threat,<sup>932</sup> the characteristics of the conflict,<sup>933</sup> the rank of the accused,<sup>934</sup> and lack of knowledge or criminal intent were central.<sup>935</sup>

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924. *Id.* ¶ 17. Erdemovic claimed to have had no other choice than to migrate from the Republic of Croatia, to join the Serbian military, to leave his bedridden wife and to take part in the Srebrenica operation to shoot the Moslem detainees. He also testified that on one occasion he managed to save some Serbs, assist a detainee at the farm, questioned the order to execute the detainees and refused to participate in the second round of executions. *Id.*

925. *Id.*

926. *Id.* ¶ 20.

927. *Id.* ¶ 23.

928. *See supra* note 856 and accompanying text.

929. *See supra* note 857 and accompanying text.

930. *See supra* notes 872-74, 881 and accompanying text.

931. *See supra* notes 923-27, and accompanying text.

932. *See supra* note 925 and accompanying text.

933. *See supra* note 923 and accompanying text.

934. *See supra* note 922 and accompanying text.

935. *See supra* note 926 and accompanying text.

## VII. Conclusion

The excesses of World War I called into question the traditional doctrine of respondeat superior, which limited liability to officers and officials issuing criminal commands.<sup>936</sup> The Commission on Responsibility advocated bringing German war criminals before the bar of justice.<sup>937</sup> This recommendation was incorporated into the Versailles Peace Treaty which incorporated an unprecedented provision for criminal prosecution.<sup>938</sup> This scheme foundered on the shoals of politics and a modest number of individuals were tried before the Penal Senate of the German Supreme Court.<sup>939</sup> The Leipzig Court displayed some sympathy for these domestic defendants and generally meted out lenient penalties to individuals relying on the superior orders defense.<sup>940</sup> The complexity of the defense was illustrated by the Court's acquittal of defendant Lieutenant Karl Neumann in the *Dover Castle* case based on the accused's reasonable belief that his attack on a hospital ship constituted a lawful reprisal.<sup>941</sup> In another case, the defendant's erroneous belief that he was acting in accordance with superior orders resulted in conviction for negligent rather than intentional homicide.<sup>942</sup> The Penal Senate ultimately retreated from a subjective standard and suggested that a defendant might be held guilty for following orders which were universally known to be in contravention of the law of armed conflict.<sup>943</sup>

World War II resulted in substantial scholarly skepticism towards the plea of superior orders.<sup>944</sup> The Allied Powers limited the defense<sup>945</sup> in the Nuremberg Charter to a plea in mitigation in those instances in which justice so required.<sup>946</sup> The Tribunal rather ambiguously ruled that superior orders might be considered in mitigation where a moral choice was not possible.<sup>947</sup> In any event,

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936. See *supra* notes 50-69 and accompanying text.

937. See *supra* notes 86-104 and accompanying text.

938. See *supra* notes 105-09 and accompanying text.

939. See *supra* note 112 and accompanying text.

940. See *supra* notes 132 and 156 and accompanying text.

941. See *supra* notes 113-20 and accompanying text.

942. See *supra* note 135 and accompanying text.

943. See *supra* notes 147-48 and accompanying text.

944. See *supra* note 236 and accompanying text.

945. See *supra* notes 245-50 and accompanying text.

946. See *supra* note 250 and accompanying text.

947. See *supra* note 277 and accompanying text.

the Nuremberg Tribunal determined that the grave nature of the defendants' offenses precluded recognition of superior orders.<sup>948</sup>

The *Ensatzgruppen* case, decided under Control Council Law No. 10, continued the trend towards limiting the superior orders defense, proclaiming that soldiers were reasoning agents and were not mere automatons.<sup>949</sup> Hitler depended upon others to carry out his commands and these individuals would not be permitted to seek shelter under the mantle of superior orders.<sup>950</sup> The Court introduced an objective standard to adjudge the liability of subordinates, ruling that combatants were obligated to obey lawful orders and would not be excused in the event that they obeyed manifestly unlawful commands.<sup>951</sup> Superior orders only would be considered in mitigation of criminal culpability.<sup>952</sup> An individual was required to engage in unrelenting resistance to illicit orders<sup>953</sup> unless his will was overborne through the threat or application of serious and severe force.<sup>954</sup> The American judges also significantly determined that resistance to Nazi commands typically did not result in retribution and that the defendants could not credibly claim that they did not possess a moral choice.<sup>955</sup> A superior's absence from headquarters following the transmittal of an illicit order<sup>956</sup> or protest after the fact did not constitute a defense.<sup>957</sup> The tribunal in the *Hostage* case expected officers with extensive experience to be aware of the illicit character of the hostage reprisal orders.<sup>958</sup> However, uncertainty in legal rules<sup>959</sup> or resistance ameliorated liability.<sup>960</sup> The *High Command* decision imposed culpability upon field commanders and their chiefs of staff who conveyed clearly criminal orders through the chain of command.<sup>961</sup> Officers were under a duty to decline to disseminate and to resist such directives.<sup>962</sup>

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948. See *supra* note 296 and accompanying text.

949. See *supra* note 309 and accompanying text.

950. See *supra* notes 325-26 and accompanying text.

951. See *supra* notes 327-29 and accompanying text.

952. See *supra* note 327 and accompanying text.

953. See *supra* note 344 and accompanying text.

954. See *supra* note 346 and accompanying text.

955. See *supra* notes 369-70 and accompanying text.

956. See *supra* notes 356-61 and accompanying text.

957. See *supra* notes 362-65 and accompanying text.

958. See *supra* note 412 and accompanying text.

959. See *supra* note 414 and accompanying text.

960. See *supra* notes 416-22 and accompanying text.

961. See *supra* notes 446-54 and accompanying text.

962. See *supra* note 441 and accompanying text.

The decisions of various other Control Council Law No. 10 and European domestic and military courts reinforced that a defendant would be liable in the event that he carried out an obviously unlawful order or the defendant knew or should have known under the circumstances that an order was unlawful.<sup>963</sup> There was a suggestion that combatants were not expected to comprehend the intricacies of international law and only would be expected to be aware of legal rules which were generally known and understood by military men.<sup>964</sup> Pleas in mitigation were recognized in those instances in which individuals performed a minor and mechanical role in carrying out a categorical command.<sup>965</sup> Mitigation was not recognized in cases in which combatants exercised discretion,<sup>966</sup> invoked claims of culture,<sup>967</sup> or *tu quoque*.<sup>968</sup> Courts also continued to wrestle with and to recognize the defense of reprisal<sup>969</sup> and entertained the plea of mistake of fact.<sup>970</sup>

In *Calley*, an American court-martial dismissed the accused's claim that he acted in response to superior orders and lacked criminal intent.<sup>971</sup> Calley's unsuccessful challenge to the court martial's reliance on a man of common understanding reasonableness standard indirectly raised the issue whether a subordinate's evaluation of the legality of an order can be divorced from the military tactics and strategy employed in combat.<sup>972</sup> Calley and other Vietnam era prosecutions revealed a continuing trend among national courts to extend solicitude towards domestic defendants, particularly ordinary combatants.<sup>973</sup>

In *Malinki*, an Israeli military court provided a memorable "black flag" metaphor for interpreting the manifest illegality standard.<sup>974</sup> This decision,<sup>975</sup> along with the *German Border Guards Case*<sup>976</sup> and *Finta*,<sup>977</sup> illustrate the broad context and circumstances which courts have come to consider in adjudging whether low-

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963. See *supra* notes 519-21 and accompanying text.  
964. See *supra* note 521 and accompanying text.  
965. See *supra* notes 526-53 and accompanying text.  
966. See *supra* notes 566-77 and accompanying text.  
967. See *supra* notes 522-25 and accompanying text.  
968. See *supra* notes 608-11 and accompanying text.  
969. See *supra* notes 603-07 and accompanying text.  
970. See *supra* notes 557-65 and accompanying text.  
971. See *supra* notes 638-65 and accompanying text.  
972. See *supra* notes 666-70 and accompanying text.  
973. See *supra* notes 672-706 and accompanying text.  
974. See *supra* notes 736-39 and accompanying text.  
975. See *supra* notes 720-52 and accompanying text.  
976. See *supra* notes 858-85 and accompanying text.  
977. See *supra* notes 790-806 and accompanying text.



ranking subordinates reasonably believed that orders were in accord with domestic and international law and in determining whether to acquit,<sup>978</sup> or more typically to mitigate the defendants' punishment,<sup>979</sup> In *Erdemovic*, a plurality of the Yugoslav War Crimes Tribunal determined that there was no clear and consistent pattern of international opinion regarding recognition of the total defense of duress for the killing of innocents who, in any event, would have been executed.<sup>980</sup> The Court clarified that the interests in protection of the civilians<sup>981</sup> dictated limiting duress under the circumstances to a plea in mitigation of punishment.<sup>982</sup> In the end, the Trial Chamber determined that various factors combined to compel Erdemovic to kill and mitigated his punishment.<sup>983</sup>

The superior orders defense presents the perennial and persistent problem of legal regulation over the military management of armed conflict. Military organizations require the expeditious and unquestioning implementation of policy directives and subordinates are trained to conform and to comply with superior orders. On the other hand, there are permissible parameters on the pursuit of warfare. The implementation of commands which contravene these constraints poses a threat to innocents and may spark a spiral of savagery. Legally limiting the obligation of subordinates to adhere to superior orders, however, places combatants in the precarious position of being compelled to choose between patriotism and possible international criminal culpability. This also assumes that the law of war is sufficiently clear and concise to be comprehended by both high-echelon and lower-ranking combatants functioning within the fast-moving field of combat. High-ranking officers and commanders undoubtedly are better positioned than subordinate soldiers to adjudge the legality of orders by reason of education, experience, expertise, information and perspective. The jurisprudence of the superior orders defense is an exercise in balancing these competing considerations.<sup>984</sup>

The law of command culpability is decidedly tilted towards obedience. Under international law a combatant only is obligated to resist manifestly illegal orders and ambiguity, uncertainty and

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978. *See supra* notes 741-47 and accompanying text.

979. *See supra* notes 782-85 and accompanying text.

980. *See supra* notes 855-81 and accompanying text.

981. *See supra* notes 868-71 and accompanying text.

982. *See supra* notes 874-75 and accompanying text.

983. *See supra* notes 916-27 and accompanying text.

984. *See supra* notes 1-37 and accompanying text.

doubt are to be resolved in the interests of obedience.<sup>985</sup> The Nuremberg judgment seemed to limit mitigation to duress.<sup>986</sup> The developing case law, however, has implicitly relied on the “justice” clause of the Nuremberg Charter provision on superior orders and has increasingly invoked a myriad of contextual factors to, on occasion acquit,<sup>987</sup> and more frequently to significantly mitigate the punishment of domestic defendants.<sup>988</sup> The result has been to maintain superior orders as a de facto legal defense.<sup>989</sup> This seems to reflect what appears to be a substantial, but subterranean international consensus supporting a strong superior orders defense. The Diplomatic Conference on Humanitarian Law in Armed Conflicts, for instance, rejected a provision which would have limited superior orders to a plea in mitigation in the case of grave breaches of the 1977 Geneva Protocol.<sup>990</sup> In fact, few international human rights and humanitarian instruments address, let alone abrogate, the defense.<sup>991</sup>

The expectation that subordinates will resist manifestly illegal orders is contrary to scientific surveys which indicate that a significant percentage of Americans believe that most people, as well as themselves, would obey an order during wartime to kill civilian men women and children.<sup>992</sup> Respondents view this as an expression of ethical integrity rather than moral malevolence.<sup>993</sup> There is some evidence that the respondents’ compliant attitude reflects the ferocious reality of contemporary armed conflict.<sup>994</sup> Combatants in Vietnam reportedly believed that soldiers who disobeyed commands to commit war crimes risked ostracism, onerous duty assignments, charges of insubordination, demotion

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985. See *supra* notes 795-99 and accompanying text.

986. See *supra* notes 275-77 and accompanying text.

987. See *supra* note 741 and accompanying text.

988. See *supra* notes 744-48 and accompanying text.

989. See *supra* note 785 and accompanying text.

990. See L.C. Green, *Superior Orders and Command Responsibility*, 27 CAN. Y.B. INT’L L. 167, 186-87 (1989). See also Protocol Additional to The Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 3 (1979), 16 I.L.M. 1391 (1977).

991. See Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948).

992. See JOANNA BOURKE, *AN INTIMATE HISTORY OF KILLING FACE-TO-FACE KILLING IN TWENTIETH CENTURY WARFARE* 193-95 (1999).

993. See *id.*

994. See *id.* at 175-76, 178. The author notes in discussing Vietnam that “in certain contexts, combatants were actually instructed in the best way of killing prisoners.” *Id.* at 190.

and even physical assault.<sup>995</sup> The ability of soldiers in Vietnam to evaluate the legality of orders was burdened by the fact that the military hierarchy actively engaged in ideological indoctrination while simultaneously resisting educating combatants as to the requirements of the code of conflict.<sup>996</sup> In his seminal study of the Nazi military machine, Omar Bartov notes that soldiers were subjected to a harsh discipline and pervasive political propaganda which paved the path towards demonization of the enemy, self-sacrifice and a willingness to engage in atrocity.<sup>997</sup> Under these conditions, there was little possibility of combatants challenging or contesting orders.<sup>998</sup>

The socio-psychological pressures conspiring towards compliance and conformity, of course, conflict with the formal expectations of military manuals, such as the Lesson Plan on the Geneva Convention prepared by the United States Department of the Army in 1970.<sup>999</sup> The plan counseled combatants who received what they believed to be an illegal order to persuade the officer to rescind the command.<sup>1000</sup> In the event that the officer persisted in issuing the order, the subordinate was instructed to disregard the directive.<sup>1001</sup> The Lesson Plan recognized that, of course, this “takes courage,” but admonished that compliance may result in criminal punishment.<sup>1002</sup> The text stressed that “[n]o one can force you to commit a crime, and you cannot be court martialled or given any other form of punishment for your refusal to disobey.”<sup>1003</sup>

National courts and military tribunals have reinforced the norm of obedience by recognizing superior orders in mitigation of the punishment of lower-ranking domestic defendants charged with wartime atrocities.<sup>1004</sup> The doctrine, however, rarely has been successfully relied upon by soldiers resisting involvement in war

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995. *Id.* at 198.

996. *Id.* at 190-91.

997. See OMAR BARTOV, HITLER'S ARMY SOLDIERS, NAZIS, AND WAR IN THE THIRD REICH 117-23 (1991).

998. See *id.* at 60. For the twin trends of decentralized ethnic wars, see MICHAEL IGNATIEFF, THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE (1997), and for sophisticated military technology, see MICHAEL IGNATIEFF, VIRTUAL WAR KOSOVO AND BEYOND (2000). Both books challenge the relevance, clarity and contours of the code of armed conflict. See Lewy, *supra* note 203.

999. Green, *supra* note 48, at 322.

1000. *Id.*

1001. *Id.*

1002. *Id.*

1003. *Id.*

1004. See *supra* note 838 and accompanying text.

crimes.<sup>1005</sup> In 1995, the United States Court of Appeals for the Armed Forces affirmed the conviction of Captain Yolanda Huet-Vaughn for desertion with intent to avoid hazardous duty and to shirk important service based on her refusal to report for service in the Persian Gulf conflict.<sup>1006</sup> The Appellate Court affirmed the ruling of the court martial excluding evidence that Huet-Vaughn had been motivated by a desire to educate the American public on the costs, consequences and illegal character of the Persian Gulf War.<sup>1007</sup> The Court also refused to entertain a defense based on resistance to manifestly illegal orders since Huet-Vaughn was unable to demonstrate that she had been specifically commanded to commit a war crime and the plea could not be relied upon to challenge the decision to wage war.<sup>1008</sup>

The international community is likely to witness a continuing tension between the formal requirements of the international humanitarian law of war and the domestic enforcement and sociological foundations of the superior orders defense.<sup>1009</sup> The fact remains, as ominously noted by psychologist Stanley Milgram in the conclusion of his classic study on obedience, that “[a] substantial proportion of people do what they are told to do, irrespective of the content of the act and without limitations of conscience, so long as they perceive that the command comes from a legitimate authority.”<sup>1010</sup>

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1005. See *supra* notes 766-74 and accompanying text.

1006. *United States v. Huet-Vaughn*, 43 M.J. 105, 111 (1995) *cert. denied* 517 U.S. 1117 (1996).

1007. *Id.* at 112-14.

1008. *Id.*

1009. See HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* (1989).

1010. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 189 (1974).

