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Developmental Trends of the Defence of Superior Order: Acritical Appraisal of the Statute of the International Criminal Court

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The plea of the Defence of Superior Orders is one of the most controversial issues in international criminal law. International criminal law puts soldiers in a dilemma: whether they should obey or disobey the order of superiors. From the subordinate's point of view, disobeying superior orders is strictly prohibited by domestic military law. On the contrary, if they obey illegal orders, they might be tried for the war crimes they committed. Either way the order of commanders puts subordinates in a precarious situation.

The defence of the superior orders is usually raised by a subordinate accused of violating IHL. In almost all instances where a subordinate is charged for committing war crimes, he/she will argue that the act was done in obedience to a superior order. Sometimes a commander who actually issued illegal order may also raise the defence of superior orders. This is in a situation where a superior issues an illegal order after he was told to do so by his superior. This is possible as a military society is very hierarchical and there is always a person higher than the accused.

This paper explores the developmental trends of the defence of superior order. The historical background of superior orders is examined as well as the theoretical approaches, in order to show the consequences that flow from it. The conclusion that arises from the analysis is that the provision of the ICC Statute on the defence of superior orders is not a reflection of customary international practice. A strong case has therefore been made for a review.

Theoretical Approaches

The doctrine of *respondeat superior* was probably the most well-known approach to superior order pleas until the 1940's because of a publication of Lassa Oppenheim, under which a soldier who carried out orders of the superiors following a superior order could not be liable.
The doctrine of *respondeat* superior was originated by the first edition of Oppenheim's book on international law, which stated that:

> Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent government concerned. If 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; the latter may, however, resort to reprisals[1]

Under this doctrine the order of the government or superior officers justifies any acts, so a subordinate who executed the order cannot be punished. The background of this doctrine was that a majority of states had similar provisions in military law during the period, as priority was given not to avoiding atrocities on the battlefield but military unity. Subsequently, a slight change was added to the second volume of Oppenheim's Treatise on International Law. The second volume of Oppenheim's Treatise also upheld the doctrine of *respondeat superior* but Oppenheim mentioned a possibility of subordinates' punishment but at the same time he put the condition that they can only be 'war criminals' with the hands of 'the enemy.'[2] In practice, it is easy to assume that his home country would never have punished him for this as long as it was working for the government interests.

The doctrine of respondeat superior is apparently based on the policy that the interest of military discipline requires immediate obedience without any hesitation, as the ultimate duty of soldiers is to obey the order. It is not difficult to assume that if he defies the superior order, violating military law of his country, he will be liable for his disobedience accordingly. Under the doctrine only the superior officer would be held responsible for his subordinate's commission, which means that subordinates are automata as if they were tools. After World War I, this doctrine had a great influence on military law in many states. In Britain, the British Manual of Military Law (1914), No. 443, as drafted by Professor Oppenheim, precisely followed own view:

> Members of armed forces who commit such violations of the recognized rules of warfare as are ordered by their government or by their commander are not war criminals and cannot therefore be punished by the enemy…[3]

Following the British practice, the US Rules of Land Warfare (1940) promulgated an identical provision[4]. Oppenheim's doctrine had a great

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[1] Oppenheim, *International Law*, 1st ed., (1906), pp 264-265. 2 2

[2] Oppenheim, *International Law*, 2nd ed., (1912), p. 310.

[3] Professor Oppenheim drafted the provision on the British Manual of Military Law on superior orders issued in 1914. Lippman Matthew 'Humanitarian Law: The Development and Scope of the Superior Orders Defence', 20 *Penn State International Law Review*, [2001] p. 159

[4] UNITED STATES DEP'T OF THE ARMY, FIELD MANUAL 27-10 § 347 (1940)

influence on military regulations of the world up to 1940s[5]. However, after World War II, the doctrine of respondeat superior apparently started to lose ground, as the international community began to realize that the doctrine did not prevent soldiers' committing atrocities against civilians and sometimes soldiers. The Allied countries started to realize the need to formulate rules and principles to punish soldiers who caused atrocities in the 1940s, especially when it became apparent that they were going to win the war.

The doctrine of respondent superior seems to be adequate in that careful consideration is given to soldiers in a dilemma under superior control. However, it became a cause of disasters during World War II, as the doctrine could not break the chain of command on the battlefield even when the order was apparently illegal. Though this doctrine was probably the major approach to superior orders before World War I, it completely had lost ground since the war and none of the scholars continued to support the view.

Position B is called the doctrine of absolute liability[6]. If an illegal order is issued by a superior, the subordinate must refuse to execute, and there must be no punishment of his decision. If he chooses to follow, he may do so at his own risk, which means he might be punished by court in the future for violation of international law, and he will not be allowed to use superior order as a defence there. The rationale behind the absolute liability doctrine is that a soldier has free will and is not a robot, thus, he has to analyse the situation on the battlefield by himself. This 'think for themselves' principle became a subject of discussion not only for the effectiveness of the military unit but also for the unit's safety itself.[7]

The international community supported the principle in order to deal with and effectively punish subordinates who carried out their superiors' orders at Nuremberg and Tokyo. The Nuremberg Charter provided the doctrine of absolute liability, although it was probably retroactive law. Subsequently, this doctrine became a part of the Nuremberg principles[8]. The theory was generally accepted in the 1950s because of the disasters caused by the Axis countries. This doctrine apparently put a soldier in an unstable position where he always had to question the legality of the order. Regardless of the fact that an order was issued or not, the subordinate who committed a war crime become liable for his action under this doctrine, as his primary

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[5] Bassiuni Cherif, *Crime Against Humanity in International Criminal Law, 1st ed.*, Martinus Nijhoff, 1998, p 374.

[6] Among those commentators who are favourable to the absolute liability approach, mention can be made of M. Green Span, the *Modern Law Of Land and Warfare* (1959), at 409, Brand, "The War Crimes Trial and the Laws of War", *BYBIL* (1949), at 416, and Eser, "Defences in War Crimes Trials, *Israel Yearbook on Human Right (1994)* p. 209.

[7] Sadat Leila Nadya,*The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Transnational Publishers, Inc., 2002, p. 21S.

[8] Kittichaisaree Kriangsak, *International Criminal Law, (*Oxford: Oxford University Press, 2001), p 20.

duty is to keep the fundamental rules of international law. At present the view according to which subordinates are never accountable for actions taken in execution of orders has been set aside. For many years this view grounded on the principle of *respondeat superior* prevailed in the international community. It gradually proved to be inadequate mainly for two reasons: firstly, the increasing tendency in modern war for combatants at all levels to breach the international legal standards on the conduct of warfare and the protection of victims of armed hostilities. This trend has made it necessary to put a stop to those breaches by calling to account not only the higher authorities but also the actual perpetrators even if they act upon superior orders. Secondly in recent times it has been convincingly argued that acceptance of superior orders as an absolute defence would lead to a sort of *reductio ad absurdwll:* to bring to book the persons responsible for gross breaches one would have to climb right up the military chain of command and even the political hierarchy with the preposterous result that only the Supreme Commander or even the Head of State could be held criminally liable for those breaches. This rationale behind the demise of the principle of *respondeat superior* and the emergence of the contrary principle of subordinates' responsibility for the execution of illegal orders has been forcefully expressed by United States military tribunals at Nuremberg in the *High Command* case[9] and has been more recently echoed by a United States court martial in *Calley*[10].

Intermediate approaches are of validity in this comparison analysis. Intermediate positions are divided into two doctrines; (1) 'moral choice test', which allows soldiers to use superior order as a defence when moral choice was impossible, (2) the position of 'manifest illegality principle', which may assert the defence of obedience of superior orders, but not if the subordinate recognized, or should have recognized, the apparent illegality of the order. The former is a subjective test, in which commission of a crime following a superior order can be a defence when 'moral choice was in fact impossible[11]. The moral choice test was firstly seen in the International Military Tribunal at Nuremberg as follows.

That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test... is not the existence of the order, but whether moral choice was in fact possible.[12]

The moral choice test is based on a subjective criterion, so theoretically it can be applied to any situation. Strictly speaking, a moral choice is always

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[9] See *Trials of War Criminals before the Nuremburg Tribunals under Control* Council Law *No.* 10. XI. at 507-508

[10] 22 *U.S.G.M.A* at 534.

[11] Trial of the Major War Criminals before the International Military Tribunal (1946) at 42.

[12] Ibid

possible as long as he is able to say no. Hence, even where he is threatened, it can be argued that a moral choice is possible. From this perspective, the expression 'whether moral choice was in fact possible' would be considered as vague wording, for there is a possibility that the moral choice test will be used arbitrarily.

A more concise view would be the latter test 'manifest illegality principle', in which commission of a crime following a superior order may be a defence only where the person was under obligation to obey the orders, and the accused did not know that the order was unlawful. The rationale behind this is based on the intelligence of the reasonable person. A subordinate should incur responsibility for his act if he commits a crime pursuant to a manifestly illegal order, nevertheless he should be free from responsibility if he commits an offence in accordance with an order which is not manifestly illegal.[13] To apply this test, the order has to be 'obvious to any person of ordinary understanding'. According to this objective principle, obedience to superior order is allowed as a defence only where orders are not so manifestly illegal that subordinates did not know or could not have known them to be unlawful.[14] The objective would be to eliminate any possibility about what he should do in any situation of war.

In Chief Military Prosecutor v. Malinki and Others (the *Kaffr Qassem* case) the Military Court of Appeal of Israel upheld the comments of the District Military Court of the Central District as follows:

> the identifying mark of 'manifestly unlawful' order must wave like a black flag above the order given, as a warning saying 'forbidden' ... an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces the eye and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of 'manifest' illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.[15]

The Court adopted the manifest illegality principle, stating that 'a certain and obvious unlawfulness' should be prevented, and confirmed the guilty verdict delivered by the District Court.

In the 1990s, neither the Statutes of the ICTY and ICTR nor the Commentary addressed the principle of *manifest illegality.* It can be said that

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[13] Dinstein Yoram *"The Defence of Obedience to Superior Orders in International Law"* Available at: *http://www.webamnesty.org/pages/icc.org*. Accessed May 2009.

[14] Bakker Jeanne "The Defense of Obedience to Superior Orders: the Mens Rea Requirement", [1989] *17 AM J CRIM Law* 66.

[15] Appeal *279-283/58,* 44 *Psakim (judgments of the District Courts oi'Isreel)* 362; quoted in Green, L.C., 'The Defence of Superior Orders in the Modern Law of Armed Conflict',[1993] *Alberta Law Review,* pp. 323-333.

the drafters of the Statutes made the best effort to follow the legacy of Nuremberg and were in favour of the doctrine of *absolute liability.*

Historical Background

Superior order pleas have been seen in domestic courts for several hundred years, the position of each state has varied. The first recorded use of a superior order plea was in 1474,[16] when Sir Peter von Hagenbach, Governor of Breisach, was charged with atrocities committed against civilians in Breisach, Austria.[17] The defendant raised the plea of superior orders against murder, arson, and rape. Rejecting his plea, the tribunal convicted him of murder, rape, perjury, and other crimes against the laws of God and man, which would be called war crimes or crime against humanity now. As a result, Hagenbach was stripped of the knighthood and executed accordingly. This case is considered as a precedent for individual responsibility, though the plea of obedience as such was rejected. However, it is not appropriate to recognize this case from the perspective of international law since the court was of domestic character .[18]

Another historical case of a superior orders plea was the guard commander's case in 1661, where Captain Axtell, the guard commander, was tried at the execution of Charles I.[19]

In the guard commander's case, the English court held:

> The captain justified all that he did was a soldier, by the command of his superior officer, whom he must obey or die. It was resolved that was no excuse, for his Superior was a traitor and all who joined with him in that act were traitor and did by that, approve the treason; and where the command is traitorous, then the obedience to that command is also traitorous.[20]

Apparently, the attempt of the superior orders plea failed, and individual responsibility of the defendant was established based on the rationale that 'where command is traitorous, then the obedience to that command is also traitorous'. This is based on the idea that the subordinate should have rejected the illegal order. If so, it is interesting to see that England did not have unconditional obedience at this period. It is likely that the court did not agree to the doctrine of *respondeat superior*, which means the subordinate did not need to follow unlawful orders.

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[16] Yoram Dinstein, "The Defence of Obedience to Superior Orders in International Law", *Sijthoff*, (1965), p. 26

[17] T. L. H. McCormack and G. J. Simpson, *The Law of War Crimes: National* and International Approaches, Kluwer, 1997,31-9

[18] 28 judges were from the confederate entities of the Holy Roman Empire..

[19] *Axtell's case* (1661), Kelying 13, 84 E.R. 1055 at 1060

[20] *Ibid*

In the United States, a plea of superior orders was raised during the War of 1812. Bevans was standing guard on the ship *the Independence* in Boston Harbor. A pedestrian insulted the marine, and then he killed this person by his bayonet. Bevans was charged with murder. He raised a superior order plea, stating that the marines on Independence had been ordered to bayonet whoever showed them disrespect. However, Justice Joseph Story instructed the jury that such an order was illegal and void, and if given and carried out, both the superior and subordinate would be guilty of murder. Bevans was convicted in the court.[21] The court held the opinion that soldiers must not follow illegal orders, if so it was similar to the *absolute liability* principle. However, the next case showed a different view.

Another American case of a superior order plea is *United States* v. *Bright; the* court apparently addressed a lenient view on superior orders:

> [i]n a state of open and public war, where military law prevails, and the peaceful voice of military law is drowned in the din of arms, great indulgences must necessarily be extended to the acts of subordinate officers done in obedience to the orders of their superiors. But even there the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against a charge of murder or trespass, in the regular judicial tribunals of this country.[22]

In principle the court showed mercy to the defendant and said that it had to give special indulgences to subordinates on the battlefield. It seems that the court supported the respondeat superior doctrine at a glance. If it had stood on the respondeat superior doctrine, it would have freed him from any liability. However, it did not completely free the defendant from his responsibility, as the court held that the superior order to kill a civilian or to invade the sanctity of his house, or to deprive him of the property was not justified. It is assumed that the court was for an intermediate position.

During the Napoleonic Wars, Ensign Maxwell raised a superior order plea. He was charged with shooting and killing a French prisoner. The Scottish Court rejected the plea of superior orders as follows:

[i]f an officer were to command a soldier to go out to the street and to kill you or me, he would not be bound to obey. It must be a legal order given with reference to the circumstances in which he is placed; and thus every officer has a discretion to disobey orders against the known laws of the land.[23]

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[21] *United States v. Bevans,* 24 F. Cas. 1138(C.C.D. Mass. 1816)(No.14,589) However, the Supreme Court reversed this decision on jurisdictional ground. *United States v. Bevans, 16* u.s. (3 Wheat.) 336 (1818)

[22] *United States* v. *Bright,* 24 F. Cas. 1232 (C.C.D. P.a. 1809) (No 14647)

[23] Bassiouni Cherif, ‘’*Crimes against Humanity in International Criminal Law’’,* (2nd ed.), *Kluwer Law International,* 1999, p. 465

Judging from the fact that the court held that soldiers had to have 'a discretion to disobey orders', it can be assumed that the court held that subordinates were not automatons and must not follow illegal orders. However, it was not clearly stated whether or not the court would have shown mercy to the defendant if it had not been an apparent illegal order.

During the Civil war, Francis Lieber, a German-born Columbia School professor, wrote the Lieber Code, which was promulgated in 1863 as General Orders Number 100.[24] The Code has 157 Articles, which had provisions concerning the treatment of prisoners and non-combatants, as well as direction on the pursuit of warfare's objectives. However, it did not answer the question of whether or not superior orders could be a legal defence against war crime prosecution. If this fact is taken as Lieber's intention excluding provisions of superior order issues, Lieber seems to have thought whether or not soldiers follow any kinds of superior orders was left to states' discretion.

In spite of the silence of the Lieber Code, Major Henry Wirz, the Swiss doctor and commandant of the Andersonville, raised the defence of superior orders in his trial.[25] He was tried before a federal Military Commission for the maltreatment of the prisoners of war in his custody. Wirz clearly raised a plea of superior orders saying he only followed the superior orders, therefore should not be held responsible. The prosecutor asserted against the claim above' [a] superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey such an order and disastrous consequences result, the superior and the subordinate must answer for it ... The conclusion is plain, that where such orders exist both are guilty'.[26]

The commission held that Wirz was personally responsible for excessive acts and sentenced to death accordingly. As this case was dealt in a military trial, no formal judgment was delivered[27] but it is assumed that the judges shared the view expressed by the judge advocate, who stated that:
[a] superior Officer cannot order a subordinate to do an illegal act, and if a subordinate obeys such an order and disastrous consequences result, both the superior and the subordinate must answer for it.[28]

The commission did not consent to the possibility to free soldiers who followed illegal orders under obligation. Soldiers are treated as a rational human being. The Wirz case became the only case dealing with the defence of superior orders which arose during the Civil War. In *Little v. Barreme*, Chief Justice John Marshall observed that 'instructions cannot change the

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[24] Wilner Alan, 'Superior Orders as a Defense to Violations of International Criminal Law',[1996) 26 *Maryland Law Review* 130

[25] Solis Gar, 'Obedience of Orders and the Law of War: Judicial Application in American Forums', [2000) 15 *Am. U Int'L. L. Rev. 492.*

[26] *Ibid.* at 773-778

[27] Bassioun Cherif, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, Inc., 1996, p. 389.

[28] H.R. Exec. Doc. No. 23, 40th Cong., 2d Sess. 764, 773 (1865) Quoted in Ibid.

nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass'.[29] It can be assumed that John Marchall was of the opinion that superior officers' orders would not justify any acts of subordinates.

In *Mitchell v. Harmony*, Chief Justice Roger Taney supported Chief Justice Marshall's view 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'.[30] Justice Roger's view did not differ greatly as he said 'the order of his superior... cannot justify'. It should be noted that the terminology 'palliate' would have been understood as mitigation.

In the case of *R. v. Smith* during the Boer (South African) war, the defendant killed the internee following the order of his superior. However, Solomon J.P. stated:

> [He] is responsible if he obeys an order that is not strictly legal is an extreme proposition which the Court cannot accept ... Especially in time of war immediate obedience... is required…I think it is a safe rule to lay down that if a soldier honestly believes that he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the order of his superior officer.[31]

In *R. v. Smith* case, in its dictum it was held that the subordinate would be free from responsibility if (1) he believes he is doing his duty following the orders, (2) what he must or should have known is not manifestly illegal. Here the origin of the *manifestly illegal* doctrine is illustrated.

It is very interesting to note that the 1922 Treaty of Washington had Article III on the plea of superior orders but did not come into force because of the denial of French ratification.32

The Signatory Powers, desiring to ensure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure service of any Power who shall violate any of those 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 as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

It is apparent that Article III of the 1922 Treaty was not following the doctrine of *respondeat* superior. However, the 1922 Treaty of Washington

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[29] *Little* v. *Barreme,6* U.S. (2 Cranch) 170, 177 (1804)

[30] *Mitchell v. Harmony*, 54 U.S. (13 How) 115, 149 (1851)

[31] (1900), 17 S.C. at 561,567-8 (Cape of Good Hope)

[32] Levie Howard , 'The Rise and Fall of an Internationally Codified Denial of the Defence of Superior Orders', [1991] 30 *Military Law* & *Law ofUiar Review* 188.

signed by the United States, Britain, France, Italy and Japan, showed that customs on the laws of war at an international level were still in dispute at this time. The fact that the efforts to try soldiers who followed superior orders finally failed by the French denial, indicates that the doctrine of *respondeat* superior, was still influential but may not have been internationally binding during 1922. This observation can be supported by Gawlik, a defence counsel for Naumann in the *Einsatzgruppen* case, who said 'France especially declined to ratify this agreement just because of the provision in that the plea of superior orders should not be admissible'.33

If there was any doubt about the entrenchment and adoption of the absolute liability doctrine at the international level, developments after the Second World War sufficiently cleared this doubt. One of the principles of the Nuremburg Charter[34] was that individuals have international duties which transcend the national obligation of obedience imposed by the individual state.[35] Accordingly, Article 8 of the Nuremburg Charter became the first document dealing expressly with the criminal responsibility of subordinates from the perspective of international law,[36] which provided that:

> 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.[37]

In the Nuremberg trial, twenty four individuals were indicted, and twenty two were tried. Most of the defendants raised the plea of superior orders, saying that "I followed Hitler's order or Himmler's order".[38] The Nuremburg Trial seriously considered this point and rejected their plea positively. The Nuremberg Trial apparently adopted the absolute liability doctrine, not

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[33] Quoted in Dinstein, *Supra note 13,* p. 98

[34] After the Second World War had ended, the Allies sort to punish, not only those government and military officials directly connected with the war itself, but also all persons involved in crime against civilians including mass murder, persecution, deportation, enslavement, extermination etc. The seed for such prosecutions was finally sown at the Moscow Conference in 1943, attended by leaders of Britain, the US and the Soviet Union; and in 1945, along with France, they signed the London Agreement and Charter, under which the International Military Tribunal was established, later to be known as the Nuremberg War Crimes Tribunal. The Charter, that accompanied this agreement was ratified by 19 other state, and it established the jurisdiction and procedures of the tribunal

[35] Judgment of Oct. 1st, 1946, International Military Tribunal Judgment and Sentences, 41 *AM. J. INT'L L.* 172, 222 (1947).

[36] D.H.N Johnson, "The Defence of Superior Orders" a *Australian Yearbook of International law* (1985). P. 32

[37] Article 8 of the Nuremburg Charter; Article 7 denied the immunity of the official position from foreign trials.

[38] Judgment of the International Military Tribunal for the trial of German war Criminals, His Majesty's Office (1946) pp. 130-131

allowing a subordinate to use superior orders as a defence. The principles of international law recognized by the Nuremberg Tribunal and the Judgment of the tribunal were unanimously endorsed by the UN General Assembly Resolution 95 (1) on December 1950.

The said Nuremberg Principles which contain the principle of negation of the defence of superior orders as principles IV, were formulated by the international law commission and accepted by the United Nations General Assembly on 12 December 1950.[39] This means nothing, but in fact that the negation of the defence of superior order might have been seen as evidence of customary international law at this period.

Internationally, Article 4(b) of the Control Council 10[40] and Article 6 of the Tokyo Charter[41] are identical to article 8 of the Nuremberg Charter, a further reflection of customary practice at this period. Sadly, neither the Geneva Conventions of 1949[42] nor the Additional Protocols of 1977 did refer to the issues of the defence of superior orders. Article 86 and 87 of Additional Protocol 1 [43] states the responsibility of commanders but did not include the provision on the defence of superior orders.

From the end of World War II to the early 1990s, the international community continuously failed to promulgate any international codification concerning the defence of superior orders except the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Article 2 of the Convention provides that an order from a superior officer or a public authority may not be invoked as a justification of torture.[44]

However, the collapse of the Soviet Union and subsequent emerging regimes and states of Russia changed a trend of international relations, which has made it possible for the international community to develop and codify the principles of international criminal law established in Nuremberg and Tokyo. The international community took big steps towards the revival of the idea of the negation of the superior order pleas after an interval of five decades. The Security Council established two *ad hoc* international tribunals; the former is the ICTY established in 1993 by the United Nations Security Council Resolution 827, following ICTY Statute; and the ICTR established

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[39] (1950) II Yearbook of the ILC 373-5

[40] Article 4(b) of Allied Control Council Law No. 10 (20 Dec. 1945)

[41] Article 6 of the Tokyo Charter.

[42] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949; Geneva Convention (III) Relative to the Treatment of Prisoners of War; August 1949; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

[43] Additional Protocol 1 of 1977.

[44] Article 2 of Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, 10 Dec 1984. U.N.G.A. Res. 39146.

in 1994 by the United Nations Security council Resolution 955 (8 Nov. 1994), following the ICTR Statute.

The ICTY [45] and ICTR [46] have similar provisions following the Nuremberg Charter. Article 7(4) of ICTY Statute and 6(4) of ICTR Statute is to the effect that the fact that an accused person 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. The international community clearly reaffirmed the absolute liability principle.

A foremost case concerning a superior orders plea of the ICTY is the *Erdemovic* case, where Drazen Erdemovic participated as a member of the Bosnian Serb army in executing Bosnian Muslims. He was charged with the violations of the law of war and crimes against humanity. Erdemovic raised the plea of superior orders in the Trial Chamber as follows:

> "Your honour, I had to do this. If I had refused, I would have been killed together with the victims"[47]

Following Article 7(4) of the ICTY Statute, the Trial Chamber did not recognize a superior order as a defence but allowed it in mitigation because Erdemovic's guilty mind was undermined. Subsequently, Erdemovic was sentenced to a ten year term of imprisonment. The ICTR produced similar jurisprudence. [48] The ICTY and the ICTR have laid a corner stone of reaffirming the principles of international criminal law. Following the Nuremberg Principles, the doctrine of absolute liability was sustained and superior order defence rejected with no exception.

Article 33 of the Statute of International Criminal Court: A Critical Appraisal

The two approaches of absolute liability and intermediate concept re-emerged at the Rome Conference. The absolute liability doctrine was strongly advocated particularly by the German delegation; it argued that having been laid down in the London Agreement the principle according to which subordinates are always criminally liable for the execution of orders involving the commission of international crimes had become a customary rule of international law. The intermediate liability approach was forcefully advanced by the United States delegation which contended that the post-World War II national case law had superseded the Nuremberg standard. As

[45] International Criminal Tribunal for the Former Yugoslavia.
[46] International Criminal Tribunal for Rwanda
[47] Prosecutor v. Erdemovic IT – 96 – 22 – T, 29 November 1996, para. 10.
[48] See Prosecutor v. Cesic, IT – 95 – 101 – S, 11 March 2004, Paras 58-60; Prosecutor v. Bralo, 10, IT – 95 – 175, 7 December 2005, para 1; Prosecutor v. Jelisic, IT – 95 – 10 – T; 4 December 1999, para 2.

a result the delegation argued the principle whereby subordinates are only answerable for crimes committed in the execution of manifestly illegal orders had become part and parcel of customary international law.[49]

The clash between these two doctrines proved to be so strong that the drafting of Article 33 became one of the major stumbling blocks in the negotiations on Part Three of the Rome Statute on 'General Principles of Criminal Law'. The tough and prolonged discussions eventually led to a compromise. In essence, the two opposing positions were reconciled simply by juxtaposing them in the same rule. The absolute liability approach was adopted for genocide and crimes against humanity, while the other approach was chosen with regard to war crimes and possibly the crime of aggression[50] Thus, the two approaches were juxtaposed by attributing a different scope or field of application to each of them.[51]

This compromise was eventually reached because it enabled states meeting in Rome to take account of the main concern of the United States delegation: namely, to protect servicemen on the battlefield from international criminal responsibility in the event that they obey orders, the legality of which they are not in a position to appraise, to carry out combat operations. The same concern did not arise with regard to genocide and crimes against humanity because such crimes, although they may be perpetrated by military persons, are always part of a widespread or

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[49] The US proposal on superior orders provided: 'In addition to other grounds for excluding criminal responsibility permitted by this Statute. a person is not criminally responsible if at the time of that person's conduct: ... (c) The person was a member of forces acting pursuant to the order of a Government or of a military commander, unless the person knew the order to be unlawful or that the order was manifestly unlawful' (A/CONF.183/C.lIWGGP/L.2. 16 June 1998. Proposal by the United States of America for Single Provision Covering Issues Currently Governed by Articles 31.32.33 and 34)

[50] Paola Gaeta "The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law" 10 *EJIL* (1999), p. 172

[51] Current Article 33 of the Rome Statute has mainly retained the wording of Option B of the working paper on Article 32 of the Draft Statute, which provided as follows: '(1) The fact that a person's conduct was pursuant to an order of a Government or of a superior. whether military or civilian shall not relieve the person of criminal responsibility unless the order did not appear to be manifestly unlawful. [(2) In respect of the commission of the crime of genocide or a crime against humanity. a person shall not be exempted from criminal responsibility on the sole ground that the person acted pursuant to an order of a Government or a superior. or pursuant to national legislation). The other option contained in the working paper was Option A. which constituted an elaboration of the proposal of the US delegation. It provided: 'The fact that a war crime has been committed pursuant to an order of a superior authority. whether military or civil, does not deprive the conduct in question of its character as a war crime, nor does it relieve the person of criminal responsibility, unless the person did not know that the superior order was unlawful and the order was not manifestly unlawful.' SceAlCONF.183/C.lIWGGPIL.9, 24 June 1998.

systematic practice involving higher political and military authorities. Possibly the United States delegation felt that orders to perpetrate such large-scale and heinous crimes could only be issued by political and military authorities of non-democratic states. It therefore considered that the adoption of the absolute liability approach for genocide and crimes against humanity would not affect United States servicemen operating abroad.

In the Statute of the International Criminal Court, adopted in Rome on 17 July 1998, the response to this dilemma is embodied in Article 33, which provides:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior. whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.

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

Thus, Article 33 in effect entails three steps: (1) obedience to superior orders is not a defence; (2) unless the three requirements under (a). (b) and (c) are cumulatively met; (3) in any event, at least one of the three requirements - that under (c) - is never met in cases where the order was to commit genocide or crimes against humanity. To put it differently, the plea of superior orders is never a defence to a charge of genocide and crimes against humanity since it is *a priori* established that orders to commit these crimes are *always manifestly unlawful.* In contrast, superior orders may be successfully used as a complete defence in those situations where the charge is one of war crimes. Indeed, Article 33 allows for the possibility that orders to commit war crimes, as opposed to genocide and crimes against humanity are not manifestly unlawful. If the requirements under (a) and (b) are met, then whenever an order is not manifestly illegal, superior orders can be used as a complete defence[52].

[52] The same holds true for the crime of aggression, assuming that a provision defining this crime and setting out the conditions for the exercise of the jurisdiction of the Court will be adopted in accordance with Articles 121 and 123 (see Article 5 of the Rome Statute). The question whether or not obedience to orders constituted a defence to a charge of war crimes was left unsettled in the Draft Statute, Article 32. para. 1, which provided as follows: 'The fact that a person's conduct was pursuant to an order of a Government or of a superior [whether military or civilian] shaU [not] relieve the persons of criminal responsibility [[if] [unless) the order [was known to be manifestly unlawful or) appeared to be manifestly unlawful]'. The Draft Statute negated the defence only in relation to a charge of genocide and of crimes against humanity (see Article 32, para, 2. of the Draft Statute according to which: 'The perpetrator or an accomplice in a crime of genocide [or a crime against humanity) [or a ...) shall not be exempted from criminal responsibility on the sole

By admitting, under certain circumstances, the defence of superior orders to a charge of war crimes[53], the drafters of the Rome Statute departed from the' Nuremberg model', under which subordinates were *in any case* responsible for crimes committed while following orders.' This deviation is all the more striking since the Security Council, through the adoption of the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, recently reaffirmed the validity of the Nuremberg approach.

It is the view of this author that there is a disparity between Article 33 of the ICC Statute and previous international legislation. This conclusion is inescapable in view of the accessed status of relevant customary international law which has revealed that Article 33 of the Statute of ICC is not in keeping with that body of law. This position is even more important because, in consideration of Article 10, of the Statute of ICC, it would seem that Article 33 - as much as other substantive provisions of the Statute on the

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ground that the person's conduct was pursuant to an order of a Government or a superior. or pursuant to national legislation or regulations').

[53] The notion that war crimes do not embrace all violations of international humanitarian law but only serious violations of such law has been recently upheld by the ICRY decision on Jurisdiction of 2 October 1995, The *Tadic* case (Case No. IT-94-1-AR72), paras 91-95. The same notion has been subsequently adopted by the ICRC for which three classes of violations of international humanitarian law constitute a war crime. These are (a) grave breaches of international humanitarian law applicable in international armed conflict; (b) other serious violations of international humanitarian law applicable in international armed conflicts; (c) serious violations of international humanitarian law applicable in non-international armed conflicts. See Working Paper Prepared by the ICRC for the Preparatory Committee for the Establishment of an International Criminal Court, New York. 14 February 1997. An example of a minor violation of the laws of warfare not amounting to a war crime was adduced in the Closing Address for the defence in the Sandrock et al. case, heard by a British military court sitting at Almelo, Holland. The defence counsel, while admitting that a spy may not be sentenced to death without trial, emphasized that 'if one is held and the sentence of death is passed. failure to carry out incidental provisions, such as sending information to the Protecting Power, or to the next of kin, need not necessarily be construed as a crime' (The Almelo Trial, in Law Reports. supra note 14. vol. I, at 39, emphasis added). As another example of 'not serious' violations of the laws of warfare, reference can be made to actions in breach of Article 124, para. 3, of the Fourth Geneva Convention of 1949 which provides as follows: 'Women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women.' Arguably, the illegality of an order to commit actions prohibited by the aforementioned rules of warfare cannot be considered 'obvious'; it follows that the defence under discussion can successfully come into play in those national legal systems which take the conditional liability approach. The same holds true for other minor violations of the laws of war.

"General Principles of Criminal Law" - intends to codify existing customary Law[54]

Despite the flaws inherent in this compromise position, Article 33 is not without merit. Article 33 is to be commended in at least three respects. First it has ruled out the possibility of the plea of superior orders for the most odious and egregious international crimes, i.e. genocide and crimes against humanity, offences which normally involve widespread attacks on innocent civilians. Secondly, Article 33 reverses the *presumption* generally made in all those national laws which take the intermediate liability approach. National laws provide that, as a rule, the plea of superior orders is a defence, after which they set out the requirements which render the defence invalid. It is for the prosecution to demonstrate the absence of these requirements. By contrast, under Article 33, there is first the presumption that the plea of obedience to orders is not a valid defence, and then the requirements are laid down for the plea to be accepted[55]. Hence, it is up to the defence to prove the existence of those requirements before the International Court, including the not manifest illegality of the order. Thirdly, the mere fact of reaching agreement on Article 33 constitutes a significant advance. This is all the more true because the lack of a treaty rule on this matter would have been inconsistent with the thrust of the Rome Statute: to translate general principles of international criminal law as much as possible into *lex scripta*, thereby better safeguarding the rights of the accused. Plainly, the failure of states to agree upon a rule on superior orders in the 1949 Geneva Conventions as well as the 1977 Protocols did not have a major negative effect. These treaties were not intended to establish an international mechanism for the prosecution and punishment of international crimes. They classified as criminal certain categories of action and left to national courts the task of trying persons allegedly responsible for those crimes. National courts were then to settle any possible legal uncertainty concerning the defence under discussion by relying upon national legislation. By contrast, it would have been extremely difficult to establish the International Criminal Court without laying down by treaty rule the applicable principle on superior orders. States would not have easily accepted the Court's jurisdiction without knowing in advance how the

[54] Article 10 provides that: 'Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute' (emphasis added). Hence, the drafters of the Rome Statute considered that only the provisions contained in Part One of the Statute, i.e. the Part to which Article 10 makes reference were not intended to affect existing (or developing) customary law; namely, they were not, among other things. simply to codify existing customary rules. It could be argued a *contrario* that all the other Parts of the Statute including Part Three concerning General Principles of Criminal Law *inter alia* aimed at codifying existing rules of customary international law or. at least, at spelling out principles of *lex lata* without however excluding the possibility of laying down laws that departed from established rules or principles.

[55] Paola Gaeta, *Supra note 50*, p. 176

question of superior orders would be regulated, particularly because *their own servicemen* could be brought before the Court.

Despite its merits, Article 33 must be faulted, primarily because it departs from customary international law without any well-grounded motivation. This departure is even more questionable given that Article 33 is basically inconsistent with the codification of war crimes affected through Article 8 of the Rome Statute. On the one hand, Article 33 provides for the validity of the defence in cases of war crimes, on the assumption that orders to commit war crimes may be issued that are *not* manifestly unlawful and thus subordinates may be ignorant of their illegality. On the other hand, Article 8 sets out an exhaustive list of war crimes, which covers acts that are unquestionably and blatantly criminal. How would it be possible to claim that the order to commit one of those crimes is *not* manifestly unlawful or that subordinates cannot recognize its illegality?

The contradiction is indeed striking because the Preamble to the ICC Statute makes it clear that the states gathered at the Rome Diplomatic Conference were 'determined to put an end to impunity for the perpetrators' of *'the most serious crimes of concern to the international community as a whole'* [56] How could it be argued that the order to commit one such 'most serious crime' might relieve a subordinate of his criminal liability, thus giving him full impunity for that crime?

Arguably, if the performance of an order by a superior implies the commission of a war crime, the order cannot but be considered manifestly unlawful, given the very serious nature of the conduct prohibited by the international rules on such crimes. The illegality of an order which constitutes a grave breach of the 1949 Geneva Convention (such as the order to kill, torture or treat inhumanely persons protected by the Conventions) is obvious. Similarly, orders to commit an action constituting a war crime under the Charter of the Nuremberg Tribunal or the Tokyo Tribunal are without doubt patently illegal. Moreover, as not *all* violations of international humanitarian law, but rather only *serious violations* of this body of law, fall into the category of war crimes," it would seem contradictory to brand an illegal act as *serious* and then, at the same time, to maintain that its illegality could not be manifest.

Possible criticism of the *manifest illegality* doctrine would be that the definition of manifest illegality is still not known. Article 33 (2) of the lCC Statute gives two examples; genocide and crime against humanity, thought it is not exhaustive. Article 33 of the ICC Statute should have made exhaustive exceptions to give concrete understanding to soldiers. According to the provision, international crimes other than genocide and crime against humanity major may not be manifestly illegal. The definition of the manifest illegality will depend on judges, which might cause a arbitrary use of a superior order defence. It has to be remembered that fighting soldiers on the battlefield can kill or injure enemy soldiers legitimately, which is not

[56] Emphasis Added.

illegitimate under international law at all. There are not distinct differences between licence to kill anyone and the right to kill or injure legitimately. The manifest illegality principle has to give a guideline to the subordinates, the role of which seems to be still unaccomplished.

As noted above, traditionally, it was felt that the subordinate, whilst committing the offensive deed, should not incur responsibility for following the illegal order. The rationale behind an accused to raise a defence of superior orders was based on practical common sense. To disobey an order can lead to reprimand, demotion and even court martial. After all, a soldier's first duty is to obey orders from a superior. Hence allowing a subordinate to raise a doctrine of superior orders recognizes that subordinate within the military have little or no direction in questioning orders of superiors.[57]

But after first and second World Wars, the court denied access to the defence of superior orders, ruling it to be unavailable where a subordinate has a "moral choice" to obey or disobey the order. This approach assumes that there are clear situations where subordinates should question and not follow certain orders which, by their very nature, are outside the realm of that which is morally and legally permissible.

The *ad hoc* international criminal jurisdictions have gone further, striking out altogether the possibility of raising a defence of superior orders. Instead, the statute of ICTR and ICTY allow only for mitigation of sentence[58]. This position is not surprising to us. As it reflects the Practice of states. Most military manuals and domestic laws today have departed from the traditional believe of unquestionability of orders, and to give effect to this, the defence if sustained in the required circumstance, is no longer exculpatory but mitigatory. We completely align ourselves with this position. It is in tandem with customary international practice. Our position is further strengthened by the fact that subordinates who are issued illegal orders will in almost all circumstance, have a moral choice. Human rights and international humanitarian law is now well entrenched nationally and internationally. Most states apart from being signatories to conventions have also taken steps to domesticate these rules. It is therefore, uncommon for states to punish a subordinate who disobeys an illegal order. The fear of diminution, demotion and even court martial is remote and unfounded. It is therefore recognized that there are limits to the blind obedience of orders by subordinates. Besides, the level of awareness of the rules of international law is high. This is because of the vigorous effects of the ICRC, United Nations and national governments. This has made superiors as much as subordinates to be conversant with their obligations in situations of armed conflicts. This being the case, a subordinate is more likely to know the legality or otherwise of an order; more so when the order is manifestly illegal.

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[57] L. Oppenheim, *International Law: A Treatise*,2nd ed., (London Longman, Green & Co. 1940) p. 107

[58] ICTR Statute, Article 6(4); ICTY Statute, Article 7(4)

Some scholars [59] have argued that, to so allow such a defense is understandable, given the complexity of modern-day asymmetrical warfare, with myriad parties involved, the blurring of the distinction between combatants and civilians, and the conduct of hostilities and controls of weapons from distant operation centers rather than in the field of combat[60]. The realities of contemporary warfare may make the task of addressing and distinguishing right from wrong, permissible from manifestly illegal, that much more of an arduous task for subordinates in the midst of combat[61]. This being so, it could be considered unjust to punish lay subordinates who acted in good faith[62]. We are not persuaded by these arguments. To expressly exclude war crimes from atrocities that are manifestly illegal, is to say the least, retrogressive. It creates adequate loophole for war criminals to escape justice. This avoidable lacuna will create ambiguity in evidential analysis and the discharging of the burden of proof in cases where war crimes have been committed. There is therefore the need for Article 33 of ICC to be amended to reflect customary international practice which is mitigatory rather than exculpatory.

It is to be hoped that in its case law the International Criminal Court will gradually bring Article 33 in line with customary international law. It should not be difficult for the Court to hold that orders to commit any of the crimes enumerated in Article 8 are always manifestly illegal and consequently can never provide a defence for subordinates.

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[59] Jamies Allan Williamson, "Some consideration on command responsibility and criminal liability" *International Review of the Red Cross*, vol 90, No. 870, 2008, p. 316.

[60] Ibid. p. 317

[61] Ibid

[62] Charles Garraway, "Superior Orders and the International Criminal Court: Justice delivered or Justice denied?" *International Review of the Red Cross*, vol. 81. No 836 (1999), p. 785.