DEFENSE OF SUPERIOR ORDERS BEFORE MILITARY COMMISSIONS

I. INTRODUCTION

"I was only following orders," is a phrase that has been uttered by those seeking a legal excuse for acts that violated the laws of war. The pleading is often associated with the leadership of Nazi Germany, prosecuted following the Second World War. In fact, however, the historical roots of assigning personal responsibility for battlefield acts pre-date the tribunals at Nuremberg.[1] The United Nations War Crimes Commission noted the complexity of the issue in 1948, stating, "[t]he question of individual responsibility and punishment in cases in which offenses were committed upon the orders of a . . . superior authority by a subordinate pledged by law to obey superior orders" has long been a significant and difficult problem.[2] More recently, Serb and Croat defendants have raised the defense before the International Criminal Tribunal for Yugoslavia.[3]

It is likely that the U.S. military commissions proposed to try crimes arising from wartime actions in Afghanistan will have to confront the legal and moral implications of a plea of "not guilty by reason of obedience to superior orders." The conflicting imperatives of securing the supremacy of the law and also preserving good order and discipline in the military creates a dilemma. The dilemma raises the difficult question of whether a plea of superior orders should be a legitimate defense to war crimes.[4] This paper contends that the fact that a subordinate follows the orders of a superior must, to a certain extent, absolve the subordinate of legal responsibility; it surveys the historical treatment of the defense in U.S. and international law; and

1. *E.g.*, Little v. Barreme, 6 U.S. (1 Cranch) 170 (1804) (applying absolute liability to a U.S. Navy captain's unlawful seizure of a foreign vessel).

2. THE UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAW OF WAR 274 (1948).

3. *See, e.g.*, Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-T, 9 (1996) (I.C.T.Y.).

4. *See* K.K. Mathew, *Right to Rebellion and Obedience to Superior Orders*, *in* THREE LECTURES 44, 54–55 (1983).

it argues that the Bush Administration should allow terrorists tried before military commissions access to the defense.

II. OBEDIENCE TO ORDERS: DISCIPLINE AND SUPREMACY THROUGH MANIFEST ILLEGALITY

A limited defense of superior orders, when viewed as an amalgam of norms of responsibility which challenge culpability, does not undermine the supremacy of the law. At issue are situations when a superior orders a subordinate to perform an illegal act, for example, attack hospitals, kill prisoners of war, or perpetrate other war crimes, and the subordinate carries out the act in compliance with the superior's orders.[5] Naturally, the defense does not apply when a soldier follows a legal order nor when the subordinate commits a criminal act on his own initiative.[6] Although the defense arises only where the subordinate follows an illegal order, it is not clear that the subordinate should bare responsibility for following all illegal orders. In many circumstances, assigning responsibility to, and subsequently punishing, the subordinate would run counter to the tenets of the criminal law.

A. Absolute Liability: An Overinclusive Extreme

This paper argues that obedience to superior orders should be viewed as a legitimate defense. This theory is not universally–held, however. Hugo Grotius, widely considered the father of international law,[7] wrote in the seventeenth century that, "[i]f the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out."[8] Grotius focuses on natural law and religion to assign moral blameworthiness to subordinates who follow illegal orders. As we will see below, this was the approach taken in the United States in the early nineteenth century.[9]

Many international criminal tribunals have taken a similar stance by imposing absolute liability on defendants. These courts prohibit a

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5. *See* YORAM DINSTEIN, THE DEFENSE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW 69–70 (1965).

6. *See id*. at 70.

7. Gary D. Solis, *Obedience of Orders and the Law of War: Judicial Application in American Forums*, 15 AM. U. INT'L. L. REV. 481, 486 n.23 (1999).

8. *Id*. at 486 (quoting HUGO GROTIUS, 2 DE JURE BELLI AC PARIS LIBRI TRES [The Law of War and Peace] 138 (Francis W. Kesley trans., 1925)).

9. *See infra* part III.A. *E.g*., Barreme, 6 U.S. (1 Cranch) at 170; United States v. Bevans, 24 F. Cas. 1138 (C.C.D. Mass. 1816); Mitchell v. Harmony, 54 U.S. 115 (1851).

defense of superior orders per se, but typically allow the fact that a subordinate followed a superior's order to serve as a mitigating factor for sentencing purposes.[10] Treating the fact that a subordinate followed an order only as a mitigating factor for sentencing purposes allows the subordinate to avoid some punishment but it does not absolve him of responsibility. The absolute liability approach stringently assigns responsibility and it seems overinclusive to ascribe moral blame to every subordinate.

An absolute liability rule exalts the supremacy of the law of war and international humanitarian law, but at great expense to military discipline, ignoring that a successful military is built on a foundation of discipline that demands "total and unqualified obedience [to orders] without any hesitation or doubt."[11] The absolute liability approach attempts to account for this dilemma by asserting that soldiers are legally bound to follow only lawful orders. Thus, the position denies that obedience to superior orders creates a defense per se when a soldier follows an illegal order.[12] This absolute liability approach requires the subordinate to scrutinize and understand the practical and legal implications of all his superior's orders. If the subordinate determines the orders are illegal, he must refuse to follow them. Otherwise, the subordinate assumes responsibility for the consequences of his or her actions.[13]

This approach suffers from the assumption that the legality of an order is easily discernable to the subordinate. There will be situations where the impropriety of an order is not clear, especially to a subordinate who does not have the same access to material information as his superior. A high-ranking U.S. Army officer recently commented after a training exercise, "I know that if I ever go to war again, the first person I'm taking is my lawyer."[14] This suggests that even high ranking commanders have difficulty discerning all the legal implications of wartime acts amidst the "fog of war", and the difficulty is only amplified at lower levels where subordinates have less access to the intelligence and overall command strategy upon which their orders

10. *See infra* part III.B. *E.g.*, *In re* Von Leeb, 11 Nuremberg Military Tribunals 511, 533 (1948).

11. DINSTEIN, *supra* note 5, at 5 (quoting the Kafr Kassem case (first instance) (Military Court, Central District 3/57, Military Prosecutor v. Melinki), 17 *Pesakim* (D.) 90, 213 (Israel 1957)).

12. *Id.* at 69.

13. *Id.* at 8.

14. Col. Patrick Finnegan, *Operational Law: Plan and Execute*, MIL. L. REV. 29, 30 (Mar.–Apr. 1996).

are based. The problem with the absolute liability approach is that, while it establishes a firm rule, it fails to address the dilemma of how to promote good order and discipline while maintaining the supremacy of the law.[15]

Under such a strict liability regime, it is likely that hesitation in carrying out orders will increase, there will be more instances of insubordination, and in volunteer armed forces, recruiting may be adversely affected. Indeed, as soldiers begin questioning every order, military preparedness erodes, which has devastating effects for a nation's security. The absolute liability approach is unsatisfactory because it seeks to categorically eliminate a defense of superior orders by mere linguistic manipulation. Since the absolute liability approach asserts that soldiers are only bound to follow legal orders, it eliminates the need for a defense, which by definition is applicable only when soldiers follow illegal orders.[16] When a soldier is given an illegal order, the demands of military discipline, which are enforced by legal sanctions, conflict with the necessity to preserve the supremacy of the law by identifying and punishing criminal violators.[17] The absolute liability approach promotes the supremacy of the law, but only by impaling itself on the military discipline horn of the dilemma.

B. Respondeat Superior: An Underinclusive Extreme

The diametrically opposite doctrine is to categorically accept obedience to superior orders as a complete defense based on a theory of respondeat superior.[18] Under such a regime, the subordinate is always vindicated, and the superior who gave the order is usually criminally liable for the acts of the subordinate.[19] The absolute defense approach does not seem to be widely embraced today and has never been adopted by any American courts.[20]

This approach suffers from deficiencies akin to those encountered by the absolute liability approach. While establishing a bright line rule, it favors the principle of military efficiency to the complete

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15. DINSTEIN, *supra* note 5, at 9.

16. *Id.* at 68–69.

17. *Id.* at 6.

18. *Id*. at 8.

19. *Id.*

20. *See infra* part III.A. The doctrine was, however, at one time the policy adopted by the military handbooks. *See, e.g.*, *Rules of Land Warfare*, United States, Ch. X, § 366 (1914); *see also* DONALD A. WELLS, THE LAWS OF LAND WARFARE: A GUIDE TO THE U.S. ARMY MANUALS 115, 118 (1992).

neglect of personal criminal accountability.[21] The absolute liability approach is overinclusive because it holds subordinates responsible for judgments they have inadequate information to make. Conversely, the respondeat superior approach is underinclusive because it fails to assign responsibility in cases where a subordinate willingly follows an illegal order that he or she knows to be illegal.

C. Manifest Illegality: A Golden Mean

To a certain extent, obedience to superior orders must be viewed as a legitimate legal defense. A limited defense of superior orders is a compromise that balances these competing aims by promoting discipline in the military while not entirely subverting the supremacy of the law.[22] Thus, the limited defense approach that is embodied in the manifest illegality principle is a sort of golden mean that has emerged in the United States.[23]

The manifest illegality principle allows the subordinate to presume that his orders are legal, and obedience to those orders is a defense unless the illegality of the orders is obvious to any person of ordinary understanding.[24] The presumption that orders are legal helps maintain and promote good order and discipline. Since subordinates do not risk incurring liability in most situations, the presumption effectively compensates for the subordinate's lack of information and eliminates the possibility of hesitation and delay in carrying out orders. Thus, the defense of obedience maintains the supremacy of the law by assigning culpability where "moral choice was in fact possible.[25] Indeed the defense holds commanders responsible for their orders, rather than subordinates. The manifest illegality principle is more, however, than a compromise which merely shifts the assignment of responsibility away from the subordinate. Underlying the manifest illegality doctrine are the postulates of widely accepted criminal defenses, such as necessity and mistake of fact. It also seems to be an area where the maxim "ignorance of the law is no excuse"

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21. *See* DINSTEIN, *supra* note 5, at 49.

22. *Id.* at 8.

23. *See id.* at 26.

24. *See id.* at 34.

25. UNITED STATES V. HERMANN GORING ET. AL., XXII TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNALS 411, 465 (1948); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, princ. IV, [1950] 2 Y.B. Int'l L. Comm'n 374, *reprinted in* The Laws of Armed Conflicts 911, 923–24 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988); Solis *supra* note 7, at 516.

should not apply.[26] The defense of superior orders is a means of challenging the mens rea, or mental culpability, elements of war crimes.[27] Whether viewed as an independent defense based on the same tenets as other accepted criminal defenses, or as a proxy for challenging the mens rea element of an illegal act, the manifest illegality principle is a legitimate means of immunizing a soldier from unreasonable culpability where the soldier follows orders under ambiguous conditions while not altering the burdens of command responsibility.

1. *Ignorance of Law*. A fundamental maxim of the law is that ignorance of the law is no excuse.[28] The manifest illegality doctrine creates an exception to this principle, but the variance is proper because the underlying rationale for disallowing an ignorance of law defense is not applicable in cases where the defense of superior orders is pled. The law seeks to hold responsible those who demonstrate a malignant heart and deserve punishment.[29] Although those truly ignorant of the law arguably do not posses the mens rea element of their crimes, jurists are reluctant to accept such a defense because of a fear that the defense will be abused by many defendants claiming ignorance.[30] This realization of the difficulties of proving actual knowledge of the law has given rise to the legal fiction of a presumptive knowledge of the law.[31]

It is unlikely that the excuse of ignorance of the law will be amenable to abuse in the manifest illegality context. The presumption of knowledge of the law, which is fundamental to the "ignorance of the law is no defense" principle, does not evaporate within the defense of superior orders framework. The defendant claiming ignorance of the law is also claiming that he reasonably believed that his orders were lawful because he was acting on reliance that his superior did understand the law.[32] This is evident in the presumption that all orders are legal, except those that are unmistakably illegal, which the courts-martial or military commissions will determine by applying a reasonableness standard.[33] While the order is presumptively legal from the

26. *See* DINSTEIN, *supra* note 5, at 29–37.
27. *Id.* at 88.
28. JOHN KAPLAN, ET AL., CRIMINAL LAW: CASES AND MATERIALS 184 (2000).
29. *Id.* at 181.
30. *See id*. at 268.
31. *Id.*
32. DINSTEIN, *supra* note 5, at 34.
33. Solis, *supra* note 7, at 503, 522.

standpoint of the subordinate, there is a concurrent presumption that the superior knows the law because commanders giving illegal orders are legally responsible.[34] This limited acceptance of an ignorance of the law defense does not create a disincentive to know the law because at some level of the command hierarchy, the law still presumes knowledge and there are limits to what extent ignorance may excuse the subordinate's acts. The manifest illegality defense assigns knowledge of the law, and thus responsibility for war crimes, to the superior who is demanding the discipline of his subordinates.[35] Within the framework of an obedience to orders defense, a soldier probably should be able to take refuge in the principles of a mistake of law claim, which would likely otherwise be unavailable as a defense by itself.

If an officer gives an illegal order to fire on a museum, the field artillery soldier may fire on the museum, knowing the target to be a museum but believing it to be a lawful target.[36] In this situation, the members of a court-martial or commission will determine if the order was manifestly illegal. Since the law of war on firing on museums, or targets of subjective historical or cultural importance, is not as clear as the law prohibiting the firing on hospitals or prisoners, the court-martial will likely decide that the order was not manifestly illegal.[37] Just because the field artillery soldier is not liable does not mean that the crime goes unpunished. The officer giving the order is presumed to know the law and the law holds him responsible for the unlawful order. Assigning presumptive knowledge of the law and thus responsibility for war crimes to the person in the best position to both understand the legal implications of his orders and avoid giving illegal orders maintains the supremacy of the law. The manifest illegality principle recognizes that the soldier likely does not have the mens rea requisite to constitute a criminal act.

2. *Mistake of Fact*. Although ignorance of the law is not generally recognized as an excuse in criminal law, mistake of fact is a more widely accepted defense.[38] As with mistake of law, a mistake of fact defense is essentially a claim that the defendant did not have the requisite mens rea for all the material elements of the crime.[39] A defen-

34. *Id*.

35. Justice Kenneth J. Keith, *Rights and Responsibilities: Protecting the Victims of Armed Conflict*, 48 DUKE L.J. 1081, 1101 (1999).

36. Solis, *supra* note 7, at 522.

37. *See id.*

dant who successfully avails himself of the defense escapes liability with proof that he acted on an honest but mistaken belief in a set of facts, which if true would have made his action lawful.[40] The applicability of a mistake of fact claim is incorporated into the manifest illegality defense.[41]

While the mistake of fact defense is widely accepted and the ignorance of law defense is generally shunned, the mistake of fact claim potentially should be more controversial for battlefield acts. Under the manifest illegality defense, a soldier is more likely to raise a mistake of fact claim when the legality of the order is more controvertible,[42] especially under circumstances where seemingly illicit orders are characterized as reprisals.[43] If a subordinate fires on a hospital, fully aware that hospitals are protected under international law, while believing assurances from his superior that the enemy uses the hospital as a command and control base and as part of its air defenses, a mistake of fact defense will exonerate the subordinate.[44] Again, the court-martial will determine if the orders were manifestly illegal and, if not, then the subordinate's obedience to a superior orders defense will allow the subordinate to avail himself of the principles of a mistake of fact to nullify the mens rea element of the crime. The supremacy of the law is upheld because those deserving of punishment will not evade the reach of the law while those who are not deserving avoid punishment.

3. *Necessity and Compulsion*. In addition to mistake defenses, the defense of superior orders also embodies the principles underlying the defenses of compulsion and choice of evils. The demands of military discipline and consequences of insubordination coercively place the subordinate in a difficult position.[45] The soldier must make a choice of evils, deciding whether to follow an order, which if illegal will subject him to liability, or to defy the order, which if legal will subject the soldier to liability for insubordination. One scholar noted, "he [may] . . . be liable to be shot by a court-martial if he disobeys an

38. MODEL PENAL CODE § 2.04(1) ("Ignorance or mistake is a defense when it negatives the existence of a state of mind that is essential to the commission of an offense.").

39. KAPLAN, *supra* note 28, at 241–42.

40. *Id.*

41. DINSTEIN, *supra* note 5, at 83.

42. *See* Solis, *supra* note 7, at 522.

43. *See id.* at 500 (describing a German case where the issue of reprisals led the court to acquit the defendant).

44. *Id.*

order and to be hanged by a judge and jury if he obeys it."[46] While not necessarily a capital offense, military personnel are subject to disciplinary proceedings for disobeying orders.[47] A soldier is compelled to follow orders as a means of escaping criminal liability for insubordination.

The manifest illegality defense recognizes the compulsive element inherent in a legal system that requires an individual's punishment for an act which he is compelled by law to commit.[48] Other prescripts of military law, together with the manifest illegality principle, form a consistent doctrine governing the carrying-out and questioning of orders that accommodates the need to maintain military discipline and the supremacy of the law. Presumptive elements to the approach for punishing insubordination mirror those in the manifest illegality defense. Article 90 of the Uniform Code of Military Justice (UCMJ) establishes that an accused may not be convicted of insubordination if the order was in fact unlawful.[49] However, the law presumes the legality of orders and punishes disobedience unless the order is clearly illegal.[50] The legal consistency in demanding obedience and in determining when a subordinate has committed a crime of war help to alleviate the compulsive pressures of a system that requires the strict obedience of a solider and then punishes him for indecorous action.

A soldier does not have to fear punishment for insubordination when he disobeys orders that he knows are illegal or are manifestly illegal, nor does he have to fear punishment for the commission of war crimes when he follows orders which are not manifestly illegal. The only asymmetry that potentially undermines the supremacy of the law would seem to be that a subordinate may carry out an order that he knows to be illegal, but which is not manifestly illegal, and yet maintain the defense of superior orders. The structure of the manifest illegality defense should have the natural consequence of eliminating situations where this set of circumstances arises. Assigning the superior presumptive knowledge of the law, and thus liability under

45. Mathew, *supra* note 4, at 55.

46. *Id.*

47. *E.g.*, MANUAL FOR COURTS-MARTIAL, United States (2000), art. 90 (addressing willfully disobeying a superior commissioned officer, and reserving potential capital punishment for disobedience in times of war), art. 91 (addressing insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer), art. 92 (addressing failure to obey standing order or regulation).

48. *See* DINSTEIN, *supra* note 5, at 76–77.

49. MANUAL FOR COURTS-MARTIAL, *supra* note 47, art. 90c(2).

50. *Id.*

the law, should create an incentive for the superior to learn the law and a disincentive to deliver illegal orders. While the defendant can raise the defense in this situation, a prosecutor can attempt to prove that the subordinate did know the law.[51] Currently, U.S. military law does allow the court to consider the defendant's subjective knowledge, disallowing the superior orders defense when the defendant "knew the orders to be unlawful."[52] Just as a subordinate may argue that he subjectively believed an illegal order he obeyed was lawful, the prosecution may introduce evidence about a defendant's subjective knowledge to demonstrate that he in fact knew the illegality of the order.[53] If the prosecutor succeeds in establishing that the subordinate knew his order was illegal, but followed the order nonetheless, the defense will not succeed in negating the mens rea element of the criminal act. It is even possible that a court-martial or military commission could determine that the order was manifestly illegal to a reasonable person in the defendant's subjective situation.[54] It thus seems likely that the defendant who knowingly follows an illegal order will be subject to criminal liability.

D. Superior Orders: a Valid Means of Challenging Mens Rea

The supremacy of the law is upheld with the manifest illegality defense of superior orders, because the defense serves to establish that the defendant does not possess the mens rea required for the criminal act for which he is charged. The law does not seek to assign responsibility to those who do not deserve it and some degree of mental culpability is usually a condition precedent for determining desert. The supremacy of the law also maintains that individuals deserving punishment do not avoid the assignment of responsibility by some legal aberration. A defendant could independently raise other defenses, some of which are encompassed in the defense of superior orders, without raising a defense of superior orders. Some defenses, however, especially mistake of law, may not be available independently of the manifest illegality principle.

There must be a defense of superior orders, as a plea of challenging the mens rea, but that defense must be limited. The manifest illegality principle results in a defense which, like Ulysses navigating

51. *Id*.
52. *Id*. R. 916, part II, at 111.
53. *See id.*
54. *Id.*

between the Scylla and Charybdis, guides jurists between the conflicting demands of military discipline and the supremacy of the law. It avoids the overinclusiveness and underinclusiveness of the absolute liability and respondeat superior extremes. By ascribing knowledge of the law and responsibility for breaches to superiors, except in cases of clear unlawfulness, the defense promotes military discipline while maintaining the supremacy of the law by focusing on those with the requisite mens rea. The manifest illegality principle announces a standard that is functional and steadfastly promotes principles of responsibility.

III. HISTORY AND SOURCES OF THE LAW

U.S. military law, as well as the recent treaty establishing the International Criminal Court (ICC),[55] accepts the manifest illegality rule as the preferred doctrinal approach to the defense of obedience to superior orders. It is not the only conceivable standard, however. As discussed below, both U.S. and international law have at times rejected the defense altogether. Based on this history, it is possible that the Department of Defense (DOD) might seek to prevent the use of the defense of superior orders before the proposed military commissions.

A. U.S. National Law

The case of Captain George Little is the first recorded case of a U.S. military officer raising the defense of obedience to superior orders to a charge grounded in international law.[56] During the U.S. war with France, Congress passed an act permitting the seizure and forfeiture of ships bound to any French port. In his written military order instructing naval commanders how to carry out the law, however, President John Adams authorized the seizure of vessels traveling both to and from French ports.[57] In 1799, a U.S. Navy captain seized the *Flying Fish*, a Danish ship, pursuant to the President's order while that vessel was en route from a French port. He was sued for trespass in U.S. maritime court by the ship's owners. Writing for the Supreme Court, Chief Justice Marshall adopted an absolute liability approach, holding that naval commanders act at their peril in obeying presiden-

55. Rome Statute of the International Criminal Court, 1998, *opened for signature* July 17, 1998, art. 33, U.N. Doc. A/Conf. 183/9th, *available at* www.un.org/law/icc/statute/99_corr/sctatute.htm (last visited Apr. 4, 2003).

56. *See, e.g.*, Barreme, U.S. (1 Cranch) at 170.

57. *Id.* at 177–78.

tial instructions at variance with the language of the underlying law, and are thus liable for damages.[58] Consequently, this early case precluded the defense of superior orders for military personnel.

Municipal and state courts considered the defense in non-military civil and criminal cases, rejecting it in cases where employees followed the instructions of their employers, and where police superiors gave orders to patrolmen. Following *Little*, these early courts rejected the defense and held the subordinates liable regardless of whether the order appeared legal to the subordinate. A Pennsylvania court, for example, punished a state militia commander who acted under the orders of the governor to prevent a U.S. Marshall from executing a federal decree.[59]

In 1813, another Pennsylvania court announced an alternate standard: obedience to a superior order is not a defense if the subordinate knows or should know the act is illegal.[60] This is essentially the rule today, but this standard did not win widespread approval of jurists in 1813. The case concerned a first lieutenant of a privateer accused of committing acts of piracy.[61] The defense did not gain immediate acceptance in most early civilian courts.

Ironically, the doctrine that a subordinate was strictly liable for illegal acts carried out at the direction of a superior officer was matched against a rule that soldiers were also strictly liable if they did not carry out orders. In 1849, Private Dinsman, a marine on the *USS Vincennes*, was repeatedly flogged and kept in irons when he inquired into the legality of his commander's orders.[62] The Supreme Court upheld the legality of the disciplinary action, promoting a perverse doctrine that on the one hand required immediate obedience to orders, regardless of those orders' legality, while on the other holding the subordinate strictly liable for the effects of the consequent act.[63] This combination contributed to an arbitrary command atmosphere, which served as a primary impetus for acceptance of the defense of superior orders.

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58. *Id.* at 178; *see also* Bevans, 24 F. Cas. at 1139–140 (holding where a sentry on orders illegally killed a man, the orders could not justify or excuse the murder).

59. United States v. Bright, 24 F. Cas. 1232, 1237–238 (C.C.D. Pa. 1809).

60. United States v. Jones, 26 F. Cas. 653, 658 (C.C.D. Pa. 1813).

61. *Id.*

62. Wilkes v. Dinsman, 48 U.S. 89, 110–11 (1849) (rejecting Dinsman's argument that his orders were illegal because his term of enlistment had expired during the cruise).

63. *Id.* at 131–32.

Thirty-eight years after *Little*, the Court re-emphasized that obedience to orders is not a defense, and that officers are strictly liable for consequent illegal acts.[64] The Court held that a colonel who expropriated a merchant's property for military use during the Mexican-America War was liable for trespass and could not invoke his superior's orders as justification.[65] The Court did, however, suggest for the first time that following superior orders could mitigate punishment. Chief Justice Taney wrote, "the order may palliate, but it cannot justify."[66] The antebellum courts dogmatically rejected the superior orders defense if the order on which the subordinate relied was illegal in the abstract sense, without regard to the order's appearance of legality to the subordinate.

Manifest illegality did not begin to emerge as a doctrine until the Civil War era. Sixty-three years after *Little*, a federal district court addressed the liability of enlisted personnel for executing illegal orders.[67] In *McCall*, the defendant soldier was sued for false imprisonment after arresting and imprisoning the plaintiff as part of an effort to quell an outbreak of riots in California following President Lincoln's assassination.[68] The court held for the defendant, declaring that "except in a plain case . . . where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander."[69] The court limited the scope of the defense and effectively annunciated a manifest illegality standard, stating there could be no defense when the order is "so palpably atrocious as well as illegal, that one must instinctively feel that it ought not be obeyed, by whomever given."[70]

In one of the most well articulated cases from the period, the court found no error in a lower court instruction that stated:

> But an order illegal in itself, and not justified by the rules and usages of war, or in its substance being clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that such order was illegal, would afford a private no protection for a crime committed under such order. . . . Any order given by an officer to a private, which does not

64. Mitchell v. Harmony, 54 U.S. 115, 137 (1851).
65. *Id.*
66. *Id.*
67. McCall v. McDowell, 15 F. Cas. 1235 (C.C.D. Cal. 1867).
68. *Id*.
69. *Id*. at 1240.
70. *Id.* at 1241.

> expressly and clearly show on its face or in the body thereof its own illegality, the soldier would be bound to obey, and such an order would be a protection to him.[71]

After 1867, the implicit standard for military personnel was that acts of subordinates were protected by the orders of their superiors, unless such orders were clearly illegal.[72]

At the conclusion of the Civil War, the defense of obedience to superior orders confronted jurists on military commissions. One such commission tried Major Henry Wirz, the commandant of the Andersonville prisoner of war camp where an estimated 12,000 Union soldiers died.[73] The Union charged Wirz with conspiracy to maltreat federal prisoners and thirteen counts of murder; he asserted a superior orders defense.[74] The case is interesting because the underlying facts are almost identical with those encountered a century later in the *Eichmann* case.[75] The commission denied Wirz's plea, found him personally responsible for battlefield excesses, and sentenced him to be hanged.[76] The commission found that conditions in the camp were deplorable and Wirz either sanctioned or overlooked many abuses by camp personnel.[77] While the commission did not articulate a manifest illegality rationale, it must have considered the conspicuous nature of Wirz's violations when rejecting his defense. Wirz was the only soldier on either side of the Civil War executed for a war crime.[78]

The mid-Nineteenth Century standard became fixed and persisted throughout much of the Twentieth Century. The case law directed that an officer was criminally responsible for the issuance or execution of orders he knew, or should have known to be illegal, and subordinates were not liable unless the illegality of the orders was clear.[79]

It was also during the Civil War that the military began to codify the laws of war. Francis Lieber wrote what is often regarded as the

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71. Riggs v. State, 91 Am. Dec. 272, 273 (Tenn. 1866); *see also* State v. Sparks, 27 Tex. 627 (1864) (holding that soldiers are duty bound to disobey illegal orders).

72. Solis, *supra* note 7, at 490.

73. 8 American State Trials 666 (1918), *reprinted in* THE LAW OF WAR 783 (Leon Friedman ed., 1972).

74. *Id.*

75. L.C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW 302 (1976).

76. THE LAW OF WAR, *supra* note 73, at 798.

77. SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW, *supra* note 75, at 303.

78. Solis, *supra* note 7, at 492.

79. *In re* Fair, 100 F. 149, 155–56 (D. Nebraska 1900); United States v. Clark, 31 F. 710, 717 (E.D. Mich. 1887).

first general codification of the law of war.[80] The Lieber code, which was promulgated in 1863 as General Orders Number 100, became a model for subsequent legal codes.[81] Despite its broad coverage, the code is silent on whether obedience to superior orders could justify a breach of the laws of war.[82] Lieber left the issue to the courts.

Subsequent attempts at American codification were heavily influenced by the writings of Lassa Oppenheim, a British international law scholar, and Great Britain's 1912 handbook on the rules of land warfare.[83] Oppenheim wrote the 1912 manual, completely revising the earlier 1903 version, and incorporated his belief that obedience to orders is a complete defense. He once wrote:

> If members of the armed forces commit violations *by order* of their Government, they are not war criminals and cannot be punished by the enemy . . . . In case members of forces commit violations ordered by their commanders, the members cannot be punished, for the commanders are alone responsible.[84]

In 1914, the United States revised Lieber's General Orders 100 and published the first U.S. manual relating to the law of war. The document was heavily influenced by its British counterpart and Oppenheim.[85] While the U.S. courts moved gradually from an absolute liability approach to the moderate approach of accepting the defense so long as the offense was not clearly illegal, the military wholly adopted the complete respondeat superior defense in its early manuals. The Rules of Land Warfare reflected Oppenheim's absolute defense approach and instructed:

> Individuals of the Armed Forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts . . . may be punished by the belligerent into whose hands they may fall.[86]

The U.S. military fought WWI and WWII under this complete defense rubric, despite attempts after WWI to hold German war criminals personally liable for their wartime acts.[87] In 1934, the United States published a new edition of the Rules of Land Warfare,

80. Solis, *supra* note 7, at 491.
81. *Id*.
82. *Id*.
83. *Id.* at 494.
84. 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 264–65 (1st ed. 1906).
85. Solis, *supra* note 7, at 494.
86. *Rules of Land Warfare*, *supra* note 20, para. 366.
87. *See* DINSTEIN, *supra* note 5, at 10–20.

which reaffirmed the original version's respondeat superior approach.[88] The version did not require that orders must have been reasonable, legal, or within the scope of the superior's authority, but instead fully exempted soldiers from prosecution if they were following orders.[89] In 1940, the military released another version, FM 27-10. This document's paragraph 347 on superior orders replicated the 1914 and 1934 standards.[90] As the end of WWII approached, however, the Allies began contemplating punishing Axis leaders including those who might have committed battlefield crimes.

The desire to punish Axis war criminals provided the catalyst for changing the military's respondeat superior approach to the defense of obedience to superior orders. The United States realized that it could not continue to sponsor the absolute defense if it intended to deny it to Axis defendants.[91] The military consequently again revised its field manual on November 15, 1944 to revert to a pre-1914 position where obedience to superior orders was no longer an automatic and complete defense.[92] The manual now read, "[h]owever, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment."[93] The end of WWII marked the end of a forty-year experiment by the military with a respondeat superior defense.

Following WWII, Congress enacted the UCMJ which became effective on May 31, 1951.[94] While none of its provisions deal with the defense of superior orders as such, the Manual for Courts-Martial (MCM)[95] contained a specific provision relating to the defense of superior orders, providing that:

> [T]he acts of a subordinate, done in good faith compliance with his supposed duties or orders, are justifiable. This justification does not exist, however, when those acts are manifestly beyond the

88. Solis, *supra* note 7, at 506.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Solis, *supra* note 7, at 510 (quoting UNITED STATES ARMY, FM 27-10, FIELD MANUAL: RULES OF LAND WARFARE ¶ 345(1) (1944) (marking the sole change to the entire manual)).

94. Act of May 5, 1951, Pub. L. No. 81-506, Ch. 169, § 1, 64 Stat. 108, §§ 551–736.

95. The U.C.M.J. is the statutory punitive articles established by Congress for all services. The M.C.M. is the manual promulgated under executive authority promulgating procedural guidelines and substantive interpretation of statutes.

> scope of authority, or the order is such that a man of ordinary sense and understanding would know it to be illegal.[96]

The defense of superior orders arose again in the courtroom following WWII and the subsequent adoption of the UCMJ. The Korean War gave rise to one of the leading reported military cases on the issue, *United States v. Kinder*.[97] Airman Kinder captured a Korean intruder while on sentry duty at an ammunition dump 300 miles south of the battle line.[98] Kinder transferred custody of his prisoner to Corporal Toth, who pistol-whipped the captive until he lost consciousness.[99] Lieutenant Schreiber, the officer in charge, ordered Kinder to shoot the Korean, and Kinder carried out the order while Toth waited in a jeep.[100] Kinder was tried and convicted of premeditated murder and conspiracy to commit murder. On appeal, his counsel contended that obedience to a superior order was a defense, regardless of the legality of the order.[101] The Air Force Board of Review rejected Kinder's arguments, holding that obedience to superior orders is no excuse when a man of common understanding would know an order to be unlawful. It then stated further, "[o]f controlling significance in the instant case is the manifest and unmistakable illegality of the order."[102]

After *Kinder*, the Vietnam War presented the military courts with several cases dealing with the superior orders' defense. Vietnam produced more prosecutions of American military personnel for killing foreign nationals than any previous conflict, and consequently,

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96. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 197b (1951). Substantially similar provisions appeared in the MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 148a (1928) and MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 179a (1949). When the Manual for Courts-Martial was revised in 1969 the subject was covered under the category of "Special Defenses" and provided:

> *Obedience to apparently 'lawful' orders.* An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.

MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 216d (1969).

97. 14 C.M.R. 742, 774 (1953).

98. *Id.* at 753.

99. *Id.*

100. *Id.*

101. *Id.* at 673.

102. *Id*. at 774; Lieutenant Schreiber was convicted of premeditated murder by general court-martial. United States v. Schreiber, 5 C.M.A. 602, 18 C.M.R. 226 (1955). Corporal Toth was released after it was determined that, since he had separated from the service, no courts had jurisdiction. Toth v. Quarles, 350 U.S. 11 (1955) (holding art. 3(a) of the U.C.M.J. unconstitutional).

more cases in which the superior orders' defense was invoked.[103] The Vietnam decisions reaffirmed the principle that obedience to orders that are manifestly illegal is not a defense. In *United States v. Keenan*, the Court of Military Appeals approved an instruction stating that the justification for acts done pursuant to orders did not exist if "the order was of such a nature that a man of ordinary sense and understanding would know it to be illegal."[104] Keenan was convicted for following an order to shoot an elderly Vietnamese citizen.[105] The court-martial and premeditated murder conviction of First Lieutenant William Calley for his participation in the My Lai Massacre on March 16, 1968, is one of the most controversial criminal trials in this nation's military history.[106] The military court rejected Calley's plea of obedience to superior orders and sentenced the lieutenant to life imprisonment.[107] The court held that the order on which Calley relied for a defense "is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful."[108] The public outcry in the United States was overwhelming and on April 1, 1971, one day after the sentence was imposed, President Nixon ordered Calley's release. Regardless, the *Calley* verdict served to educate the masses and will hopefully deter future My Lai's.[109] The manifest illegality doctrine in American military jurisprudence has been settled for the last fifty years. Indeed, the doctrine can be traced in civilian law to the time of the Federalists in *Little v. Barreme* and not the Nuremberg Trials. The period of the absolute defense during the early twentieth century was little more than an errant detour. The American Law Institute has even recognized the defense in the Model Penal Code.[110] The most recent iteration of the manifest illegality defense in the MCM reads:

> *Obedience to orders.* It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to

103. Aubrey M. Daniel III, *The Defense of Superior Orders*, 7 U. RICH. L. REV. 477, 495 (1973).

104. 18 C.M.A. 108, 39 C.M.R. 108, 117 n.3 (1969).

105. *Id*. Interestingly, the man giving Keenan the order, Corporal Luczko, was acquitted by reason of insanity. Daniel, *supra* note 103, at 496 n.48.

106. *Id.* at 477.

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

108. United States v. Calley, 48 C.M.R. 19, 27 (1973).

109. Daniel, *supra* note 103, at 504.

110. MODEL PENAL CODE § 2.10 (1985) (recognizing "it is an affirmative defense that the actor, in engaging in conduct charged to constitute an offense, does no more than execute an order of his superior in the armed services that he does not know to be unlawful.").

> be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.[111]

B. International Law

Articulating a satisfactory statement of current international law regarding the defense of superior orders is exceedingly difficult. There is no canonical authority, and the numerous pertinent sources offer varying answers. A review of treaties, cases, and custom reveals many instances in international law where the defense received treatment markedly similar to that provided in U.S. courts. On many occasions, however, international law has proven less accepting of the doctrine.[112] It thus seems that there is no settled international law on the defense of superior orders.[113]

In addition, few of the major multilateral treaties squarely address the status of the defense of superior orders, indicating how difficult it has been for states to reach an agreement on the doctrine. Some are altogether silent regarding the defense. In January 1944, the newly formed UN War Crimes Commission could not reach agreement on the issue of obedience to orders due to the varied practice and laws of its Member States.[114] The Commission ultimately recommended the validity of the plea of superior orders be left to national courts "according to their own views of the merits and limits of the plea."[115] Treatment of the defense is conspicuously missing from The Hague and Geneva Conventions, including the 1977 Protocols to the Geneva Convention.[116] In addition, the Convention on Civil and Political Rights fails to address the defense.[117]

Most multilateral treaties that do address the issue engage an absolute liability approach and attempt to preclude obedience to orders as a defense. Some do consider superior orders as a mitigating factor

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111. MANUAL FOR COURTS-MARTIAL, *supra* note 47, § 916(d).

112. *See* Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, CAL. L. REV. 939, 966–67 (1998).

113. MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF WAR 41 (1999).

114. DINSTEIN, *supra* note 5, at 108–09.

115. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 2, at 278.

116. Col. Howard S. Levei, *The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders,* 30 MIL. L. & L. OF WAR REV. 185 (1991).

117. International Covenant on Civil and Political Rights, Mar. 23, 1976, *available at* http://www.unchr.ch/html/menu3/b/a_ccpr.htm (last visited Mar. 2, 2003); *see also* Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, U.N. GAOR, 13th Sess., Supp. No. 34, at 91, U.N. Doc. A/10034 (1975) (also silent on the defense).

in punishment.[118] Perhaps the most well-studied of this group of treaties is the statute establishing the International Tribunal at Nuremberg. This document only permitted obedience to orders to mitigate punishment.[119] Some members of the U.S. prosecution team were upset with this compromise. Bill Donovan, director of the Office of Special Services,[120] was fired from the prosecution team by Justice Jackson for voicing reservations about the prosecution of military "officers who had obeyed the orders of their government."[121] The practice of the tribunal itself, as well as the conduct of other contemporary war crime trials administered directly by the Allied powers, is more equivocal.[122] In *In re Von Leeb*, the tribunal stated, "[w]ithin certain limitations, [a soldier] has the right to assume that the orders of his superiors . . . are in conformity to international law."[123] In another case, the tribunal said, "[i]f the illegality of the order was not known to the inferior and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected." [124] Although the language of the Nuremberg Charter was clear, the results of the trials left the question of the viability of the superior orders' defense unresolved under international law except in regards to the most egregious offenses.[125]

Most other multilateral treaties that address the status of the defense adopt an absolute liability approach similar to the Nuremberg Charter.[126] The 1922 Washington Treaty, for example, declared that

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118. OSIEL, *supra* note 113, at 42.

119. Charter of the International Military Tribunal of Aug. 8, 1945, art. 8, *annexed to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544 ("The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.").

120. This WWII era U.S. governmental organization was the predecessor of the modern Central Intelligence Agency.

121. ANTHONY CAVE BROWN, THE LAST HERO: WILD BILL DONOVAN 744 (1982).

122. OSIEL, *supra* note 113, at 42.

123. *In re* Von Leeb, 11 Nuremberg Military Tribunals 511 (1948). This was also known as the "High Command Trial."

124. *In re* List, 11 Nuremberg Military Tribunals 632, 650 (1948) (also known as the "Hostage Case"); *see also* HILAIRE MCCORBREY, INTERNATIONAL HUMANITARIAN LAW 221 (1990) (noting that even after Nuremberg, "[S]uperior orders will still operate as a defense if the subordinate has no good reason for thinking that the order concerned was unlawful.").

125. OSIEL, *supra* note 113, at 42.

126. *See, e.g.*, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, art. 2(3), *available at* www.unhchr.ch/html/ menu3/b/h-_cat39. htm (last visited Mar. 2, 2003) ("An order from a superior officer or a public authority

"[a]ny person . . . who shall violate any of these rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment. . . ."[127]

A noteworthy exception is the Rome Statute of the International Criminal Court (ICC). The ICC statute is one of the few multilateral treaties to recognize the defense of superior orders.[128] The statute allows the defense upon certain conditions being present: the subordinate was under a legal obligation to obey orders, the subordinate did not know the order was unlawful, and the order was not manifestly unlawful.[129] The statute also specifies that orders to commit genocide or crimes against humanity are illegal as a matter of law.[130]

The United Nations Security Council has also attempted to shape the obedience to orders' defense. In chartering the International Criminal Tribunal for the former Yugoslavia (ICTY), and for Rwanda (ICTR), the Council disallowed superior orders as a defense. In accordance with the Nuremberg standard, the doctrine was permitted only in mitigation of punishment.[131] These Security Council pronouncements suggest that international law does not recognize a defense of obedience to orders.

Appearances, however, can be deceiving.[132] Much like the Nuremberg tribunals, the ICTY and ICTR proved amenable to the defense despite the contrary language of their charters. In the first case before the ICTY, the dicta indicates that the tribunal would not pre-

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may not be invoked as a justification of torture."); Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, § 5, art. VIII (establishing that "the defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted").

127. Treaty Relative to the Protection of the Lives of Neutral and Noncombatants at Sea in Time of War and to Prevent the Use of Noxious Gases and Chemicals, Feb. 6, 1922, U.S.–U.K.–Fr.–Italy–Japan, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, vol. II, 2118 (1910-1923).

128. Rome Statute of the International Criminal Court, 1998, art. 33, *available at* http://www.un. org/law/icc/statute/99_corr/sctatute.htm (last visited Apr. 4, 2003) [hereinafter Rome Statute].

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

130. *Id.* art. 33(2).

131. Statute of the International Tribunal for the former Yugoslavia, May 25, 1993, art. 7(4), *available at* http://www.un.org/icty/basic/statut/stat2000.htm (last visited Apr. 4, 2003); Statute of the International Tribunal for Rwanda, art. 6(4), *available at* www.ictr.org.wwwroot/ENGLISH/basicdocs.statute.html (last visited Apr. 4, 2003) (the language in both statues is nearly identical to the language of art. 8 of the Charter of the Nuremberg Tribunals, *supra* note 119).

132. OSIEL, *supra* note 113, at 43.

clude a defense of duress where the facts indicate that the defendant acted in obedience to a superior who threatened summary execution for non-compliance.[133] In these tribunals, the standard that seemed to emerge is that "evidence of having received orders from superiors, though not a complete defense, is relevant and admissible to the question of whether the soldier labored under duress when performing the command."[134]

Custom is another source of law that shapes the contours of the defense, and an examination of customary law reaffirms that there are no clear norms governing the application of the defense. War crimes prosecutions by states, whether involving their own soldiers or their enemies', are typically grounded on domestic military codes that incorporate the relevant international treaties defining such offenses.[135] Since the relevant treaties are often silent on the obedience to orders' issue, courts generally look to their particular state's military codes.[136] Some states, seeking to maximize discipline, offer the soldier a complete defense, an approach widely favored in the former Communist bloc and much of the Third World.[137] Other states, like the United States, excuse the subordinate only if he had an honest belief that the order was lawful. The majority approach in the West appears to be the manifest illegality standard.[138] Because state practice is inconsistent, no consensus exists around which opinio juris may form and thus customary international law does not dictate how states must address the defense of obedience to superior orders.[139]

Since there is no consistent state practice, international law does not provide a clear requirement regarding the defense of obedience to superior orders. When setting up a military tribunal, a state has great latitude in its treatment of the defense. Indeed, there seems to be little basis in current international law for allowing the plea as an

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

134. OSIEL, *supra* note 113, at 43.

135. *Id.* at 43–44; *see also* art. 18, U.C.M.J., 10 U.S.C. § 818 (2000) (incorporating international law into U.S. military law).

136. OSIEL, *supra* note 113, at 44.

137. *Id.*

138. *Id.*

139. Rome Statute, *supra* note 128, art. 38(1)(b); *see generally* Nicaragua v. USA, 1986 I.C.J. 14, 97 (holding that custom is constituted by two elements, an objective one—'general practice'—and a subjective one—'opinio juris'—Libya v. Malta, 1985 I.C.J. 29 (also known as the "Continental Shelf Case") (stating that the substance of customary international law must be "looked for primarily in the actual practice and opinio juris of States.").

absolute defense, as the U.S. manuals did for the first half of the twentieth century. Overall, however, international law permits a number of doctrinal options: the manifest illegality circumscribed version, superior orders as mitigation to punishment, or preclusion of the defense altogether. It should be noted, however, that even when the defense is disallowed, tribunals and courts have historically permitted at least a limited defense greatly resembling the manifest illegality scheme. Since tribunals tend to recognize the defense de facto in some form, states creating tribunals can better control the extent to which the tribunals will recognize the defense by recognizing some version of the defense de jure.

IV. TWENTY-FIRST CENTURY AND THE WAR ON TERROR

A. The Creation of U.S. Military Tribunals

The September 11th attacks and their aftermath have pushed the issue of whether obedience to orders should constitute a defense to war crimes into the minds of both government officials and legal scholars. The issue became important when the Bush Administration announced, via the President's Military Order of November 13, 2001, its intention to try individuals accused of criminal terrorist actions by military commission.[140] By opting for military commissions, as opposed to conventional military courts, the Administration avoids having to follow the established laws, rules, and procedures of the UCMJ.[141]

Many commentators believe the primary consideration behind the Administration's choice stems from the rules of procedure and evidence in the UCMJ, which would make it more difficult to obtain convictions without jeopardizing sources and methods of gathering sensitive information.[142] Particular focus has been paid to the inad-

140. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 F.R. 57833 (Nov. 16, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html (last visited Mar. 2, 2003).

141. *See* Geneva Convention of 1949, Aug. 12, 1949, arts. 84, 85, and 204 (requiring that if States capture P.O.W.s they must try them in the same established courts and with the same rules and procedures in which they try their own military personnel); Maj. Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW. 19, 31–32 (March 2002).

142. Viet D. Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 405 (2002).

missibility of hearsay evidence before military commissions.[143] While it has not received as much critical attention, the acceptance by the MCM of a defense of superior orders[144] may have influenced the Administration's decision to create the military commission option.

The President's Military Order did not establish the rules and procedures for the military commissions.[145] It was not until March 21, 2002, that the Department of Defense (DOD) released the procedures for the military commissions.[146] This military order addresses the purpose and statute of the commissions, their jurisdiction, make-up of commission personnel, and the procedures afforded to the accused, including general rules of evidence. The entire document is silent, however, on the issue of whether obedience to orders constitutes a valid affirmative defense.[147] With no indication from the guidelines on whether defendants before the commissions may plead obedience to orders, we are left to speculate as to the eventual resolution of this key issue.

It is easy to conceive of situations where defendants before military commissions could legitimately raise a defense of obedience to superior orders. The Administration has expressed a desire to prosecute those who "knowingly harbored" people involved in acts of international terrorism against the United States.[148] Consider the potential prosecution of a member of the Taliban's military who was ordered by his superior to provide lodging and a security detail for an undisclosed person who would be staying two nights in the defendant's place of residence. It must be conceded that there is nothing manifestly illegal with this order; indeed, such a directive probably resembles the orders that the commanding officer at Camp David receives prior to a Presidential visit. If the undisclosed person turned out to be a ranking member of al Qaeda, the United States might later charge the defendant with knowingly harboring a terrorist. It

143. *See, e.g.*, Nat Hentoff, *This is Not America's Way of Justice*, THE SAN DIEGO UNION-TRIB., Apr. 15, 2002, at B6; Doug Cassel, *Tribunals Won't Cut It*, CHICAGO TRIB., Apr. 7, 2002, at 1; Gwen Robinson, *US Presses on with Military Tribunal Plan*, FIN. TIMES, Dec. 14, 2001, at 11.

144. MANUAL FOR COURTS-MARTIAL, *supra* note 47.

145. President's Military Order, *supra* note 140.

146. Military Commission Order No. 1 of Mar. 21, 2002, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf (last visited Jan. 11, 2003).

147. *See generally id.*

148. Department of Defense Order on Military Commissions Fact Sheet, Mar. 21, 2002, *available at* http://www.dod.mil (last visited Jan. 11, 2003).

becomes crucial to this defendant whether or not he may avail himself of the superior orders defense.

In another context, a Taliban soldier who participated in the prison revolt in Mazar-e-Sharif, during which CIA agent Mike Spann was killed, may find himself as a defendant charged with conspiracy to commit murder. During the uprising, the prisoners certainly achieved some tactical success, as it took three days and air strikes before the United States was able to fully regain control of the prison compound. It is difficult to distinguish the prison uprising from any other battle, so it is unlikely that any order given by a ranking prisoner in the compound to mount a "counter attack" was itself manifestly illegal. A defendant who participated in the uprising will be interested in whether or not he may raise a defense of due obedience.

A final hypothetical involves a mid-level al Qaeda official who participated in the planning of the attacks on the *U.S.S. Cole* or the Pentagon. Given that al Qaeda allegedly compartmentalized so much of the planning of operations from the execution of the missions, this planner may not have known that his plans would be executed in the manner they were. To be sure, the person was in fact involved in acts of international terrorism perpetrated against the United States, but he may not have known while planning the missions that they would result in terrorist acts. It is common for military planners to develop many contingency plans that may never be executed. If the defendant only participated in planning contingencies for attacking military targets, such as the *U.S.S. Cole* or the Pentagon, in case al Qaeda ever found itself at war with the United States, then it is unclear that any orders to develop those plans would have been manifestly illegal.[149] It would be critical to this accused whether or not he has a defense of superior orders. Although these specific examples may seem overly simplistic, it must be understood that it is not unreasonable to anticipate that future defendants before military commissions will have legitimate bases to invoke a defense of superior orders.

B. The defense before the Military Commissions

The current U.S. administration has a real opportunity to shape how the defense of obedience to orders is treated in customary international law. Eventually, the DOD must develop a policy determin-

149. Given that the attack on the Pentagon involved hijacking a commercial airline and killing the civilians on board, this plan and any order to develop it would likely be held manifestly illegal.

ing whether to allow the defense before military commissions. Nearly every other judicial institution created to try war crimes has addressed the issue.[150] Failing to develop a policy simply leaves the decision to the individual commission members, and it is doubtful the DOD will leave such a decision to the members.[151] The DOD is not constrained by international law, which will support a decision either to allow the defense or to impose absolute liability on the defendants. The remainder of this paper will argue that the defense should be permitted exactly as it is for U.S. servicemen: obedience to orders is a defense so long as the order was not itself manifestly illegal.

It is possible that allowing defendants to plead due obedience before the commissions will not greatly interfere with the government's ability to secure convictions. If the commissions are only used to try a select few individuals accused of the most egregious crimes, like the primary terrorist leaders, it is unlikely that those individuals could establish the elements of the defense. Consequently, allowing the defense would not jeopardize attaining convictions.

The President's Military Order does not identify what crimes the commissions may try nor does it draw an explicit line between acts of terrorism and war crimes.[152] International terrorism is "surely a crime of some sort," and the Administration wants to establish that it is a war crime.[153] The Administration has been somewhat successful in this effort, evidenced by the fact that the international community has supported the U.S. declaration that the September 11th attacks were acts of war and thus the military action against al Qaeda and its Taliban sponsors was justified.[154]

The Administration does not want to jeopardize this international support, and it is likely that they will use commissions sparingly and only to prosecute those members of al Qaeda and the Taliban directly linked to terrorist activities. While the Military Order states

150. The Nuremberg Tribunals, *supra* note 119; The Tribunals for the Former Yugoslavia and Rwanda, *supra* note 131; The Rome Statutes for the International Criminal Court, *supra* note 128.

151. The multilateral treaties that were silent on the treatment of the defense left the decision to each state's municipal courts. Such a course would not make sense here, as silence would only delay making a decision since the commissions ultimately deciding are themselves within the DOD.

152. Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457, 473 (2002).

153. *Id.*

154. Diane F. Orentlicher and Robert K. Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653, 653 (2002).

that commissions will be aimed at all non-citizens engaged, directly or indirectly, in international terrorism,[155] it is doubtful the Administration will try individuals captured in Afghanistan for acts of violence that are commonly expected in fighting wars.[156] The decision to create the commissions at all has been a politically contentious issue, and the Administration could minimize the harshest criticism by subjecting only the top terrorist leadership to trial before the commissions.

Even if the use of military commissions is not limited to the terrorist leadership, it is possible that the members of the military commissions will recognize some form of defense of superior orders de facto despite the commissions' guidelines specifically disallowing the defense de jure. Historical experience suggests that it is probable that jurists, when faced with facts that strongly implicate the defense, are unlikely to convict the defendant. To be sure, this is a welcome occurrence in a state that purports to follow the rule of law. Despite established law to the contrary, the judges in *McCall v. McDowell* determined that the soldier should not bear individual liability when following orders that were not plainly illegal.[157] After WWI, Article 228 of the Treaty of Versailles decreed to "bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."[158] Notwithstanding this attempt to enforce the principle of individual responsibility for criminal wartime acts, the judges of the Leipzig Court ultimately decided to punish subordinates following orders only if the order was known to the subordinate to infringe upon civil or military law.[159] The experience following WWII was very similar. As discussed above, the judges at Nuremberg also considered whether defendants acted pursuant to superior orders even though the Charter was explicit in stating that superior orders was not a defense.[160] The results of the trials before the ICTY again demonstrate that jurists have a tendency to recognize the defense de-

155. Military Order, *supra* note 140, § 2(a)(1)(ii).

156. George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635, 639 (2002).

157. McCall v. McDowell, 15 F. Cas. 1235 (1867).

158. Treaty of Versailles, June 28, 1929, art. 228, *in* 2 MAJOR PEACE TREATIES OF MODERN HISTORY 1389 (1967).

159. Solis, *supra* note 7, at 497–501. It should be noted that, after WWI, the Allies allowed the suspected war criminals to be tried in their own state's courts. The Leipzig courts were thus German courts, so the intentions of the allies were probably not congruent with the intentions of the judges.

160. *See* Discussion of the Nuremberg Trials, *supra* note 115 and accompanying text.

spite statutes to the contrary.[161] Any reasonable commission member would recognize the compelling rationale for accepting the defense as a valid challenge to mental culpability and implicitly allow the defense of superior orders.

Supplementing this trend is the fact that the military commission members will be commissioned officers in the U.S. armed forces.[162] The membership qualifications and appointment process for the military commissions is very similar to those for courts-martial.[163] The commission members will naturally draw upon their own experience with military law and the function of the MCM, which recognizes the defense. The commission members will understand, perhaps better than the broader civilian population, how the military requirements of discipline create a compulsive influence. They may have a difficult time denying the defense to lower level members of al Qaeda or the Taliban in situations such as those described by the examples above.

The Administration has little to lose from allowing the defense. First, the Administration contends that it is concerned with the military necessity of protecting sources and methods of gathering intelligence and evidence.[164] Allowing a defense of superior orders would not jeopardize those sources and methods. Second, if the commissions are used sparingly, it is doubtful many defendants could use the defense. If, however, the commissions are used liberally, it is doubtful that members would actually deny the defense to a defendant pleading duress or mistake. In these instances, a not-guilty verdict is likely to prevail whether or not the defense exists de jure. No matter how the commissions are eventually used, the outcome of cases will not likely be determined by the tangible existence of a defense of superior orders.

The Administration may stand to gain by expressly allowing the defense in the limited circumstances where a reasonable person in the defendant's position would not have known the orders to be illegal. First, by creating state practice of accepting the defense, the Administration could establish precedent that might someday apply to U.S. servicemen. Second, allowing the defense adds to the legitimacy of the commissions and gives the appearance that the commissions are not merely designed to ensure easy convictions. While international

161. *See* Discussion of Prosecutor v. Drazen Erdemovic, *supra* note 133 and accompanying text.

162. Military Commission Order, *supra* note 140, § 4(3).

163. MANUAL FOR COURTS-MARTIAL, *supra* note 47, §§ 502, 503 (2000).

164. *See id.*

law provides no clearly established principle on the defense of superior orders, the Administration would create such a precedent by coordinating its acceptance of the defense with the ICC's.[165] Though the United States is not party to the ICC,[166] it would win legitimacy from modeling military commission policy in accordance with that treaty's procedures—which purport to be the most complete and universal codification of laws relating to prosecuting war criminals. Thus, the Administration can silence more critics by increasing the similarities between the rules and procedures of the military commissions and the military law the United States applies to its own personnel.[167] Allowing the defense would ensure critics that the Administration is not abandoning the principles of justice and propagating a biased forum.[168]

V. CONCLUSION

Determining whether or not to punish a person for a war crime when they claim to have been following orders is both a difficult legal and moral issue. A state may adopt an absolute liability approach and hold each individual responsible for his acts regardless of whether the defendant knew the illegality of his acts or could have realistically altered his conduct. Alternatively, a state may offer an absolute defense of obedience to orders which promotes military discipline while allowing some atrocious crimes to go unpunished. States may wish to strike a balance between the absolute liability approach and the respondeat superior approach and permit a defense of obedience to orders except in circumstances where the underlying order was clearly illegal to a reasonable person. This hybrid approach has emerged several times throughout history, but by no means does international law require a state to adopt such an approach. The United States has adopted the manifest illegality doctrine for prosecuting U.S. servicemen, largely because that approach promotes both discipline and the supremacy of law.

Presently, the United States finds itself in the difficult position of needing to address how the defense of obedience to orders should

165. *See* Rome Statute, *supra* note 128, art. 33.

166. Anderson, *supra* note 167, at 599.

167. *See* Kenneth Anderson, *What to Do With Bin Ladan and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 592 (2002).

168. One of the most enduring criticisms of the tribunals has been that the Nuremberg Tribunals were established to create a "victor's justice."

apply to defendants tried for terrorism before U.S. military commissions. The United States is not bound by any overriding law, and is not concerned with promoting discipline within the ranks of terrorist organizations. Accordingly, one might believe that the Bush Administration will disallow the pleading of the defense before military commissions. The United States is guided, however, by reason and a desire to promote the supremacy of the law. The United States should recognize the fundamental tenets of criminal law and allow the defense of obedience to orders as a legitimate means of demonstrating a defendant's lack of mental culpability.

The Bush Administration now possesses a valuable opportunity to influence the development of customary international law. The United States should take the lead in annunciating the defense of superior orders under international law by providing it to defendants before military commissions. By according commission defendants the same doctrinal defense that is permitted in U.S. domestic law and under the ICC, the Administration will signal to the world that it is serious about procedural justice as well as fighting terrorism. The reaction to the tragedies of September 11th may cause a desire to reject the defense altogether in favor of an absolute liability approach, but historical evidence suggests that jurists recognize the legitimacy de facto even when it is not recognized de jure. The Bush administration would be wise to allow the defense before military commissions.

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