9 Obedience to Orders, the First Defense

9.0. Introduction[1]

"I was only following orders!" The phrase has been heard so often in so many circumstances that it is its own parody. It is a plea mouthed by the relatively innocent junior soldier and by the duplicitous battlefield murderer. Is it a legitimate defense to grave breach charges? Was it ever a legitimate defense to war crimes? In all nations, among any soldier's first catechism is that he shall obey orders. "No military force can function effectively without routine obedience, and it is the routine that is stressed . . . But there is some ultimate humanity that cannot be broken down, the disappearance of which we will not accept. . . . Trained to obey 'without hesitation,' they remain nevertheless capable of hesitating."[2]

In 1996, in Berlin, former German Democratic Republic (GDR) border guards who killed German civilians fleeing to the West raised the defense of obedience to superior orders.[3] In Rome, also in 1996, a former S.S. Captain invoked the defense,[4] as did a French National Assembly deputy, in Paris.[5] In International Criminal Tribunal for the Former Yugoslavia (ICTY) trials, Serb and Croat defendants raise the defense today.[6] In Germany, in 1999, a former Gestapo agent was tried for assisting in the murder of 17,000 Jews at the Nazi death camp at Maidanek, Poland, during World War II. His defense: I was only following orders.[7]

Is a soldier immune from punishment because his or her acts were carried out pursuant to the orders of a superior? It was not until World War II that the question of personal responsibility appeared resolved. In fact, World War II, Nuremberg, and the "subsequent proceedings" materially altered the legal position of the soldier who pleaded obedience to superior orders in defense of his war crimes.

[1] An early version of this chapter appeared in 15–2 *American U. Int'l L. Rev.* (1999), 481–526.
[2] Michael Walzer, *Just and Unjust Wars*, 3d ed. (New York: Basic Books, 2000), 311.
[3] *Border Guards Prosecution Case* (1996), 5 StR 370/92 [BGH] [Supreme Court] (FRG). Convicted of manslaughter, the defendants were sentenced to twenty months' probation, suspended. Five years later, "In a landmark judgment, *Streletz, Kesler and Krenz v. Germany*, the European Court of Human Rights . . . unanimously held that criminal prosecution of the leaders of the German Democratic Republic (GDR) for ordering to kill individuals attempting to flee the GDR is compatible with the principle *nullum crimen sine lege* and . . . the prohibition on retroactive criminal laws . . . " 95–4 *AJIL* (Oct. 2001), 904.
[4] The 84-year-old Priebke was eventually sentenced to life in prison.
[5] *Papon* case, unpublished transcript of Judgment (18 Sept. 1996), *Cour d'appel de Bordeaux, Chambre d'accusation Arrêt du*, no. 806.
[6] *Prosecutor v. Erdemović*, IT-96-22-T (1997).
[7] "Germany: Ex-Gestapo Agent on Trial," *NY Times*, April 28, 1999, A10.

9.1. A History of the First Defense

Obedience to orders, a defense as ancient as the laws and rules of war, has been the most frequent defense raised by soldiers charged with their violation, whatever the incarnation of those laws. It rarely is a successful defense.[8] One of the first recorded instances of its use as a defense was in 1474, when Peter von Hagenbach, appointed governor of Breisach by Charles of Burgandy, unsuccessfully raised the defense to charges of murder, arson, and rape. (See Chapter 1, Cases and Materials.) Captain Axtell, the guard commander at the execution of Charles I, one hundred thirty years after von Hagenbach, raised the same defense and fared no better. In the guard commander's case the English court held, "[The captain] justified all that he did was as a soldier, by the command of his superior officer, whom he must obey or die. It was . . . no excuse, for his superior was a traitor . . . and where the command is traitorous, there the obedience to that command is also traitorous."[9] Both von Hagenbach and Axtell were convicted and put to death. Then as now, societies faced the dark deeds of their own, as well as those of the enemy's. Too often, those deeds arose not from passions raised in battle, but from the directions of superiors to subordinates.

In his plays, Shakespeare (1564–1616) told of the dire consequences of soldiers' obedience to illegal orders.[10] In the seventeenth century, Grotius wrote, " . . . [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."[11] Apparently no adherent of Grotius, the British Military Code of 1715, from which America's first military laws were drawn, was said to have provided that refusal to obey a military order was a capital offense, no qualification being made as to the lawfulness of the command.[12]

In early America, the defense of superior orders was first defined in nonmilitary civil and criminal cases tried in U.S. domestic courts – employers' instructions to employees and police supervisors' orders to patrolmen. Those early cases rejected the defense if the order upon which the subordinate relied was illegal in the abstract, without considering the order's appearance of legality to the subordinate.[13] In an 1813 civil case involving a police officer, the court enunciated a civilian standard that has stood the test of time for combatants, as well as civilian noncombatants: Obedience to a superior's order

[8] A May 2005 Russian Federation court-martial of several special forces members resulted in acquittal of murder and destruction of civilian property based "on orders from their superiors and that military discipline had compelled them to commit their actions." 87-859 *Int'l Rev. of the Red Cross* (Sept. 2005), 593.

[9] *Axtell's Case* (1661), Kelyng 13; 84 E.R. 1060.

[10] Theodor Meron, "Leaders, Courtiers and Command Responsibility in Shakespeare," in Michael Schmitt and Jelena Pejic, eds., *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Martinus Nijhoff, 2007), 403–11.

[11] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, Francis W. Kelsey, trans. (New York: Hein reprint, 1995), Book I, Chap. 4, § I.3.

[12] Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes," 21 *British Yearbook of Int'l L.* (1944), 58, 73. However, a review of Col. William Winthrop, *Military Law and Precedents*, 2d ed. (Washington: GPO, 1920), reveals no British Code of that date. Art. XV of the 1688 British Articles of War does provide that any disobedience shall result in "such Punishment as a Court-Martial shall think fit." There is no such disobedience provision in the British Articles of War of 1765 nor in the American Articles of War of 1775, 1776, or 1786.

[13] *E.g.*, *U.S. v. Bright*, 24 F.Cas. 1232 (C.C.D. Pa., 1809).

is not a defense if the subordinate knew, or should have known, that the order was illegal.[14]

The first recorded case of an American military officer pleading the order of his superior in defense of having committed an offense grounded in international law was that of Navy Captain George Little. In 1799, during the U.S. war with France, and pursuant to a federal law, Captain Little seized the Danish ship *Flying Fish*. The seizure, alas, was not in conformance with the federal law relating to seizures, although it was in keeping with President John Adams's written instructions as to how that law should be carried out by U.S. naval commanders. The owners of the Danish ship sued for damages. In the subsequent Supreme Court opinion – an opinion that could have current relevance – Chief Justice John Marshall wrote for the majority that naval commanders acted at their peril when they obeyed presidential instructions that were at variance with the law. If the instructions are not "strictly warranted by law" the commander is answerable.[15] If the instruction is illegal it may not be obeyed, and he who *would* obey is tasked with recognizing its illegality.

This military officer's burden of legal interpretation was even greater for the unschooled seaman or soldier. In those early days, however, there are no recorded cases of enlisted soldiers or sailors being charged with committing illegal acts pursuant to a superior's order. An opinion addressing that situation would wait another sixty-three years, until 1867.

In 1813, Captain Little's unsuccessful defense was raised in another federal case involving a superior's command, and it was again rejected. The junior officers of a privateer pleaded their captain's order in defense to charges of their assault and theft on board a captured ship. The court held, "No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify the act . . . The participation of the inferior officer, in an act he knows, or ought to know to be illegal, will not be excused by the order of his superior."[16] So the 1804 *Little* standard was made clearer: A military officer is liable for those orders that he knows, *or should know*, to be illegal.

In an 1849 case, Private Samuel Dinsman, a Marine embarked aboard the *USS Vincennes*, disobeyed the orders of the ship's captain, receiving twenty-four lashes ("stripes") and confinement, as a consequence. In approving Dinsman's punishment, the high court emphasized the authority of military officers and the folly of a subordinate questioning their orders: "[An officer's] position . . . in many respects, becomes quasi judicial. . . . Especially it is proper, not only that a public officer, situated like the defendant [the ship's captain], be invested with a wide discretion, but be upheld in it . . . It is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error."[17] Early on, then, the Supreme Court's view of officer–enlisted relationships, based in part on British cases,[18] allowed little room for military subordinates to question a superior's orders.

[14] *E.g.*, *U.S. v. Jones*, 26 F. Cas. 653 (C.C.D. Pa., 1813).
[15] *Little et al. v. Barreme et al.*, 6 U.S. (2 Cranch) 170, (1804). To the same effect, *U.S. v. Jones*, id.; and *U.S. v. Bevans*, 24 F.Cas. 1138 (C.C.D. Mass. 1816), and more recently, *Neu v. McCarthy*, 309 Mass. 17, 33 N.E.2d 570 (1941).
[16] *U.S. v. Jones*, supra, note 14.
[17] *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 129–30, 131 (1849).
[18] Several such cases are cited in *Wilkes*, id., at 131.

Thirty-eight years after the *Little* case, in 1851, the Supreme Court decided the same issue with the same result, Chief Justice Roger Taney adding, "The [superior's] order may palliate, but it cannot justify."[19] This *dictum*, which has since become U.S. policy, suggested that a superior's order might extenuate an offense committed at that order, leading to a lesser punishment.[20]

Until then, the focus had been either on the officer's legal responsibility for issuing an improper order or on the subordinate's penalty for disobeying the officer's proper order. In 1867, a federal district court addressed the enlisted man's liability, not for disobeying, but for executing an *illegal* superior order. In *McCall v. McDowell*, the court declared, "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."[21]

So, after 1867, in at least one Federal Court district, enlisted American soldiers and sailors were essentially off the legal hook. If one were to connect Captain Little's 1804 Supreme Court opinion with McCall's 1867 federal opinion, a first implicit standard for military personnel was established: The acts of subordinates, even if illegal, were protected by the orders of their superiors, unless such orders were *clearly* illegal. The superior remained liable for any illegal act or order given.[22]

Throughout this period Great Britain took the same tack as the United States. During the Napoleonic Wars, for example, a young British ensign, at his superior's order, killed a French prisoner. A Scottish court rejected the ensign's plea of superior orders in terms an American officer of that day might have recognized: "If 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 . . . Every officer has a discretion to disobey orders against the known laws of the land."[23]

The Lieber Code is silent on whether superior orders could justify a violation of the rules he recorded. Lieber apparently presumed that the opinions announced by U.S. domestic courts would control the issue. Despite the Code's silence, the Civil War raised another opportunity for a court to rule on the issue in the military commission that tried Major Henry Wirz, commandant of the Andersonville, Georgia, prisoner of war (POW) camp where 12,000 Union soldiers died. (See Chapter 2, Cases and Materials.) Charged with conspiracy to maltreat federal prisoners and thirteen counts of murder, Wirz pleaded that he had only obeyed his superiors' orders. The military commission found Wirz personally responsible for the acts charged and he was hanged, the Civil War's only soldier of either side to be executed for offenses amounting to war crimes.[24]

[19] *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1851). The *Harmony* decision was reasserted in *Dow v. Johnson*, 100 U.S. 158 (1879).
[20] Department of the Army, FM 27–10, *The Law of Land Warfare* (Washington: GPO, 1956), para. 509.a.
[21] *McCall v. McDowell*, 15 Fed. Cas. 1235 (C.C.D. Cal. 1867).
[22] Nineteenth-century American courts essentially rejected the doctrine of *respondeat superior*. That era's 9th Article of War read, "The principle of conduct is, that illegal orders are not obligatory."
[23] Alan M. Wilner, "Superior Orders As A Defense to Violations of International Criminal Law," 26 *Maryland Law Review* (1966), 127, 130.
[24] 8 *American State Trials*, 666 ff. (1918).

9.1.1. *The Twentieth Century's Evolving Standard*

The Civil War ended, a new century turned, and obedience to orders continued as a valid defense not only for enlisted men,[25] but for civilians tried in civil courts, as well.[26] In Great Britain a military case, *Regina v. Smith*, reached the same conclusion: "By focusing . . . on the state of mind of the actor and the surrounding circumstances, a reasonable belief in the legality of the orders would exculpate the defendant by negating the requisite *mens rea*."[27] The Second Boer War (1899–1902) provided several other British cases involving the defense, the most notorious of which involved Lieutenant Harry H. "Breaker" Morant, executed after failing in asserting a defense of superior orders.[28]

For the United States and Great Britain, the standard of the mid-nineteenth century remained fixed: An officer was criminally responsible for the issuance or execution of orders he knew, or should have known, to be illegal. Subordinates were *not* liable for illegal orders they carried out, unless the illegality of those orders was clear.

Case law was just beginning to define what "clear illegality" meant. Two civilian appellate opinions refer to illegal orders as those whose illegality was "apparent and palpable to the commonest understanding,"[29] and "so plain as not to admit of a reasonable doubt."[30] Still, a lack of legal clarity as to the meaning of "clear illegality" would persist into the twenty-first century.

In 1902, during the U.S.–Philippine War, several American officers were charged with committing or ordering war crimes,[31] including a U.S. Marine Corps major, who testified that he had been ordered by an Army brigadier general to kill and burn, and told that the more he killed and burned the more it would please the general.[32] The major was acquitted. The general was tried for his order and was convicted. In 1906, however, the prominent British publicist, Lassa Oppenheim, wrote that obedience to superior orders constituted *a complete defense* to a criminal prosecution. "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 may not be punished, for their commanders are alone responsible . . . "[33]

Basing his formulation on traditional concepts of international law, Oppenheim intertwined obedience to orders with *respondeat superior* (let the superior answer) and its related Act of State doctrine. In doing so, Oppenheim was instrumental in bringing about a major change to the obedience defense. Enlisted soldiers bore no personal

[25] *E.g.*, *Riggs v. State*, 43 Tenn. 85 (1886); *In re Fair, et al.*, 100 Fed. 149 (D.Neb. 1900).
[26] *E.g.*, *Hately v. State*, 15 Ga. 346 (1854); *Thomas v. State*, 134 Ala. 126, 33 So. 130 (1902).
[27] *Regina v. Smith*, 17 Cape Reports 561 (S. Africa 1900), the era's leading British case that rejects the defense of obedience to orders.
[28] Kit Denton, *Closed File* (Adelaide: Rigby Publishers, 1983), a lay account reflecting a case history far different from the 1982 film, "Breaker Morant."
[29] *In re Fair*, supra, note 25, at 155.
[30] *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903).
[31] See: Guénaël Mettraux, "US Courts-Martial and the Armed Conflict in the Philippines (1899–1902): Their Contribution to National Case Law on War Crimes," 1–1 *J. of Int'l Crim. Justice* (April 2003), 134–50.
[32] *U.S. v. Maj. Littleton W.T. Waller* (General court-martial, Manila, P.I., Special Order No. 54, March 1902). Unreported.
[33] Lassa F. L. Oppenheim, *International Law*, vol. II, 1st ed. (London: Longmans Green, 1906), 264–5.

responsibility, Oppenheim held, when superiors ordered their criminal acts. Even the clear illegality of the orders was not an issue. (Forty-two years later, in the judgment of the post–World War II "Hostage Case," the tribunal dryly noted of this change, "We think Professor Oppenheim espoused a decidedly minority view."[34]) In 1912, Oppenheim wrote Great Britain's handbook on the rules of land warfare, a revision of Britain's first 1903 manual.[35] The new handbook by Oppenheim incorporated his view that, for subordinates, obedience to orders constituted a complete defense to law of war charges.

Looking to the British example, as the United States historically did in matters of military law and, to a lesser degree, looking to France's new manual on the topic, America revised General Orders 100 and, in 1914, published its first law of war manual. *Rules of Land Warfare (1914)*, paragraph 366, "Punishment of Individuals – War Crimes," reads, " . . . 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."

With this paragraph, the United States joined Britain in making a subordinate's obedience to orders a complete legal defense, setting aside American military and civilian case law of the previous 110 years. Although the U.S. manual held that officers ordering illegal acts "may be punished," the next phrase, "by the belligerent into whose hands they may fall," suggests that, should the officer never be captured, or should he be of the ultimately victorious army, it was questionable if there would be any punishment at all.

Curiously, Imperial Germany, where obedience was popularly thought to be absolute, employed a less forgiving rule for its soldiers. Subordinates were punished if they executed an order knowing that it related to an act which obviously aimed at a crime, "even if no crime was actually committed. It is sufficient if the order aims at the commission of a crime or offense."[36] No *actus reus* required.

In the United States, the various versions of the Articles of War were the precursors of today's Uniform Code of Military Justice, setting out offenses for which soldiers could be tried and punished. Article 64 of the 1912 Articles of War was pertinent to the issue of obedience of orders. That article, willful disobedience of a superior officer, is explained in the Army's 1917 *Manual for Courts-Martial* (the first such *Manual*). The *Manual*'s discussion of Article 64 notes that willful *dis*obedience of "any lawful command of his superior officer" was punishable.[37] Furthermore, "An accused can not be convicted of a violation of this article if the order was in fact unlawful; but, unless the order is plainly illegal, the disobedience of it is punishable . . . "[38] The *Manual*'s discussion completely ignored the contrary *Rules of Land Warfare* paragraph 366 providing the accused a complete defense.

In practice, however, the two manuals did not conflict. If a soldier obeyed a superior's order, for example, to murder prisoners, the issue of disobedience did not arise, and the

[34] *U.S. v. List and 10 Others* ("The Hostage Case"), *T.W.C. Before the Nuernberg Mil. Tribs.*, vol. XI (Washington: GPO, 1950), judgment, 1237.

[35] Donald A. Wells, *The Laws of Land Warfare: A Guide to the U.S. Army Manuals* (Westport, CT: Greenwood Press, 1992), 5.

[36] *U.S. v. Ohlendorf and 23 others* ("The Einsatzgruppen Case"), *T.W.C. Before the Nuernberg Mil. Tribs.*, vol. IV (Washington: GPO, 1950), 486.

[37] *A Manual for Courts-Martial, Courts of Inquiry and Other Procedure Under Military Law* (Washington: GPO, 1916), 208.

[38] Id., at 210.

soldier was protected from punishment for his illegal act by the land warfare manual – superior orders were the soldier's complete defense. In contrast, if the soldier *refused* to obey the order to shoot the prisoners, he was protected from punishment by the *Manual for Courts-Martial* – the order's illegality exempting him from prosecution for disobedience.

America fought World War I with those two dueling manuals in effect, while U.S. civilian law continued its steady and separate path regarding obedience to orders, a path contrary to the new military standard.

During the Great War, the Allies considered punishing Germans who had violated the law of war, from the Kaiser to the lowest conscript. At the war's conclusion, the Preliminary Peace Conference created a Commission on Responsibilities* to study the issue of accountability for the war. In March 1919, the Conference reported, "military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offense. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged . . . "[39] Although this statement of the Commission related to senior government and military authorities, it was also applicable to more junior officers. Thus, contrary to the U.S., British, and French field manuals of the day, Article 228 of the Treaty of Versailles ("Bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.") documented the intention of the Allies to seek individual responsibility for law of war violations and disregard any defense of superior orders. The U.S. military standard was not to be applied. An international law scholar of the period wrote, "[Article 228] appears to be the first treaty of peace in which an attempt has been made by the victorious belligerent to enforce against the defeated adversary the application of the principle of individual responsibility for criminal acts during war by members of his armed forces against . . . the other party."[40]

There were Leipzig proceedings that provide a window to the German court's thinking as to the concept of obedience to orders. In a harbinger of Grand Admiral Karl Dönitz's World War II Nuremberg trial, Grand Admiral Turpitz, Secretary of State of the German Navy from 1914 to 1916, was charged with having originated and issued orders for unrestricted submarine warfare, but the High Court at Leipzig found that responsibility did not lie with him (or his coaccused successors, Admirals Von Capelle, Scheer, Hipper, and Muller). Instead, responsibility lodged in the Supreme Command of naval operations, the ex-Kaiser himself. At Leipzig, no personal responsibility was to be found in the high command. Turpitz and his fellow admirals were acquitted.

Two notable Leipzig cases were defended on the basis of superior orders. Lieutenant Karl Neumann, commander of a German submarine, admitted that he had torpedoed and sunk the British hospital ship, *Dover Castle*, pleading that he did so only in obedience to orders issued by the Admiralty. The German government had asserted that Allied hospital ships were being used for military purposes, in violation of customary international law, and declared in a March 1917 order that hospital ships not complying with several German conditions would be attacked. Neumann, the court held, believed the order to be a lawful reprisal, as the order specified, and thus he was not criminally

* Officially titled The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.

[39] J.W. Garner, "Punishment of Defenders Against the Laws and Customs of War," 14 *AJIL* (1920), 95, 117.

[40] Id., at 70–1.

responsible for the sinking he carried out. Citing the German obedience to orders standard, §47(2) of the German Military Penal Code,[41] by which a subordinate acting in conformity with superior orders is liable to punishment only when he knows that his orders constitute a felony or misdemeanor, Neumann was acquitted.[42] The Court held, "Subordinates . . . are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including the accused, to be without any doubt whatever against the law."[43] Obedience to orders was a complete defense – *unless* the order was patently unlawful.

A similar case saw a different result, however, and arguably set a lasting standard. The submarine U-86, commanded by Captain Helmuth Patzig, sank a Canadian hospital ship, the *Llandovery Castle*, with the loss of hundreds of lives. At trial, the evidence revealed that, just after the sinking, Patzig and two subordinates, Lieutenants Ludwig Dithmar and Johann Boldt, conferred and decided to conceal their act by killing the survivors. Patzig and another officer machine-gunned the 234 survivors in lifeboats and in the water, assisted by Dithmar and Boldt, who spotted targets and maintained a lookout. At least two lifeboats were sunk by gunfire, and many of the 234 were killed. A precise number was unknowable because many drowned or were killed by subsequent shark attacks.

Patzig, having taken refuge in Danzig, then an independent state, was ruled beyond extradition. Like Neumann before them, Dithmar and Boldt pleaded "not guilty" on the basis of superior orders from the German naval high command. Like Neumann, Dithmar and Boldt were found not guilty of sinking the hospital ship by reason of their obedience to superior orders that were not obviously unlawful. But their machine-gunning of survivors resulted in guilty findings for aiding and abetting manslaughter. The court held, "According to the Military Penal Code, if the execution of an order . . . involves such a violation of law as is punishable, the superior officer issuing such an order is alone responsible. However, the subordinate obeying such an order is liable to punishment if it was known to him that the order . . . involved the infringement of civil or military law. This applies in the case of the accused."[44]

Even for the Leipzig judges, shooting survivors in the water was manifestly contrary to customary law of war and, applying a test of actual knowledge, the judges found that the two accused must have known that to be so.

At Leipzig, in the twentieth century's first significant effort to assess criminal responsibility for battlefield war crimes, the German court applied the strict German military code's standard, a code similar to the one from which the American victors had retreated. The familiar German formulation: Subordinates were liable for carrying out orders they knew, or should have known, to be illegal. At the commander's level, officers issuing orders they knew, or should have known, to be illegal, were personally liable.

Whatever ironic justice there may have been in the convictions of Dithmar, Boldt, and Neumann dissipated when, several months after trial, all three escaped, apparently with the connivance of their jailers. And the American soldier's defense of obedience to orders remained unchanged. It was also essentially unconsidered by military courts.

[41] German Military Penal Code, 1872, which was based upon the Prussian Military Code, 1845.
[42] The *Dover Castle* Case, 16 *AJIL* (1921), 704, decided under German military law.
[43] Cited in Wilner, supra, note 23, at 134.
[44] The *Llandovery Castle* Case, 16 *AJIL* (1921), 705, also decided under German military law.

There was little incentive to do so. In 1920, the leading military legal scholar of the era, Army Colonel William Winthrop, wrote, "That the act charged as an offense was done in obedience to the order – verbal or written – of a military superior, is, in general, a good defense at military law." However, a few lines later he added,

> The order, to constitute a defense, must be a *legal* one. . . . It is the 'lawful command of his superior officer' which by the 21st Article of war*, 'any officer or soldier' may be punished even with death for disobeying. . . . Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it . . . [except] orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.[45]

This caveat to the standard announced in the 1914 *Rules of Land Warfare* was Winthrop's addition, and was not reflected in the *Manual for Courts-Martial*. It was historically based and reflected common sense, if not official policy. There was no evaluation of the authority of Winthrop's addition at court-martial because the nation was at peace, without occasion for a war crimes trial.

Today, military law expects soldiers to presume the lawfulness of their orders.[46] Case law suggests that, even if a soldier doubts the legality of an order, but remains unsure, he will not be held liable for obeying an unlawful order.[47] As the Nuremberg International Military Tribunal (IMT) noted, it is not "incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality."[48]

Between the wars, court-martial cases centered on the offense of *dis*obedience, rather than obedience. The *Rules of Land Warfare* still made superior orders a complete defense to battlefield war crimes. The common military offense of disobedience, with its prerequisite for acquittal being the illegality of the order, had little bearing on invocation of the war crime defense.

9.1.2. *Genesis of the Current American Standard*

Prior to World War II, customary law of war was considered to apply to nations, rather than individuals. Act of State doctrine, in the context of domestic courts, held that no state could exercise jurisdiction over another state. This position was based on then-accepted principles of the sovereignty and the equality of states. Associated with this doctrine, sovereignty was regarded as attaching to individuals within a state. The sovereign was a definable person to whom allegiance was due and, as an integral part of his or her mystique, the sovereign could not be made subject to the judicial processes of his country or any other country.[49] Vestiges of Act of State doctrine survive in today's exemption from suit of certain governmental entities and persons officially acting for those entities – in

* Article 64, 1912 Articles of War.

[45] William Winthrop, *Military Law and Precedents* (Washington: GPO, 1920), 296–7, emphasis in original.

[46] *E.g.*, *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989). When the defense raises the issue of lawfulness by some evidence, the prosecution has the burden to disprovs lawfulness beyond a reasonable doubt. *U.S. v. Tiggs*, 40 C.M.R. 352 (A.B.R. 1968).

[47] *U.S. v. Kinder*, 14 C.M.R. 742, 750 (A.F.B.R., 1954).

[48] *U.S. v. von Leeb* ("The High Command Case") XI *TWC* (Washington: GPO, 1950), 510–11.

[49] The classic case illustrating the relationship between territorial jurisdiction and sovereign immunity is *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116 (1812).

American jurisprudence the *Feres* doctrine, for example.[50] In 1918, however, the Allies' postwar attempts to hold the Kaiser personally and criminally responsible as an "author" of the war represented a significant assault on Act of State doctrine. In the twentieth century the doctrine was dying, but in the 1920s and 1930s it was not yet moribund.

It was an aspect of Act of State doctrine that allowed the United States and Great Britain to view military officers as personifications of their states. If the state – exempt from criminal process – ordered a common soldier to act, the soldier had no choice but to obey. Having no choice, the soldier must be free of liability for that obedience. Western nations were coming to recognize, however, that military officers were not credible embodiments of the state. Even Kaisers, kings, and commanders were being questioned; the doctrine was in doubt. "In the extensive literature on the question of international crimes and international jurisdiction which has appeared since 1920 a considerable number of writers," Ian Brownlie reports, "have envisaged criminal responsibility of states alone . . . " As to individual criminal responsibility, he continues, "it is nevertheless suggested that the concept has no legal value, cannot be justified in principle, and is contradicted by . . . international law."[51] By the time of World War II Act of State doctrine had effectively been rejected.[52]

The numerous bilateral and multinational treaties of the interwar period were silent on the subject of superior orders, with the exception of the 1922 Washington Treaty relating, *inter alia*, to submarine warfare. With World War I's recent prosecutions of submarine commanders in mind, Article II of the Washington Treaty read: "Any 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 . . . "[53] The treaty was ratified by future World War II combatants America, Great Britain, Italy, and Japan, although rejected by France.

As the Second World War approached, the United States and Great Britain continued to view superior orders as a complete defense. In the 1929 edition of its land warfare manual, Great Britain held, as did the 1912 edition, "It is important, however, to note that members of the 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. He may punish the officials or commanders responsible for such orders if they fall into his hands . . . "[54] The manual did not say how its prohibition on punishing British subjects might be viewed by injured states holding British prisoners accused of war crimes.

In 1934, the United States published a second edition of *Rules of Land Warfare*. Its paragraph addressing superior orders was unchanged from the original 1914 edition. The failure of the manual's index to include a "superior orders" entry suggests the degree

[50] *Feres v. U.S.*, 340 U.S. 135 (1950).

[51] Ian Brownlie, *International Law and the Use of Force By States* (Oxford: Clarendon Press, 1963), 150–2.

[52] Hans Kelsen, "Collective and Individual Responsibility in International Law With Particular Regard to the Punishment of War Criminals," 31 *Cal. L. Rev.* (1943), 530; and Lassa Oppenheim, *International Law*, vol. II, Hersch Lauterpacht, ed., *Disputes, War and Neutrality*, 6th ed., rev. (London: Longmans Green, 1944).

[53] *Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States of America and Other Powers*, vol. III (1910–1923), 67th Con., Doc. No. 348, at 3118 (1923).

[54] Col. J.E. Edmonds and L. Oppenheim, *Land Warfare. An Exposition of the Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army*, ed. of 1929 (London: HMSO, 1912), Ch. X, para. 443, at 95.

of concern paid the issue. A soldier's law of war offenses remained fully exempt from prosecution if committed pursuant to the order of a superior. There was no qualification that the order must have been reasonable, legal, or within the authority of the superior.

9.1.3. *World War II and an Old "New" Standard*

In 1940, with the war already raging in Europe, the United States followed its 1934 law of war manual with yet another version. This version's paragraph 347 on superior orders replicated the 1934 and 1914 standard. By 1940, the more optimistic of the Allies began considering eventually punishing enemy leaders for their roles in the war; not only their senior leadership, but soldiers who might have committed battlefield war crimes, as well. In 1942 the Allies announced that "they intended to prosecute German and Japanese soldiers for obeying improper orders and to deny the opportunity for them to plead superior orders. But this clearly required a reassessment of our own [American] manual."[55] The results of Leipzig were not to be repeated; the Allies, not the enemy, would try enemy war crimes suspects. But we could not ourselves sponsor the defense we intended to deny the vanquished enemy.

Recall that in 1906 Oppenheim, in his text, *International Law*, was instrumental in establishing the prevailing UK/U.S. military standard of liability (or its lack) for obedience to illegal superior orders. Succeeding editions of his work continued to exert their influence among international legal authorities. The 1940 sixth edition was edited by Professor Hersch Lauterpacht, in place of then-deceased Oppenheim, and Lauterpacht made a significant amendment. He urged a reversion to the pre-1906 military standard, at the same time distancing himself from the standard that his predecessor's work had been instrumental in establishing. "The fact that a rule of warfare has been violated in pursuance of an order . . . of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. A different view has occasionally been adopted by writers, but it is difficult to regard it as expressing a sound legal principle."[56]

The fact that Lauterpacht's native Great Britain was engaged in mortal struggle with an enemy who would (it was hoped) face the international criminal bar surely had a bearing on this new stance. "By the sixth edition of 1940, the world looked very different . . . [and Lauterpacht] must have been influenced by the experience of the first year of the war. The earlier main rule was now relegated to a footnote . . ."[57] Lauterpacht noted the incongruity of differing civil and military standards,[58] and found that subordinate immunity was simply "at variance with the corresponding principles of English

[55] Wells, supra, note 35, at 24.

[56] Lassa Oppenheim, *International Law*, vol. II, Hersch Lauterpacht, ed., *Disputes, War and Neutrality*, 6th ed. (London: Longmans Green, 1940), 264–5.

[57] Martti Koskenniemi, "Hersch Lauterpacht and the Development of International Criminal Law," 2–3 *J. of Int'l Crim. Justice* (Sept. 2004), 810–25, 816–17.

[58] *Neu v. McCarthy*, 33 N. E.2d 570 (1941); and *State v. Roy*, 64 S.E.2d 840 (1951) are representative of cases wherein soldiers are convicted of civil wrongs in state courts despite "superior orders" defenses. "It is an interesting gloss on the complexity of the problem that in Great Britain and in the United States the plea of superior orders is, on the whole, without decisive effect in internal criminal or constitutional law, although it is apparently treated as a full justification in relation to war crimes . . . " Lauterpacht, "The Law of Nations," supra, note 12, at 72–3.

criminal and constitutional law . . . It is not believed to represent a sound principle of law . . . "[59] His altered position reflected a changing and maturing international law, as well as the withering of Act of State doctrine, with the concomitant ripening of personal responsibility for wrongful battlefield acts.

In January 1944, the newly formed United Nations War Crimes Commission took up the issue of obedience to orders. The United States was squarely behind a recommendation that the defense be rejected: "The plea of superior orders shall not constitute a defense . . . if the order was so manifestly contrary to the laws of war that a person of ordinary sense and understanding would know or should know . . . that an order was illegal."[60] The Commission could not reach agreement on the issue, however, stymied by the varied practice and laws of several member nations. Finally declaring it futile to attempt formulation of an absolute rule, the Commission recommended that 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."[61] The stage was set for basic change in America's superior orders doctrine, and it was not long in coming.

In April 1944, in a striking development, the UK revised its law of war manual, adopting almost word-for-word Lauterpacht's language in his sixth edition of *International Law*. That modification was, of course, a complete about-face. Seven months later, in November 1944, the United States similarly reversed and revised FM 27–10, *Rules of Land Warfare*, affirming that not only individuals, but organizations and government officials could now be considered culpable for law of war offenses: "Individuals and organizations who violate the accepted laws and customs of war may be punished thereof. However, 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. The person giving such orders may also be punished."[62] As before 1914, obedience to a superior's orders was no longer an automatic or complete defense. That paragraph was the sole change in the new 1944 manual.

France, to be consistent with its allies, made a similar change to its law of war manual, as did Canada. The Soviet approach remained, as it had always been, identical to the older American/British position.[63]

Throughout World War II, Nazi Germany itself professed an opposition to the defense of superior orders, adhering to the standard rediscovered by the United States and Great Britain in 1944. Early that year, after captured Allied pilots were murdered by German civilian mobs, Nazi propaganda minister Joseph Goebbels explicitly condemned the plea of superior orders as inadmissible in contemporary international law. "He did so, naturally, in regard to the Allies, and with the intention of justifying the Nazi practice of shooting captured Allied airmen."[64] In the *Deutsche Allgemeine Zeitung*, Goebbels wrote, "No international law of warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment by pleading as his defense

[59] Id., Lauterpacht, at 69, fn.2.
[60] Mark P. Osiel, *Obeying Orders* (New Brunswick, NJ: Transaction, 1999), 278.
[61] Id.
[62] Department of the Army, FM 27–10, *Field Manual: Rules of Land Warfare*, Change No. 1, 15 Nov. 1944 (Washington: GPO, 1944), para. 345(1).
[63] Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley: University of California Press, 1959), 491.
[64] U.N. War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948), 288.

that he followed the commands of his superiors."[65] In the official Nazi newspaper, *Volkisher Beobachter*, "The [Allied] pilots cannot validly claim that as soldiers they obeyed orders . . . if these orders are in striking opposition to all human ethics, to all international customs in the conduct of war."[66]

Throughout the war, the *Wehrmacht-Untersuchungsstelle für Verletzungen des Völkerrechts*, the Bureau for the Investigation of War Crimes, was a unit of the German Army. Knowing what we do about Nazi practices in Russia and other conquered territories, it is ironic that the Bureau regularly gathered evidence for the court-martial of Nazi soldiers charged with war crimes; reportedly, death sentences often resulted.[67]

Nazi battlefield excesses are often recalled, and rightly so. War crimes are not committed only by the enemy, however. World War II, like all wars before and after, was violent, brutal, and often unmindful of legal restrictions. Two examples are illustrative.

A troubling event involved the U.S. Navy commander who skippered the submarine *USS Wahoo* (SS-238). During a January 1943 patrol, the commander's boat surfaced after having sunk a troop-carrying freighter. The sea was filled with Japanese survivors – probably more than a thousand. "Whatever the number, [he] was determined to kill every single one."[68] He ordered the submarine's deck guns and machine guns to fire on enemy lifeboats and survivors in the water, which his sailors did, for more than an hour. The *Wahoo*'s second-in-command, Richard O'Kane, later a rear admiral and Medal of Honor holder, reported, "*Wahoo*'s fire . . . was methodical, the small guns sweeping from abeam forward like fire hoses cleaning a street. . . . Some Japanese troops were undoubtedly hit during this action, but no individual was deliberately shot in the boats or in the sea. The boats were nothing more than flotsam by the time our submarine had completed [firing]."[69]

On returning to Pearl Harbor, the *Wahoo* was lauded, the boat receiving a Presidential Unit Citation and her skipper a Navy Cross. In his patrol report, the submarine commander freely described the killing of the hundreds of survivors of the sunken transport. "To some submariners, this was cold-blooded murder and repugnant. However, no question was raised . . ."[70] The commander's order to fire on survivors appears no different than that of the World War I sub commander, Helmuth Patzig, who was sought as a war criminal by the Leipzig court. Patzig's subordinates, Dithmar and Boldt, were convicted by the Leipzig court of acts similar to those of the *Wahoo's* skipper's.[71]

[65] Id.
[66] Cited in Greenspan, *Modern Law of Land Warfare*, supra note 63, at 442.
[67] Alfred M. deZayas, *The Wehrmacht War Crimes Bureau, 1939–1945* (Lincoln: University of Nebraska Press, 1989), 10, 18, 20–1, 86.
[68] Clay Blair, Jr., *Silent Victory* (New York: Lippincott, 1987), 384.
[69] Richard H. O'Kane, *Wahoo* (Novato, CA: Presidio Press, 1987), 153–4.
[70] Blair, supra, note 68, at 386. During the November 1942 naval battle of Guadalcanal, for example, the tug *Bobolink*, at the command of her skipper, similarly machine-gunned Japanese survivors in the water. Samuel Eliot Morison, *History of United States Naval Operations in World War II*, vol. V (Boston: Little, Brown, 1966), 256.
[71] Historically, it has been forbidden to harm survivors of sunken vessels who are in the water. 1907 Hague Convention III for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Art. 16: "After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them . . . against pillage and ill-treatment." At World War II's Nuremberg IMT, Grand Admiral Karl Dönitz was charged with, but acquitted of, ordering Nazi submarines to kill shipwreck (i.e., sinking) survivors. *Trial of the Major War Criminals*, vol. I (Nuremberg: IMT, 1947), 313.

Excuses that "the defeat of the Axis required the use of force in a fashion that more squeamish times – when the fundamental *survival* of the West was less directly threatened – have been found repugnant,"[72] although they may have stated a popular view. Such excuses ignore the laws of war that states are obliged to observe.

By war's end, neither Nazi Germany nor Imperial Japan were in a position to charge battlefield war crimes by their enemies. The United States was, and in October 1945, the United States began its first World War II war crimes trial, that of General Tomoyuki Yamashita, commander of the defeated Japanese forces in Manila. The issue of superior orders did not arise directly in the course of Yamashita's trial before a military commission of five Army general officers. Later, however, Supreme Court Justice Frank Murphy, in a passionate and oft-quoted dissent from the Court's opinion involving Yamashita's conviction, noted that individual criminal responsibility lies not only in those who commit battlefield war crimes, but those who order them, as well.[73] Justice Murphy's affirmation of the 1944 *Rules of Land Warfare* standard, and the responsibility of commanders who order war crimes, differed little from Chief Justice Marshall's 1804 opinion regarding U.S. Navy Captain George Little and the *Flying Fish*. The Yamashita case would resonate beyond the Far East IMT,[74] even into the Vietnam War and the cases of Lieutenant William Calley and Captain Ernest Medina,[75] of My Lai infamy.

9.2. The Standard Applied: The Nuremberg IMT

The Nuremberg IMT's procedural rules were a product of the London Agreement of August 1945.[76] Article 8 of the IMT Charter embodied the change initiated by Professor Lauterpacht four and a half years earlier, and incorporated in the U.S. *Rules of Land Warfare* less than nine months previously. Article 8 read: "The fact that the defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment . . . " The Nazis were to be held criminally responsible, personally responsible, for war crimes they committed and for war crimes they ordered. Obedience to superior orders would be no legal shield. "The fundamental principle involved: the criminal responsibility of individuals . . . "[77] As the IMT noted in reference to war crimes, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who

[72] Williamson Murray, "The Meaning of World War II," 8 *Joint Forces Quarterly* (Summer 1995), 50, 54.

[73] *In re Yamashita*, 327 U.S. 1, 38 (1945), not a decision on the merits, but a decision on an application for habeas corpus and prohibition writs.

[74] B.V.A. Röling, "Introduction" to C. Hosoya, N. Andō, Y. Ōnuma, and R. Minear, eds., *The Tokyo War Crimes Trial: An International Symposium* (New York: Harper & Row, 1986).

[75] Gen. Yamashita was convicted of failure to control his troops whom he *knew, or should have known*, were committing war crimes, the long-established standard for a commander's liability. Medina was acquitted on the basis of his court's instruction that conviction must be based on the commander's *actual knowledge* of his troops' crimes. Medina's prosecutor acknowledged that the court's instruction (which was requested by the government) was erroneous. Col. William G. Eckhardt, "Command Criminal Responsibility: A Plea For A Workable Standard," 97 *Military L. Rev.* 1 (1982).

[76] BGen. Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10* (Washington: GPO, 1949), 1.

[77] U.N., *The Charter and Judgment of the Nurnberg Tribunal: History and Analysis* (New York: UNGA, 1949), 39.

commit such crimes can the provisions of international law be enforced."[78] The Tokyo IMT Charter's Article 6(b), as well as paragraph 16 of American Regulations Governing the Trial of War Criminals in the Pacific Area, were similar to Nuremberg's Article 8. As at Nuremberg, pleas of superior orders were unsuccessfully raised in Pacific Area cases, the *Jaluit Atoll Case*,[79] for example.

The American/British legal detour had lasted thirty years, but the Nuremberg IMT seemingly brought the soldiers' legal defense full circle: A law of war violation pursuant to a superior's manifestly illegal order remained a war crime. That was the law applied at Nuremberg and, as Geoffrey Best points out, "No element of Nuremberg legislation was more single-mindedly adhered to than this one, the emphatic assertion of individual responsibility. . . ."[80]

Still, it is not entirely correct to assert that, "The IMT Charter . . . *eliminated* the defense of superior orders."[81] As single-mindedly as the element may have been applied as to senior officers and officials, the IMT injected an unanticipated ameliorating factor not in keeping with a strict interpretation of the Charter: "The true test," the Tribunal noted, "which is found in varying degrees in the criminal law of most nations, is not the existence of the [manifestly illegal] order, but whether moral choice was in fact possible."[82] "Moral choice" was not, and is not, the same as simple "manifest illegality."

> The assertion that it [the "true test"] is in conformity with the law of all nations is patently false. More obscurely, it seems to add the requirement that there was no 'moral choice' to the test relating to superior orders. Dinstein gives the best explanation for this. He claims that in reality the Tribunal was accepting that superior orders were not, in and of themselves, a defence under the Nuremberg IMT Charter, but expressing its view that the existence of superior orders was relevant to other such defenses as coercion (duress).[83]

"The superior orders defense remains very much alive wherever the criminality of the defendant's conduct cannot convincingly be categorized as immediately obvious . . ."[84] Even after Nuremberg, "superior orders will still operate as a defense if the subordinate had no good reason for thinking that the order concerned was unlawful."[85]

Despite Nuremberg, the defense of superior orders lives. It is true that no military case is found in U.S. jurisprudence within the past sixty years in which the defense has been successful, but it cannot be said that the defense is dead.

[78] Brownlie, supra, note 51, at 154, citing *Trial of German Major War Criminals* (London: HMSO, 1946), 41.
[79] *Trial of Masuda, et al.* (1945), U.S. Mil. Comm., Marshall Islands, L.R.T.W.C., I.
[80] Geoffrey Best, *War and Law Since 1945* (Oxford: Clarendon Press, 1994), 190.
[81] Steven R. Ratner and Jason S. Abrams, *Accountability For Human Rights Atrocities In International Law* (Oxford: Clarendon Press, 1997), 6.
[82] The IMT is quoted in *U.S. v. Ohlendorf*, supra, note 36, at 471.
[83] Robert Cryer, "The Boundaries of Liability in International Criminal Law, or 'Selectivity by Stealth,'" 6–1 *Conflict & Security L.* (June 2001), 3–31, 12. Footnotes omitted. In accord: Hans-Heinrich Jescheck, "The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute," 2–1 *Journal of Int'l Crim. Justice* (March 2004), 38–55, 46. "However, the Court's view that '[t]he provisions of this article are in conformity with the laws of all nations' cannot hold. In fact, the contrary is true as regards military orders."
[84] Osiel, supra, note 60, at 97.
[85] Hilaire McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* (Aldershot: Dartmouth Publishing, 1990), 221.

9.2.1. *The Standard Applied: The "Subsequent Proceedings"*

Following the Nuremberg IMT, the United States initiated a series of war crimes trials in its sector of Berlin, as did the French, British, and Russians in their sectors. Referred to as "the subsequent proceedings" because they were subsequent to the IMT in purpose and method, the trials were based on a 1945 Joint Chiefs of Staff directive[86] and generally paralleled the IMT's procedures and rules. The proceedings' implementing directive was Control Council Law Number 10, a reference to the Allied Council that oversaw the governing of Berlin. Eventually totaling twelve U.S. trials, an aggregate of 191 high-ranking military and civilian Nazis were tried in the subsequent proceedings.

There was little similarity between the IMT Charter and Control Council Law Number 10,[87] except in one article. In language essentially identical to IMT Charter Article 8, the subsequent proceedings' Article II.4(b) read, "The fact that any person acted pursuant to the order of . . . a superior does not free him from responsibility for a crime, but may be considered in mitigation." Brigadier General Telford Taylor, the U.S. proceedings' Chief Prosecutor wrote, "The major legal significance of the [Control Council] Law No. 10 judgment lies, in my opinion, in those portions of the judgments dealing with the *area of personal responsibility* for international law crimes."[88] (Taylor had been Deputy Chief Counsel at the Nuremberg IMT, under Chief Counsel, Supreme Court Justice Robert H. Jackson.) Taylor continued, "The tribunal had to determine whether the plea of 'duress' or 'superior orders' was genuine . . . and, if the plea was found to be bona fide, to what extent it should be given weight in defense or mitigation."[89] General Taylor's questioning of the plain language of the subsequent proceeding Article ii.4(b) that repeated Article 8 of the Nuremberg IMT Charter suggests the difficulty the IMT may have had in applying Article 8 as written. The subsequent proceedings had many more opportunities to test the courtroom workability of the test. The "subsequent tribunals had greater difficulty. They sought to resolve the matter by treating it as an issue of intent."[90] That diluted formulation, expressed as "moral choice," is seen in the *Einsatzgruppen* (Ohlendorf) and *High Command* (Leeb) cases, two of the twelve subsequent proceedings.

The moral choice test that effectively modified the IMT's Article 8 by ameliorating its blanket rejection of superior orders as a defense also affected subsequent proceedings Article II.4(b), and led to a required showing of duress as a necessary part of a successful defense of superior orders.[91] Despite Article 8 and Article II.4(b), "in various judgments . . . the tribunal nevertheless applied a limited responsibility doctrine."[92] The consideration of the "moral choice" test is apparent in the subsequent proceedings' *Flick*

[86] Taylor, *Final Report*, supra, note 76, at 2–10; App. C.
[87] Telford Taylor, *The Anatomy of the Nuremberg Trial* (New York: Alfred Knopf, 1992), 275.
[88] Id. at 109, emphasis in original.
[89] Id. at 110.
[90] Col. Charles Garraway, "Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied," 836 *Int'l Rev. of the Red Cross* (Dec. 1999), 785.
[91] Duress and superior orders are conceptually distinct and separate issues, although the same factual scenario may raise both concepts. "As obedience to superior orders may be considered merely as a factual element in determining whether duress is made out on the facts, the absence of a superior order does not mean that duress as a defense must fail. . . . The fact that the Appellant obeyed an order of a superior does not go to the preceding legal question of whether duress may at all be pleaded . . ." *Erdemović Judgment*, supra note 6, at 25–7.
[92] Nico Keijzer, *Military Obedience* (The Netherlands: Sijthoff, 1978), 212.

and *Farben* judgments,[93] while, in the *High Command* case the tribunal notes, "within certain limitations, [a soldier] has the right to assume that the orders of his superiors . . . are in conformity to international law."[94] In Canada, the moral choice test is accepted by the Supreme Court even today.[95]

Still, some Nazis never did get it. In the course of the IMT's General Staff prosecution, Brigadier General Taylor relates the testimony of SS General Otto Ohlendorf when asked about the legality of orders. Ohlendorf replied, "I do not understand your question; since the order was issued by the superior authorities, the question of illegality could not arise in the minds of these individuals, for they had sworn obedience to the people who had issued the orders."[96] Taylor notes, "That was carrying the defense of 'superior orders' to the absolute: *Befehl ist befehl*."[97] (Orders are orders.) Ohlendorf was convicted and hanged.

Although finding the presence of moral choice in several subsequent proceedings cases, Article 8 of the Charter was strictly applied in other trials. For example, in the *Pelius Case*,[98] *The Scuttled U-Boats Case*,[99] and the *Almelo*,[100] *Dostler*,[101] and *Belsen*[102] cases. In each of those trials, unlawful superior orders were held to not exonerate subordinates from personal responsibility for their war crimes.

In contrast, some tribunals in effect held that if a subordinate did not know, and could not be expected to know, that the order he carried out was illegal, *mens rea* was lacking and the subordinate was not guilty. This reflection of today's U.S. military standard is seen, for example, in the *Hostage* and *Einsatsgruppen* cases. "If the act done pursuant to a superior's order be murder, the production of the order will not make it any less so," the *Hostage Case* Tribunal wrote. "It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of the crime exists and the inferior will be protected."[103] Similar language is found in the *Einsatzgruppen Case*.[104]

[93] In the judgment of the *Flick* case the Tribunal notes, "Quotas for production were set for industry by the Reich . . . The defendants were justified in their fear that the Reich authorities would take drastic action . . . might even have been sent to a concentration camp . . . Under such compulsion [the defendants] submitted to the program . . . " The longest sentenced imposed was seven years, with credit for time served. *U.S. v. Flick*, *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. VI (Washington: GPO, 1952), 1197–8. In the *Farben* case, "this Tribunal is not prepared to say that these defendants did not speak the truth when they asserted that in conforming to the slave-labor program they had no other choice than to comply . . . Refusal of a Farben executive . . . would have been treated as treasonous sabotage and would have resulted in prompt and drastic retaliation. . . . As applied to the facts here, we do not think there can be much uncertainty as to what the words 'moral choice' mean." The longest sentence was eight years, with credit for time served. *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. VIII, pt. 2 (Washington: GPO, 1952), 1175–6.

[94] *U.S. v. von Leeb*, supra, note 48, at 511.

[95] *R. v. Finta* [1994] 1 S.C.R. 701. See Cases and Materials, this chapter.

[96] Taylor, *The Anatomy of the Nuremberg Trials*, supra, note 87, at 248.

[97] Id.

[98] *Trial of Eck, et al.* ("The Peleus Trial") L.R.T.W.C., vol. I (London: U.N.W.C.C., 1947), at 1.

[99] *Trial of Grumpelt* ("The Scuttled U-Boats Case") 1946, L.R.T.W.C., vol. I (London: U.N.W.C.C., 1947), at 55.

[100] *Trial of Sandrock, et al.* ("The Almelo Trial") L.R.T.W.C., vol. I (London: U.N.W.C.C., 1947), at 35.

[101] *The Dostler Case*, L.R.T.W.C., vol. I (London: U.N.W.C.C., 1947), at 22.

[102] *Trial of Kramer, et al.* ("The Belsen Trial"), 1945, L.R.T.W.C., vol. II (London: U.N.W.C.C., 1947), at 1.

[103] *U.S. v. List* ("The Hostage Case"), supra, note 34, at 1236.

[104] *U.S. v. Ohlendorf*, supra, note 36, at 470.

9.3. What Orders Should Not Be Obeyed? Manifestly Illegal Orders

No state's armed services instructs its members in *dis*obeying orders. Moreover, members of all armed services have a right to presume the lawfulness of orders they receive. One may go through an entire military career and never encounter an illegal order. They are exceedingly rare, but they are sometimes given. My Lai and Abu Ghraib are only two prominent U.S. examples. Service members must know what an illegal order is and what to do if they receive such an order. My Lai "was not a fearful and frenzied extension of combat, but 'free' and systematic slaughter, and those men that participated in it can hardly say that they were caught in the grip of war. They can say, however, that they were following orders, caught up in the grip of the United States Army,"[105] (which is no excuse, legal or moral). It should not be forgotten that at My Lai four young soldiers refused to carry out Calley's orders to fire on the unarmed, unresisting noncombatants.*

The issue of illegal orders is not covered in the Geneva Conventions because the Conventions describe the protections due victims of war, rather than addressing specific battlefield criminal issues. For U.S. combatants, *The Law of Land Warfare* addresses the issue and specifies the current U.S. standard:

> a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful . . . [T]he fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.[106]
>
> b. In considering . . . whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received;. . . . At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.

This paragraph clearly lays out the basic rule for U.S. military personnel: Obedience to orders is not a legal defense, per se; military law provides a reasonable exception (derived from post–World War II war crimes cases[107]). Superior orders specifically may not be considered by a court *unless* the accused did not know and could not be expected to have known the order's illegality; and in case of a prosecution it provides triers of fact with a mitigating consideration in making a determination of guilt or innocence: mistake of law; the accused did not know and could not reasonably have been expected to know the order was unlawful.

[105] Walzer, *Just and Unjust Wars*, supra, note 2, at 310.

* They were PFC James Dursi, Dennis Bunting, Specialist-4 Robert Maples (even as Calley's M-16 was pointed at him), and Sergeant Michael Bernhardt. Additionally, Warrant Officer Hugh Thompson, with his gunner Larry Colburn and observer Glenn Andreotti, landed his helicopter between a group of U.S. soldiers pursuing fleeing Vietnamese, and, after directing Colburn to fire on the Americans if they did not comply, ordered the soldiers, led by a lieutenant, to break off their pursuit. The moral and physical courage of these "disobedient" soldiers has never been adequately recognized.

[106] FM 27–10, *The Law of Land Warfare*, supra, note 20.

[107] For example, *U.S. v. List*, supra, note 34.

> [A] soldier or airman is not an automaton but a "reasoning agent" who is under a duty to exercise judgment in obeying orders of a superior officer . . . [W]here such orders are manifestly beyond the scope of the issuing officer's authority and are so palpably illegal on their face that a man of ordinary sense and understanding would know them to be illegal, then the fact of obedience to the order of a superior officer will not protect a soldier . . . [108]

Exactly what constitutes an illegal order? The term denoting a required disobedience is "manifestly"; manifestly illegal orders must not be obeyed. "Manifestly" is first encountered in the 1886 edition of Winthrop's *Military Law and Precedents*: " . . . [T]he only exceptions recognized in the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commanders to admit of no rational doubt of their unlawfulness."[109] "Manifest illegality" gained wide recognition in a post–World War I trial. German Commander Karl Neumann, a submarine commander who freely admitted sinking a British hospital ship, the *Dover Castle*, claimed that he thought his orders to do so constituted a lawful reprisal. In a widely reviled decision, he was acquitted by the German Supreme Court at Leipzig, on the basis of superior orders. The court ruled that Neumann lacked knowledge of the manifest illegality of his "ordered" act.[110]

Manifest illegality is not a soldier disobeying based on the asserted illegality of his nation's *jus ad bellum* resort to force.[111] Nor may a service person's conscience, religious beliefs, moral judgment, or personal philosophy rise to manifest illegality to justify or excuse the disobedience of an otherwise lawful order.[112]

What does constitute manifest illegality? Like the term "war crime," it cannot be defined in the abstract. The U.S. Uniform Code of Military Justice does not define it because whether a subordinate's act, or a superior's order, is manifestly illegal is usually an objective question related to a specific situation.[113] The question is, would a reasonable person recognize the wrongfulness of the act or order, even in light of a soldier's duty to obey? "In short, where wrongfulness [of an order] is clear, you must disobey, but you must resolve all genuine doubts about wrongfulness in favor of obedience."[114] In an ambivalent situation, uncertainty as to whether the conduct or order was manifestly illegal must be resolved by the courts in favor of the defendant, for "the whole point of the rule is that no 'reasoning why' is necessary to discern the wrongfulness of an order

[108] *U.S. v. Kinder*, supra, note 47, at 776. This language is from the post–World War II case, *U.S. v. Ohlendorf*, supra, note 36, at 470.

[109] William Winthrop, *Military Law and Precedents* (Washington: GPO, 1886), 296–7.

[110] "German War Trials: Judgment in Case of Commander Karl Neumann," 16–4 *AJIL* (Oct. 1922), 704–08; and, Jackson N. Maogoto, "The Superior Orders Defense: A Game of Musical Chairs and the Jury is Still Out," 10 *Flinders J. of L. Reform* (2007), 1–26, 6–7.

[111] In the context of Operation Desert Storm, such an argument was held a nonjusticiable political question; the court holding that the duty to disobey an unlawful order applies only to "a positive act that constitutes a crime [that is] so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their lawfulness." *U.S. v. Huet-Vaughn*, 43 M.J. (1995), 105, 107. Another such case was *Germany v. "N"* (2005), in which a *Bundeswehr* major refused duty associated with the U.S. invasion of Iraq, asserting "his constitutional right of freedom of conscience," 100–4 *AJIL* (Oct. 2006), 911.

[112] *Manual for Courts-Martial*, 1995, Part IV, para. 14c(2)(a)(iii). See also, *U.S. v. Kabat*, 797 F.2d 580 (8th Cir. 1986).

[113] The German Military Penal Code is one of the few that attempts a definition: Illegality is manifest when contrary "to what every man's conscience would tell him anyhow." Cited in Osiel, supra, note 60, at 77.

[114] Id., Osiel, at 84. This discussion of manifest illegality is informed by Prof. Osiel's excellent exposition on the topic in his chapter 3, at 71–89.

immediately displaying its criminality on its face."[115] An Israeli court offered a dramatic description:

> The distinguishing mark of a "manifestly unlawful order" should fly like a black flag above the order given . . . Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernable only to the eyes of legal experts . . . [U]nlawfulness appearing on the face of the order itself . . . unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart stony and corrupt, that is the measure of "manifest unlawfulness" required to release a soldier from the duty of obedience . . . [116]

An 1867 American civil case described a manifestly unlawful order as one "so palpably atrocious as well as illegal that one ought to instinctively feel that it ought not to be obeyed . . . "[117] During the Korean War, the order of an Air Force Lieutenant to an Airman First Class to "Take him [a wounded Korean trespasser] out to the Bomb Dump and shoot him," was found manifestly unlawful.[118] The U.S. Court of Military Appeals found manifestly illegal an Army Specialist's order to a private to continue driving when the truck's brakes were not working properly.[119] In Vietnam, an Army captain commanded, "take [the prisoner] down the hill and shoot him."[120] Can possible disciplinary action for not obeying such commands excuse the obeying of them? Recognizing the illegality of such orders requires neither superior intellect nor academic accomplishment.

There are improper orders of less clear illegality, no doubt, subtle in their wrongfulness, requiring a fine moral discernment to avoid criminality in their execution. Such orders are rare on the battlefield and are not *manifestly* unlawful. Manifest illegality requires not fine moral discernment but obviousness. Junior soldiers are not expected to parse the orders they receive or apply a lawyer's judgment to directions from those of higher grade. They are not expected to review law books or be familiar with case law. "Any uncertainty about whether the defendant's conduct was manifestly illegal must be resolved in his favor."[121] In doubtful cases, the order must be presumed lawful and it must be obeyed. Because it was an uncertain or doubtful case, it was not a manifestly unlawful order and the soldier should not face disciplinary action for obeying it.

9.4. Upon Receiving a Manifestly Illegal Order

What should a U.S. combatant do upon receiving an unlawful order? First, if she believes the order is manifestly illegal – patently and obviously unlawful – or beyond the authority of the superior issuing the order, as a threshold matter the order should not be obeyed.

[115] Id., 115.
[116] *Kafr Kassen* case App. 279–83 (1958), Id., at 77, fn. 13.
[117] *McCall v. McDowell*, supra, note 21.
[118] *U.S. v. Kinder*, supra, note 47, at 754. The fate of the officer who gave the order is detailed in Chapter 10. *U.S. v. Schreiber*, 18 C.M.R. 226 (C.M.A., 1955).
[119] *U.S. v. Cherry*, 22 M.J. 284, 286 (C.M.A. 1986). Although there are several cases finding orders, for example, over broad (*U.S. v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958)), and *U.S. v. Wysong*, 26 C.M.R. 29 (C.M.A. 1958)), or arbitrary (*U.S. v. Wilson*, 30 C.M.R. 165 (C.M.A. 1961)), and *U.S. v. Dykes*, 6 M.J. 744 (N.C.M.R. 1978)), or arbitrary and unreasonable (*U.S. v. Green*, 22 M.J. 711 (A.C.M.R. 1986)), or arbitrary, incapable of being obeyed, and void for vagueness (*U.S. v. Lloyd*, General Court-Martial (U.S. Army Southern European Task Force and 5th Support Command, Vicenza, Italy, 27–30 Aug. 1985)), few orders are found manifestly illegal. (Another case that does so is *U.S. v. Dykes*, above.)
[120] *U.S. v. Griffen*, 39 C.M.R. 586 (ACMR, 1968).
[121] Osiel, *Obeying Orders*, supra, note 60, at 109.

Second, the service member should ask for clarification of the order to ensure it was correctly understood, or correctly heard, or was not merely misspoken by the senior person. Simply asking, "Sir, do I correctly understand that your order is to murder the prisoner?" may make the senior officer realize the order's illegality – or at least bring a realization that the subordinate appreciates its illegal nature.

Third, if the superior individual – officer, noncommissioned officer, or civilian authority – persists in the manifestly unlawful order, after refusing to obey the subordinate should report the incident to a higher authority.[122] If it was higher authority who issued or condoned the order, the incident should be reported to still higher authority, or to any judge advocate – that is, any military lawyer.[123]

Receipt of a manifestly illegal order is *not* justification for a subordinate to attempt to relieve the superior of duty or, even more unwise, to take physical action, such as resorting to armed force, to stop a superior's unlawful plan. The subordinate's duty is fulfilled when he refuses to obey and reports the incident. Any subsequent action should be left to higher authority.

Whether one is a combatant or a noncombatant, upon learning of a war crime or of a suspected war crime, the service member or civilian should report it to higher military authority. Combatants are taught that obligation, and are expected to understand and carry out that responsibility. The requirement for High Contracting Parties to train their combatants in the Geneva Conventions includes such instruction.[124] "A civilian or serviceman thus instructed will not in the future be able to plead as a defense that he knew not that his conduct was prohibited by the law of war or that he thought that the order he received was lawful."[125]

Unfortunately, Army studies involving Army and Marine Corps infantrymen indicate that, despite training, there is a significant hesitance to report fellow soldiers and Marines who injure or kill innocent noncombatants.[126]

[122] A typical U.S. directive is Marine Corps reference publication MCRP 4–11.8B, *War Crimes* (6 Sept. 2005), at 9. "[I]t is DOD, joint, and Department of the Navy policy that: . . . All 'reportable incidents' committed by or against members of, or persons serving with or accompanying the US Armed Forces, must be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action." The publication notes, "A 'reportable incident' is a possible, suspected or alleged violation of the law of war . . . "

[123] Lt.Gen. William Peers, who led the Army's most thorough and complete investigation into the My Lai incident, wrote, "This left the soldier in a dilemma. A specific problem was: To whom should a soldier report a war crime when his immediate commander was personally involved in the conduct of the crime?" Lt.Gen. W.R. Peers, *The My Lai Inquiry* (New York: Norton, 1979), 33.

[124] 1949 Geneva Conventions common Article 47/48/127/144: "High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction . . . "

[125] Col. G.I.A.D. Draper, "Rules Governing the Conduct of Hostilities – the Laws of War and Their Enforcement," in Michael A. Meyer and Hilaire McCoubrey, eds. *Reflections on Law and Armed Conflicts* (The Hague: Kluwer Law, 1998), 87–93, 92.

[126] Office of The Surgeon, Multinational Force – Iraq; and, Office of The Surgeon General, United States Army Medical Command, *Mental Health Advisory Team (MHAT) IV, Operation Iraqi Freedom 05–07, FINAL REPORT* (17 Nov. 2006), at 36. A graph documents that 40% of 447 Marines and 55% of 1,320 soldiers questioned in Iraq would report unit members for injuring or killing innocent noncombatants. Another graph shows that 87% of soldiers and 86% of Marines questioned "Received training that made it clear how I should behave towards non-combatants." (This important study, once available at: http://www.behavioralhealth.army.mil, is no longer at that site.)

9.5. The First Defense in Foreign and International Forums

After World War II, the Nuremberg IMT, and "subsequent proceedings," the defense of superior orders was essentially that superior orders were not a defense, per se, but that they could be relevant for other defenses, such as duress. U.S. armed forces, as instructed in FM 27–10, *Rules of Land Warfare*, carried on under that view.[127] Article 7.4 of the ICTY's 1993 Statute adopted much the same position, as did Article 6 of the International Criminal Tribunal for Rwanda (ICTR) 1994 Statute.[128] There were, as always, thoughtful dissenters,[129] but they were few and their voice weak.

However, the International Criminal Court (ICC), in Article 33 of its Rome Statute, adopts the strict "manifest illegality" standard of the Nuremberg Charter: "Article 33.1. 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:. . . . (c) The order was manifestly unlawful." Professor Antonio Cassese writes, "Article 33 must be faulted as marking a retrogression . . . "[130]

> The decision that was taken to adopt Article 33 represented, in the view of most, a sensible and practical solution which could be applied in all cases. In particular, it was limited to war crimes, as it was recognized that conduct that amounted to genocide or crimes against humanity would be so manifestly illegal that the defence should be denied altogether . . . It would, of course, not prevent superior orders being raised as part of another defence such as duress.[131]

Soviet law rejected and continues to reject the superior orders defense to war crimes. Today's German military law rejects them as a defense, although they are allowed as a defense under its criminal law.[132] Denmark and Norway excuse the soldier who disobeys lawful orders that he reasonably believes to be illegal.[133]

Negotiations during the formulation of the 1977 Additional Protocols illustrated that the Communist bloc and many Third World states, wishing to maximize compliance with official directives, offer their soldiers full immunity when they obey *un*lawful orders, even if they cannot demonstrate that they mistakenly believed the orders lawful.[134] Despite lengthy negotiations to draft an Additional Protocol provision limiting the defense of superior orders, that effort was unsuccessful due to objections to its limitation by African and Asian states.[135] Accordingly, there are no provisions in the 1977 Protocols regarding a subordinate's obedience to orders.

[127] See: FM 27–10, *The Law of Land Warfare*, supra, note 20. The change, from superior orders constituting a complete defense, was initiated with Change I to the 1940 edition of FM 27–10, dated Nov. 15, 1944.

[128] "Article 7.4. 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 ICTR's provision is identical.

[129] Cryer, "The Boundaries of Liability in International Criminal Law," supra, note 83, at 13, fn. 70.

[130] Antonio Cassese, "The Rome Statute of the International Criminal Court: Some Preliminary Reflections," 10–1 *European J. of Int'l L.* (1999), 144–71, 157.

[131] Garraway, "Superior Orders and the International Criminal Court," supra, note 90, at 788 (Dec. 1999).

[132] *War Crimes*, supra, note 64, at 66–7.

[133] Keijzer, *Military Obedience*, supra, note 92, at 79.

[134] Col. Howard S. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions, Supplement* (1985), 10, 15, 19, 22, 31, 37–44.

[135] Col. Howard S. Levie, "The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders," 30 *Mil. L. & L. of War Rev.* (1991), 204.

ICTY trials have seen the defense raised even though the ICTY's Articles specifically reject it.[136] From the outset, the Tribunal has made clear that, although not a defense, obedience to orders may be a relevant and admissible defense.[137] "Most of the Nuremberg defendants attempted to plead that they were acting under superior orders. . . . This is in stark contrast with the three United Nations *ad hoc* tribunals [the ICTY, ICTR, and the Special Court for Sierra Leone], where the defense of superior orders has been raised only rarely."[138]

In the ICTY's first case, Dražen Erdemović, upon his plea of guilty, was sentenced to ten years confinement. As *The Washington Post* phrased it, "the tribunal rejected the hauntingly familiar excuse of Nazi war criminals – that Erdemović was following orders . . ."[139] The Erdemović case, however, raised the haunting defense of duress. (See Cases and Materials, this chapter.) Similar guilty verdicts followed in other ICTY cases: prison commander Zdravco Mucic, convicted of ordering subordinates to commit murders[140]; Major General Radislav Krstić, who directed the 1995 attack on Srebrenica, charged with genocide for personal involvement, as well as his command responsibility[141]; paramilitary commander Anto Furundžija, sentenced to ten years for failing to stop subordinates' rapes.[142] Low-ranking and high, all pleaded the defense of obedience to orders. (See Chapter 10, Cases and Materials, for the ICTY's Krstić opinion.)

9.6. Summary

It should be remembered that illegal orders are rare. A combatant need not anticipate them periodically arising, nor carefully examine each order's lawfulness. Yet, they do occur, and when they do, their illegality will be clear – will be manifest.

Obedience to orders is a defense frequently raised but seldom successful. The defense has a lengthy history not only in war crimes cases, but in civil trials, not only in the United States, but in armed forces worldwide. Its application has not been uniform in either U.S. or foreign courts-martial. "Obviously, universal acceptance will be out of the question; indeed, several experts [during Additional Protocol I's early negotiations] took pains to emphasize the need of military discipline and the difficulty 'in time of armed conflict to permit soldiers to decide whether to obey or not.'"[143] *Befehl ist befehl*?

[136] Article 7.3 of the Tribunal's statute expands the concept of the senior's responsibility, or *respondeat superior*. It holds that acts committed by a subordinate do not relieve his "superior" of individual criminal responsibility. The word superior, rather than the more frequently found, "commander" allows for the prosecution of civilian as well as military leaders.

[137] *Erdemović*, supra, note 6. "While the complete defense based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application are particularly strict."

[138] William A. Schabas, *The UN International Criminal Tribunals* (New York: Cambridge University Press, 2006), 330–1.

[139] Charles Trueheart, "Balkan War Crimes Court Imposes First Sentence," *The Washington Post*, Nov. 30, 1996, A31.

[140] Charles Trueheart, "Croat, 2 Bosnian Muslims Convicted of Atrocities Against Serbs," *The Washington Post*, Nov. 17, 1998, A34. "The first judgment of its kind since the post-World War II tribunals in Nuremberg and Tokyo rejected the arguments of mid-level officers who claimed they were just following orders."

[141] Steven Erlanger, "Bosnian Serb General Is Arrested By Allied Force in Genocide Case," *The Washington Post*, Dec. 3, 1998, A1.

[142] "Bosnian War Crimes Panel Finds Commander Guilty in Rape Case," *The N.Y. Times*, Dec. 11, 1998, 1.

[143] Frits Kalshoven, "The Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Second Session), 3 May – 2 June, 1972," in *Reflections on the Law of War: Collected Essays* (Leiden: Martinus Nijhoff, 2007), 57–99, 88.

The U.S. approach – obedience is not a defense, as such, but it may be mitigating and may be relevant in the assertion of other defenses – is widely shared by other states but not universally. The standard of what it is that constitutes an unlawful order – manifest illegality – is also widely shared, even if there can be no black letter definition of that term that will meet all cases.

There is potential conflict between the U.S. view of manifest illegality and that of other states. What result, if a non-American U.N. commander direct a U.S. contingent to carry out orders that the Americans view as contrary to customary international law?[144] If the order is manifestly unlawful, of course it should not be obeyed, but the legal outcome of conflicting understandings of "manifest" remain to be seen.

The defense of superior orders will be raised in the future, by generals and by enlisted service members. Illegal orders will be issued and, given the overbearing influence of a military force's hierarchical structure (which is felt particularly in the lower ranks, and particularly in combat), those illegal orders will be obeyed.[145] It is a topic to be debated for as long as armed conflicts persist.

CASES AND MATERIALS

ATTORNEY-GENERAL OF THE GOVERNMENT OF ISRAEL V. ADOLF EICHMANN

Israel, District Court of Jerusalem, December 12, 1961

Introduction. *During World War II,* SS Obersturmbannführer *(Lieutenant Colonel) Adolf Eichmann led the Race and Resettlement Office of the* RSHA, *or Reich Security Main Office, which administered the mass extermination of European Jewry, the "Final Solution," and other "undesirables." At the end of the war, he escaped to Argentina where, working under the name Ricardo Klement for a water company, he lived with his family until kidnapped by Israeli agents in 1960. He was tried in Israel.*

Judgment of the District Court

1. Adolf Eichmann has been arraigned before this Court on charges of unsurpassed gravity – crimes against the Jewish people, crimes against humanity, and war crimes. The period of the crimes ascribed to him, and their historical background, is that of the Hitler régime in Germany and in Europe, and the counts of the indictment encompass the catastrophe which befell the Jewish people during that period – a story of bloodshed and suffering which will

[144] E.g., the 1995 fall of Srebrenica, and the subsequent murder of 6,500 Muslim men and boys by Bosnian Serbs has been attributed, in part, to differing objectives of the states whose soldiers were supposed to provide a safe haven. Jan Willem Honig and Norbert Both, *Srebrenica* (New York: Penguin, 1997).

[145] Osiel, supra, note 60, at 241, fn. 21.

be remembered to the end of time. . . . How could this happen in the full light of day, and why was it just the German people from whom this great evil sprang? Could the Nazis have carried out their evil designs without the help given them by other peoples in whose midst the Jews dwelt? Would it have been possible to avert the catastrophe, at least in part, if the Allies had displayed a greater will to assist the persecuted Jews? Did the Jewish people in the lands of freedom do all in their power to rally to the rescue of their brethren and to sound the alarm for help?. . . .

216. The accused's principal defence is that everything he did was in accordance with orders from his superiors. This he regards as full justification for all his deeds. He explains that his S.S. training inculcated in him the idea of blind obedience as the supreme virtue, obedience based on boundless faith in the judgment of the leadership, which would always know what the good of the Reich demanded and give its orders accordingly. At the end of the trial, we heard this argument in its most extreme form from counsel for the defence, as follows:

> The basic principle of all States is loyalty to their leadership. The deed is dumb and obedience is blind. These are the qualities on which the State is founded. Do such qualities merit reward? That depends on the success of its policy. If a policy is unsuccessful the order will be considered a crime in the eyes of the victors. Fortune will not have served the one who has obeyed and he will be called to judgment for his loyalty. The gallows or a decoration – that is the question. To fail is an abominable crime. To succeed is to sanctify the deed . . .

If in these words counsel for the defendant intended to describe a totalitarian régime based on denial of law, as was Hitler's régime in Germany, then his words are indeed apt. Such a régime seeks to turn the citizen into an obedient subject who will carry out every order coming from above, be it to commit injustice, to oppress or to murder. It is also true that under such a regime the criminal who acts in obedience to a criminal leader is not punished but on the contrary earns a reward, and only when the entire régime collapses will justice reach him. But arguments of this kind are not to be heard in any State in the world whose system of government is based on the rule of law. The attempt to turn an order for the extermination of millions of innocent people from a crime into a political act in order thus to exempt from personal criminal responsibility those who gave and those who carried out the order will not avail. And let not the counsel for the defence console us with the promise of a World Government to come when such "acts of State" will pass from the world. We do not have to wait for such a radical change in the relations between nations to bring a criminal to judgment for his personal responsibility for his deeds, which is the basis of criminal jurisdiction the world over.

We have already considered elsewhere in our judgment the defence of "act of State" in international law, and have shown that it cannot avail the accused . . .

The personal responsibility of a government official for his acts lies at the foundation of the rule of law which we have adopted under the inspiration of the Common Law. As Dicey, *Law of the Constitution*, 10th ed., Ch. XI, p. 326, explains:

> The Minister or servant of the Crown . . . is legally responsible for the act in which he is concerned, and he cannot get rid of his liability by pleading that he acted in obedience to royal orders. Now supposing that the act done is illegal – he becomes at once liable to criminal or civil proceedings in a court of law.

220. Here we shall add that the rejection of the defence of "superior orders" as exempting completely from criminal responsibility, has now become general in all civilized countries. . . .

It should be pointed out here that even the jurists of the Third Reich did not dare to set down on paper that obedience to orders is above all else. They did not repeal Section 47(2) of the German Military Criminal Code, which provides that whoever commits an offence against the criminal law through obedience to an order of his superior is punishable as an accomplice to a criminal act if he knew that the order concerned an act which is a crime or an offence according to general or military law. This provision was applicable also to S.S. men, according to the laws of their jurisdiction.

221. It is self-evident that the accused knew well that the order for the physical extermination of the Jews was manifestly unlawful and that in carrying out this order he engaged in criminal acts on a colossal scale . . .

Not only was the order for physical extermination manifestly unlawful, but also all the other orders for the persecution of Jews for being Jews, even though they were framed in the formal language of legislation and subsidiary legislation, since these were only a cloak for arbitrary discrimination contrary to the basic principles of law and justice. . . .

Conclusion. *Eichmann was found guilty of crimes against the Jewish people, crimes against humanity, and war crimes. He was hanged on May 31, 1962. His corpse was cremated and his ashes scattered at sea.*

"THE EINSATZGRUPPEN CASE" THE UNITED STATES V. OHLENDORF, ET AL.

Trials of War Criminals before the Nuernberg Military Tribunals, vol. IV (1948)[146]

Introduction. *SS* Gruppenführer *(Lieutenant General) Otto Ohlendorf commanded one of four* einsatzgruppen *– mobile task forces to carry out "liquidations" in occupied countries. Ohlendorf's units operated in the Ukraine and Crimea. In 1941, units he commanded were responsible for a single mass murder of more than 14,000 victims, most of them Jews. He was charged with a total of 90,000 executions. He later was also appointed a Deputy Secretary of State. Ohlendorf and twenty coaccused were tried before a military tribunal. The following is from the Tribunal's 1948 Judgment*:

Superior Orders

Those of the defendants who admit participation in the mass killings which are the subject of this trial, plead that they were under military orders and, therefore, had no will of their own . . . It is axiomatic that a military man's first duty is to obey. If the defendants were soldiers and as soldiers responded to the command of their superiors to kill certain people, how can they be held guilty of crime? This is the question posed by the defendants. The answer is not a difficult one.

[146] *U.S. v. Ohlendorf*, "The Einsatzgruppen Case," supra, note 36, at 470–1, 473–4, 480–2, 509.

The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent . . . It is a fallacy of wide-spread consumption that a soldier is required to do everything his superior officer orders him to do . . . The fact that a soldier may not, without incurring unfavorable consequences, refuse to drill, salute, exercise, reconnoiter, and even go into battle, does not mean that he must fulfill every demand put to him. In the first place, an order to require obedience must relate to military duty. An officer may not demand of a soldier, for instance, that he steal for him. And what the superior officer may not militarily demand, the subordinate is not required to do. Even if the order refers to a military subject it must be one which the superior is authorized, under the circumstances, to give.

The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offense. If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance to the criminality of the order. If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionally greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse, for example, if a subordinate, under orders, killed a person known to be innocent, because by not obeying it he himself would risk a few days of confinement. Nor if one acts under duress, may he, without culpability, commit the illegal act once the duress ceases.

The [Nuremberg] International Military Tribunal, in speaking of the principle to be applied in the interpretation of criminal superior orders, declared that –

> "The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."
> . . . .

Superior Orders Defense Must Establish Ignorance of Illegality

To plead superior orders one must show an excusable ignorance of their illegality. The sailor who voluntarily ships on a pirate craft may not be heard to answer that he was ignorant of the probability he would be called upon to help in the robbing and sinking of other vessels. He who willingly joins an illegal enterprise is charged with the natural development of that unlawful undertaking. What SS man could say that he was unaware of the attitude of Hitler toward Jewry?. . . .

Some of the defendants may say they never knew of the Nazi Party extermination program or, if they did, they were not in accord with the sentiments therein expressed. But again, a man who sails under the flag of the skull and cross-bones cannot say that he never expected to fire a cannon against a merchantman. . . .

Duress Needed for Plea of Superior Orders

But it is stated that in military law even if the subordinate realizes that the act he is called upon to perform is a crime, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real, and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled

to pull a lethal lever. Nor need the peril be that imminent in order to escape punishment. But were any of the defendants coerced into killing Jews under the threat of being killed themselves if they failed in their homicidal mission? The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order. If the second proposition be true, the plea of superior orders fails. The doer may not plead innocence to a criminal act ordered by his superior if he is in accord with the principle and intent of the superior. When the will of the doer merges with the will of the superior in the execution of the illegal act, the doer may not plead duress under superior orders. . . .

Superior means superior in capacity and power to force a certain act. It does not mean superiority only in rank. It could easily happen in an illegal enterprise that the captain guides the major, in which case the captain could not be heard to plead superior orders in defense of his crime.

If the cognizance of the doer has been such, prior to the receipt of the illegal order, that the order is obviously but one further logical step in the development of a program which he knows to be illegal in its very inception, he may not excuse himself from responsibility for an illegal act which could have been foreseen by the application of the simple law of cause and effect . . .

One who embarks on a criminal enterprise of obvious magnitude is expected to anticipate what the enterprise will logically lead to.

In order to successfully plead the defense of superior orders the opposition of the doer must be constant. It is not enough that he mentally rebel at the time the order is received. If at any time after receiving the order he acquiesces in its illegal character, the defense of superior orders is closed to him.

Many of the defendants testified that they were shocked with the order [to execute all Jews in their areas of responsibility] when they first heard it . . . But if they were shocked by the order, what did they do to oppose it? . . . The evidence indicates that there was no will or desire to deprecate its fullest intent.

[I]t is not enough for a defendant to say . . . that it was pointless to ask to be released, and, therefore, did not even try. Exculpation is not so easy as that. No one can shrug off so appalling a moral responsibility with the statement that there was no point in trying. . . .

Several of the defendants stated that it would have been useless to avoid the order by subterfuge, because had they done so, their successors would accomplish the task and thus nothing would be gained anyway. The defendants are accused here for their own individual guilt. No defendant knows what his successor would have done . . . One defendant stated that to have disobeyed orders would have meant a betrayal of his people. Does he really mean that the German people, had they known, would have approved of this mass butchery?

That so much man-made misery should have happened in the twentieth century . . . makes the spectacle almost insupportable in its unutterable tragedy and sadness. Amid the wreckage of the six continents, amid the shattered hearts of the world, amid the sufferings of those who have borne the cross of disillusionment and despair, mankind pleads for an understanding which will prevent anything like this happening again.

Conclusion. *Defendant Ohlendorf and thirteen others were convicted of multiple crimes and sentenced to death by hanging. Two other accused were sentenced to confinement for life, another three to twenty years, and another two to ten years.*

UNITED STATES V. PRIVATE MICHAEL A. SCHWARZ

45 C.M.R. 852 (NCMR, 1971)

Introduction. *The Military Tribunal's opinion clearly articulates the nuances of the law of war associated with the defense of obedience of orders. It drew a template for subsequent courts to follow. The following case illustrates how young judge advocates in the U.S.–Vietnam conflict, in a court-martial conducted in the combat zone, did their best to follow the law of Nuremberg.*

On February 19, 1970, not far from Da Nang, South Vietnam, Private Schwarz was part of a five man "killer team." The patrol, led by a young Lance Corporal, received a fiery briefing by their company commander (See Chapter 2, Cases and Materials), then departed on their nighttime patrol. Upon reaching their first checkpoint, the small hamlet of Son Thang-4, the patrol went to three thatch-roofed "hooches" where, in turn, they murdered six, then four, then six more unarmed, unresisting Vietnamese women and children. The testimony of Schwarz was that he had followed the orders of the patrol leader to open fire on the victims at point-blank range, at all three hooches. During his general court-martial, held in Da Nang in June 1970, Schwarz, charged with sixteen specifications (counts) of premeditated murder, opted to testify under oath. His direct and cross-examination reveal how one young Marine understood the defense he was raising, obedience to orders. The following direct examination questions (by the Marine defense counsel) and answers (by the accused, Schwarz) are from the verbatim court-martial record.[147] *At this point in the trial the accused is trying to show how thoroughly he was conditioned to obey orders*:

Q. During your stay at Parris Island [boot camp], what instructions, if any, were you given regarding obedience to orders?
A. To do what they asked. If I'm given an order to do it, and not question.
Q. How much of this instruction did you receive?
A. Extensively, sir. Most every day, sir. In one way or another.
Q. Where did you attend ITR [Infantry Training Regiment, where new marines receive infantry training]?
A. Camp Geiger, north of Camp LeJeune, North Carolina.
Q. Did you receive any instruction there, in regard to obeying orders? . . .
A. About the same as boot camp. That if I'm given an order to obey it. All of us in formal classes were given this.
Q. What if you had a question about an order?
A. Then to go up the chain of command and question through the proper steps.
Q. Have you ever had occasion to discuss when it would be wrong or when it would be right to obey an order? . . .
A. Once at ITR I asked the sergeant or corporal about this, if there was any occasion, instance, when you were permitted to disobey an order, and he said there was . . . He used the example, if I'm told to scrub out a toilet with my hands that I didn't have to do that, that I should refuse to do it, there wouldn't be any trouble. But, if I was going to refuse, to make sure that I was right.
Q. Did you run into any other occasions? . . .
A. When I was in recon [3d Reconnaissance Battalion, Schwarz's former unit] after I got to Vietnam, it wasn't a formal class, but we were asking about two instances. I heard about it. I asked a man who was with me about it. If it came down, you're supposed to do it. If

[147] On file with author.

you're ordered to do it, you have to do it. That the only time you disobey it is only when it's completely ridiculous. That there's no way that you should or could do it. . . .

Q. [In Son Thang-4, upon hearing a shot] what did you find, when you came out [of the hooch you were searching]?

A. I ran out, looked around, and I saw this one woman falling over. I thought she got – I just thought she got shot by someone. So, I got there and H___ [the patrol leader] said, "Open up, kill them all, kill all of them" . . . Me, I made up my mind I wasn't going to shoot them unless I seen someone to shoot at. He fired his '79 [M-79 grenade launcher], then he re-loaded. And, all the time he was re-loading, he was yelling, "Shoot them, kill them all, kill all of them bitches". . . .

Q. Then what happened?

A. Then someone yelled, "Cease fire," sir.

Q. What happened after that?

A. I was standing there. I heard a baby cry and H___ said, "Recon [Schwarz's nickname], go shoot the baby and shut it up." I couldn't see no baby. So, I went over there. When I found the one that was crying, it was on my left – it would be on the right side of the group. I got down. I couldn't see no baby but I could hear him crying, and something snapped in my mind. If you clapped your hands in front of a baby he's going to shut up, and that's all my concern was, to keep the baby quiet. So, I put my.45 [pistol] down and fired two rounds over the right shoulder – the left shoulder – the right shoulder.

Q. You didn't hit anybody?

A. No, sir. I know definitely I didn't hit anyone . . .

Q. I just want to back up one moment. Why didn't you obey that order that H___ gave you?

A. I just couldn't see shooting a baby. . . .

Cross-examination by the Marine prosecutor:

Q. When your brothers were telling you about the women and children in Vietnam, did they ever tell you it was lawful to bring women and children out of a hooch and shoot them down – unarmed women and children?

A. No, sir.

Q. They never did tell you that?

A. No, sir.

Q. Private Schwarz, you did know that there were some orders that you could refuse to obey, did you not?

A. Yes, sir.

Q. And, in fact, on that particular night you claim you did disobey some of those orders?

A. Yes, sir. But, not for the fact that I thought they were illegal orders. I just thought morally I couldn't do it.

Q. You didn't think it was an illegal order? It was your own moral compunction?

A. Right, sir.

Q. You said that if you were going to disobey, you better make sure that you were right?

A. Yes, sir.

Q. Were you sure that you were right when you disobeyed one of the orders, by not shooting the child, for example?

A. To me it was right, sir.

Q. So, then you knew it to be the opposite of that; to shoot the child would be wrong?

A. No, sir. Because that's what I'd been ordered. As far as I knew, these were the enemy. . . .
Q. Private Schwarz, at the time that you went out on that killer team that night, were you aware that it was wrong and not permitted for Marines to kill unarmed civilians?
A. Unarmed prisoners, yes, sir. Any civilians, you're not allowed to kill them unless he's putting harm toward you, sir. . . .
Q. But [at the first hooch] you really didn't know what was going on, then?
A. No, sir, I didn't. [At] number one, no, sir. I didn't know if we were taking fire or what, and I just knew that the team leader had ordered to shoot, because I wasn't out there, I was just going along. I thought he knew what he was doing, because he ordered it. . . .

Following the government and defense cases-in-chief, and the government's case in rebuttal, the members (military jury) were excused while the trial counsel (prosecutor, or "TC") and defense counsel ("DC"), in the presence of the accused, discussed jury instructions with the military judge ("MJ"). (The government's case-in-chief included testimonial evidence that a young child had been found at the scene, dead from a gunshot wound to the head.) The following discussion is from the record of trial:

DC to MJ: Sir, in regard to the instruction regarding defense for obedience to orders . . . I would like to put in there also that the presumption of the legality of an order when it relates to military duties, as we have here . . .
TC: Colonel, the government felt that the only issue here is not whether the order was in fact legal or illegal . . . but whether the accused believed it was, reasonably.
DC: This points out that it is presumed to be legal, and he disobeys it at his own peril . . .
MJ: How about saying, or working something in, along these lines: I have here a copy of the *Keenan* instruction [regarding obedience to orders[148]] which I propose to adapt and modify as applicable in this case . . . I don't want to get into this business, "disobeyed at the peril of the subordinate" type thing. That's a matter I think you can argue.
DC: The thing I want to get before the court without arguing is that he is under this burden as to whether or not to obey the order . . . He disobeys the order given at his own peril.
MJ: Well, everyone violates the law at his own peril. We all know that.
DC: He has conflicting duties, here. One says he should and the other says he shouldn't, and I just want the court instructed as to the law regarding when he has the duty to –
MJ: I think that [the *Keenan* instruction] clearly brings to mind the principle you have in mind; that the court must find that, beyond a reasonable doubt, the illegal nature of the order known by the accused before they can convict him.

A portion of the instructions eventually agreed upon by both counsel and the accused, and given by the military judge to the members, was the Keenan *instruction, tailored to the circumstances of Schwarz's case*:

MJ: If you find beyond a reasonable doubt that the accused, under the circumstances of his age and military experience, could not have honestly believed the order issued by his

[148] Referring to *U.S. v. Keenan*, 39 CMR 108 (CMA, 1969).

> team leader to be legal under the laws and usages of war, then the killing . . . was without justification. A marine is a reasoning agent, who is under a duty to exercise judgment in obeying orders . . . Where such orders are manifestly beyond the scope of the authority of the one issuing the order, or are palpably illegal upon their face, then the act of obedience to such orders will not justify acts pursuant to such illegal orders.

Conclusion. *The members found Schwarz guilty of twelve of the sixteen specifications of premeditated murder. After arguments by both counsel regarding the quantum of punishment, the members sentenced Schwarz to forfeiture of all pay and allowances, to be discharged from the Marine Corps with a dishonorable discharge, and confinement for life.*

At his later general court-martial, with a different trial team and a different military jury, the patrol leader was acquitted of all charges. It was not Nuremberg, but it was two of many valiant efforts to live up to the examples set there.

REGINA V. FINTA

[1994] 1 S.C. R. 701

Introduction. *During World War II, Captain Imre Finta commanded the Royal Hungarian Gendarmerie in Nazi-occupied Szeged, Hungary. During his command, 8,617 Jews were arrested and deported to various concentration camps from Budapest, an area in Finta's charge. The authority for Finta's Gendarmerie to arrest and deport the victims was the so-called "Baky Order," a decree issued by the Hungarian Ministry of the Interior. Following the war, Finta was tried in absentia in a Hungarian court and found guilty of "crimes against the people." In 1948, before his Hungarian trial, Finta had immigrated to Toronto, Canada, where he became a citizen in 1956. In 1987, Canada charged Finta with manslaughter, kidnapping, robbery, and unlawful confinement, all charges arising from his command of the police units that forced the wartime Jewish deportations. His defense? He was only following orders. There was no suggestion of a gun held to his head or other direct physical coercion. The orders he argued that he followed were those in the Baky Order. After a six-month jury trial, Finta was acquitted of all charges. His acquittal was upheld by Canada's Court of Appeals and by the Supreme Court.*

From the opinion of Canada's Supreme Court:

> The defense of obedience to superior orders and the peace officer defense are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defenses are subject to the manifest illegality test: the defenses are not available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defense of obedience to superior orders and the police officers' defense will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. There can be no moral choice where there was such an air of compulsion and threat to the accused that he or she had no alternative but to obey the orders.

Conclusion. *What is your opinion of the Canadian court's view of "moral choice"? In your opinion, does it comport with the "moral choice" holding of the Nuremberg IMT? What is your standard of comparison?*

PROSECUTOR V. ERDEMOVIĆ

IT-96-22 Indictment (22 May 1996) Footnotes omitted.

Introduction. *Forty-eight years after the Ohlendorf judgment, and twenty-five years after the Schwarz court-martial, the ICTY was still trying cases in which the defense of obedience was raised to the commission of war crimes. The Erdemović decisions illustrate the complexities that can arise in responding to a seemingly simple defense.*

2. On or about 6 July 1995, the Bosnian Serb army commenced an attack on the UN "safe area" of Srebrenica. This attack continued through until 11 July 1995, when the first units of the Bosnian army entered Srebrenica.

8. Between 13 July 1995 and approximately 22 July 1995, thousands of Bosnian Muslim men were summarily executed by members of the Bosnian Serb army and Bosnian Serb police at divers locations . . .

11. On or about 16 July 1995, buses containing Bosnian Muslim men arrived at the collective farm in Pilica. Each bus was full of Bosnian Muslim men, ranging from approximately 17–60 years of age. After each bus arrived at the farm, the Bosnian Muslim men were removed in groups of about 10, escorted by members of the 10th Sabotage Detachment to a field adjacent to farm buildings and lined up in a row with their backs facing Drazen Erdemović and members of his unit.

12. . . . Erdemović, did shoot and kill and did participate with other members of his unit and soldiers from another brigade in the shooting and killing of unarmed Bosnian Muslim men at the Pilica collective farm. These summary executions resulted in the deaths of hundreds of Bosnian Muslim male civilians.

IT-96-22-T bis (5 March 1998)

On review of Erdemović's trial, the Appeals Chamber found the guilty plea to be voluntary but also found that it was not informed. The Trial Chamber did not make clear to Erdemović, held the Appeals Chamber, that crimes against humanity was a more serious charge than violation of laws and customs of war. On that thin basis the Appeals Chamber ordered a second trial. The record of Erdemović's second trial, quoting from his various prior appearances before the ICTY, describes the circumstances of the events that were the basis of the charges against him:

14. . . . . Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you are sorry for them, stand up, line up with them and we will kill you too". I am not sorry for myself but for my family my wife and son who then had nine months, and I could not refuse because they would have killed me. . . .

Q. What happened to those civilians?
A. We were given orders to fire at those civilians, that is, to execute them.
Q. Did you follow that order?
A. Yes, but at first I resisted and Brano Gojkovic told me if I was sorry for those people that I should line up with them; and I knew that this was not just a mere threat but that it could happen, because in our unit the situation had become such that the Commander of the group has the right to execute on the spot any individual if he threatens the security of

the group or if in any other way he opposes the Commander of the group appointed by the Commander Milorad Pelemis. . . .

. . . I said immediately that I did not want to take part in that and I said, "Are you normal? Do you know what you are doing?" But nobody listened to me . . .

It was . . . I was under orders. If I had not done that, my family would have been hurt and nothing would have been changed.

Q. Did you know at the time of anyone who was shot for having disobeyed orders?
A. You know, I will tell you, I am sure that I would have been killed had I refused to obey because I remember that Pelemis had already ordered one man to slaughter another man and I am familiar with some other orders, I mean, what a Commander was entitled to do if he was disobeyed; he could order this person's liquidation immediately. I had seen quite a bit of that over those few days and it was quite clear to me what it was all about.
Q. . . . . I was not afraid for myself at that point, not that much. If I were alone, I would have run away, I would have tried to do something, just as they tried to flee into the forest, or whatever. But what would happen to my child and to my wife? So there was this enormous burden falling on my shoulders. On the one hand I knew that I would be killing people, that I could not hide this, that this would be burning at my conscience.

IT-96-22-T (29 November 1996)

With the circumstance of Erdemović's charges before them, the Trial Chamber of his first trial considered his plea of guilty and ruled:

15. The defence of obedience to superior orders has been addressed expressly in Article 7(4) of the [ICTY's] Statute. This defence does not relieve the accused of criminal responsibility. The [UN] Secretary-General's report which proposed the Statute . . . clearly stated in respect of this provision that, at most, obedience to superior orders may justify a reduced penalty "should the International Tribunal determine that justice so requires".

16. In respect to the physical and moral duress accompanied by the order from a military superior (sometimes referred to as "extreme necessity"), which has been argued in this case, the Statute provides no guidance . . .

17. A review by the United Nations War Crime Commission of the post-World War Two international military case law . . . considered the issue of duress as constituting a complete defence. After an analysis of some 2,000 decisions by these military tribunals, the United Nations Commission cited three features which were always present and which it laid down as essential conditions for duress to be accepted as a defense for a violation of international humanitarian law.

(i) the act charged was done to avoid an immediate danger both serious and irreparable;
(ii) there was no adequate means of escape;
(iii) the remedy was not disproportionate to the evil . . .

18. . . . The absence of moral choice was recognized on several occasions as one of the essential components for considering duress as a complete defence. A soldier may be considered

as being deprived of his moral choice in the face of imminent physical danger. This physical threat, understood in the case-law as a danger of death or serious bodily harm, must in some sense also meet the following conditions: it must be "*clear and present*" or else be "*imminent, real, and inevitable*."

These tribunals also took into account the issue of voluntary participation in an enterprise that leaves no doubt as to its end results in order to determine the individual responsibility of the accused members of the armed forces or paramilitary groups. The rank held by the soldier giving the order and by the one receiving it has also been taken into account in assessing the duress a soldier may be subject to when forced to execute a manifestly illegal order.

Although the accused did not challenge the manifestly illegal order he was allegedly given, the Trial Chamber would point out that according to the case-law referred to, in such an instance, the duty was to disobey rather than to obey. This duty to disobey could only recede in the face of the most extreme duress.

19. Accordingly, 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 . . .

20. On the basis of the case-by-case approach and in light of all the elements before it, the Trial Chamber is of the view that proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided. Thus, the defence of duress accompanying the superior order will . . . be taken into account at the same time as other factors in the consideration of mitigating circumstances. . . .

48. Since the International Tribunal is confronted for the first time with a guilty plea accompanied by an application seeking leniency by virtue of mitigating circumstances based on superior orders which are likely to have limited the accused's freedom of choice at the time the crime was committed, the Trial Chamber believes it necessary to ascertain in the relevant case-law whether such a defence has indeed permitted the mitigation of sentences handed down . . .

51. However, the Trial Chamber considers that the rejection by the Nuremberg Tribunal of the defence of superior orders [in the cases of Field Marshals Keitel and Jodl], raised in order to obtain a reduction of the penalty imposed on the accused, is explained by their position of superior authority and that, consequently, the precedent setting value of the judgment in this respect is diminished for low ranking accused.

52. As regards other tribunals which have ruled on cases involving accused of various ranks, the Trial Chamber notes that superior orders, whether or not initial resistance on the part of the accused was present, have been admitted as mitigating circumstances or have led to considerably mitigated sentences. This was the case in the following decisions . . .

53. . . . the Trial Chamber emphasises, however, that a subordinate defending himself on the grounds of superior orders may be subject to a less severe sentence only in cases where the order of the superior effectively reduces the degree of his guilt. If the order had no influence on the unlawful behavior because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist. . . .

89. In accordance with the principles the Trial Chamber has established . . . it identified a certain number of questions . . . :

– could the accused have avoided the situation in which he found himself?
– was the accused confronted with an insurmountable order which he had no way to circumvent?
– was the accused, or one of his immediate family members, placed in danger of immediate death or death shortly afterwards?
– did the accused possess the moral freedom to oppose the orders he had received? Had he possessed that freedom, would he have attempted to oppose the orders?

91. The Trial Chamber would point out, however, that as regards the acts in which the accused is personally implicated and which, if sufficiently proved, would constitute grounds for granting mitigating circumstances, the Defence has produced no testimony, evaluation or any other elements to corroborate what the accused has said. For this reason, the Judges deem that they are unable to accept the plea of extreme necessity.

In accordance with Erdemović's continuing plea of guilty, the Trial Chamber, with its odd finding (paragraph 18) that the accused had not challenged his illegal order, sentenced him to ten years' confinement. Erdemović appealed the sentence.

IT-96-22-A (7 October 1997)

19. . . . [T]he majority of the Appeals Chamber finds that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings. Consequently, the majority of the Appeals Chamber finds that the guilty plea of the Appellant was not equivocal . . .

20. However, the Appeals Chamber . . . finds that the guilty plea of the Appellant was not informed and accordingly remits the case to a Trial Chamber other than the one which sentenced the Appellant in order that he be given an opportunity to replead . . .

21. Consequently, the Appellant's application for the Appeals Chamber to revise his sentence is rejected by the majority. The Appeals Chamber also unanimously rejects the Appellant's application for acquittal.

IT-96-22-T bis (5 March 1998)

. . . *at Erdemović's retrial*:

13. . . . . The parties agreed on the facts. In particular, the accused agreed that the events alleged in the indictment were true, and the Prosecutor agreed that the accused's claim to have committed the acts in question pursuant to superior orders and under threat of death was correct.*

15. *Aggravating factors*
The Trial Chamber accepts that hundreds of Bosnian Muslim civilian men between the ages of 17 and 60 were murdered by the execution squad of which the accused was part. The Prosecution has estimated that the accused alone, who says that he fired individual shots using a Kalashnikov automatic rifle, might have killed up to a hundred (100) people. This approximately matches his own estimate of seventy (70) persons. No matter how reluctant

* A significant concession by the Prosecution, made pursuant to a plea bargain agreement.

his initial decision to participate was, he continued to kill for most of the day. The Trial Chamber considers that the magnitude of the crime and the scale of the accused's role in it are aggravating circumstances to be taken into account . . .

17. Duress

The Trial Chamber has applied the ruling of the Appeals Chamber that "*duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.*" It may be taken into account only by way of mitigation [of the sentence] . . .

[There has been testimony of] the Accused's vulnerable position as a Bosnian Croat in the BSA [Bosnian Serb Army] and his history of disagreements with his commander, Milorad Pelemis, and subsequent demotion . . .

The evidence reveals the extremity of the situation faced by the accused. The Trial Chamber finds that there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed.

Conclusion. *A plea bargain accepted by the Trial Chamber called for Erdemović to plead guilty to certain charges, which he did, in return for which the Prosecution recommended a sentence of seven years' imprisonment. The Trial Chamber sentenced Erdemović to five years confinement "for the violation of the laws or customs of war," with credit for his time in pretrial confinement, which was three weeks short of two years.*

Do you think the ICTY Trial Chamber's opinion was consistent with the judgment in Nuremberg's Ohlendorf case? Is consistency with Nuremberg a concern?

There has been criticism that the Erdemović case and sentence were overly harsh, given the circumstances of his crime.[149] *There are also opinions that the sentence was inappropriately light,*[150] *and still other opinions that the Trial Chamber's opinion created new legal norms,*[151] *or that it was simply badly decided.*[152]

[149] Aaron Fichtelberg, "Liberal Values in International Criminal Law: A Critique of Erdemović," 6–1 *J. of Int'l Crim. Justice* (March 2008), 3–19. At 18: "[T]he court made an inappropriate decision . . . In essence, they undermined the moral and theoretical core of international humanitarian law. . . . Of course, the Tribunal's decision was influenced by a number of 'extra-legal' considerations . . . " And, Illan Rua Wall, "Duress, International Criminal Law and Literature, 4–4 *J. of Int'l Crim. Justice* (Sept. 2006), 724–44. At 724: "Erdemović should never have stood trial . . . " At 727–8: "The dissenting opinion of Judge Cassese provides a rich source of jurisprudence, as well as ethical and philosophical knowledge . . . He argues that the majority decision is founded on the idea that the subject of duress 'ought rather die himself than kill an innocent'. 'However, where an accused cannot save the life of the victim, no matter what he does, the rationale for the common law exception . . . disappears.'" Footnotes omitted.

[150] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (New York: Cambridge, 2004), 247–8: "[T]he correct approach is that an accused cannot be exonerated on the ground of duress if the war crime consisted of murder. This proposition is founded on the simple rationale that neither ethically nor legally can the life of the accused be regarded as more valuable than that of another human being (let alone a number of human beings). . . . At that critical moment, the accused is not allowed to play God."

[151] Schabas, *The UN International Criminal Tribunals*, supra, note 138, at 120.

[152] Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), 34. "It may be respectfully noted that the Court not only failed to indicate on what national laws it had relied but also omitted to specify whether it had taken into account . . . national laws on war crimes . . . It would therefore seem that the legal proposition set out by the Court does not carry the weight it could have, had it been supported by convincing legal reasoning."

As a matter of law, Article 31.1(d) of the ICC Statute breaks with the ICTY's Erdemović majority:[153]

> 1 . . . [A] person shall not be criminally responsible if, at the time of that person's conduct: (d) The conduct which is alleged to constitute a crime . . . has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. . . .

Had Erdemović been tried by the ICC he likely would have been found not guilty.

UNITED STATES V. STAFF SERGEANT RAYMOND L. GIROUARD

General Court-Martial, Fort Campbell, Kentucky (March 2007)

Introduction. *A U.S. Army case that arose near Tikrit, Iraq, in May 2006, illustrates the reticence of young junior soldiers to inform superiors of war crimes committed by other soldiers. As often occurs, the failure to report war crimes involved soldiers who were themselves involved in the wrongdoing, surely no encouragement to exposure.*

The incident involved a squad from the 101st Airborne Division which was sent on a patrol to a remote and dangerous area near a former chemical plant, now a suspected insurgent training camp. Before departing, the squad was allegedly told by a senior officer to "kill all military-age men" they encountered. During the mission, after a brief firefight three Iraqi men were captured and blindfolded, and their hands were bound with plastic "zip ties." While reporting the encounter by radio, the squad leader, Staff Sergeant (SSgt.) Girouard, was allegedly told by a senior noncommissioned officer that the prisoners should have been killed.

Pursuant to a quickly hatched conspiracy, it was agreed between several squad members that the detainees' zip ties would be cut and they would be told to run. They would be shot and killed as they ran. To make a later account of escaping prisoners plausible, SSgt. Girouard would punch in the face one member of the squad and inflict a knife cut on the arm of another. The visible wounds would substantiate a false account of a struggle with the escaping detainees.

The following extracts are from a written, sworn statement provided by one of the members of the patrol to an Army investigator.[154] *It was the soldier's second statement, after an initial statement disclaiming all knowledge of any wrongdoing. This second statement was later admitted in evidence at the court-martial of SSgt. Girouard.*

> A. . . . As we all stood there, SSgt. Girouard said to bring it in close. In a low toned voice he said, "We are going to change the zip-ties . . . " and glanced at the detainees, who were outside. He mentioned that 1st Sgt. ___ transmitted over the radio that the detainees should have been killed . . . [Girouard's] hands and his body language was as to say that the detainees were going to get roughed up. I didn't like the idea so I walked towards the door. He looked around at everyone and asked if anyone else had an issue or a problem. Nobody said anything . . . [Outside] I told Sergeant ___ that I was smoked . . . Right there, I heard "Oh shit" and saw 2 detainees running away. They all got shot and fell . . . I made my way to the house only to see 3 bodies, which were the detainees, and SSgt. Girouard. I

[153] Kriangsak Kittichaisaree, *International Criminal Law* (New York: Oxford University Press, 2001), 264.
[154] On file with author.

asked him what happened. But he couldn't answer . . . A week later, while we sat at combat outpost 2, in Samarra, I overheard all the talk about what had really happened . . . PFC C__ mentioned to people in his truck that SSgt. Girouard had punched [him] pretty hard . . . I heard about a kitchen knife being used to cut Specialist H___. Specialist G___ did not say who did the cutting . . .

Q. While in the house did you specifically hear Girouard state that he was going to cut the detainees' zip-ties and shoot them?
A. After he pulled us in close, yes he did.
Q. Did he specify who was going to do the shooting?
A. Not while I was in the room . . .
Q. While in the room, did Girouard state that he or someone else will cut H__ and punch C__?
A. No, not while I was in the room. . . .
Q. Did you witness anyone shoot the detainees?
A. No, I could not see rifles pointed or firing.
Q. Why did you tell A__ [in your first sworn statement] the detainees were shot inside the house?
A. I told him 1 person was shot inside the house when we first assaulted the objective. Not a detainee. The first K.I.A. [enemy killed in action] was shot through the window from the outside of the house when we ran to the house . . .
Q. Besides yourself, C___, H___, Girouard, M___, and G___, who else knows about the conspiracy to shoot the detainees and subsequently killed them? Who else knows the circumstances of how they were killed?
A. Only myself, Corporal S___, and Sergeant A___. No one else to my knowledge. . . .
Q. Is all the detail you provided in your previous sworn statement on 29 May 06, from when you heard "Oh shit" and saw 2 detainees get shot, to when you arrived back to the house and saw the bodies and H__, Girouard and C__, correct to the best of your knowledge?
A. Yes.
Q. Why didn't you attempt to stop Girouard, H__, and C__ from killing the detainees?
A. Afraid of being called a pussy.
Q. Why didn't you immediately inform your platoon leader or anyone else, on the radio?
A. Peer pressure and I have to be loyal to the squad.
Q. Do you feel what Girouard, H__, and C__ did was wrong?
A. Yes, it was wrong.
Q. Do you know what they did is a violation and is punishable under the UCMJ [Uniform Code of Military Justice]?
A. Yes.
Q. Do you know that you are obligated as a soldier to report any crime you witness?
A. Yes.
A. Do you know by withholding that information, you have violated the UCMJ?
A. Yes. . . .
Q. What was C__'s demeanor while Girouard was talking about the plan?
A. His reaction was normal. It was later on that I took notice how he was feeling. 3 days later he told me he couldn't stop thinking about it. As if it bothered him. He then asked me about my previous deployment [in Iraq] and how I dealt with seeing dead bodies and shooting the enemy. I told him it was alright that he felt like that. He was really stressed because when he slept the few hours he did, he dreamed about it over and over. . . .

Q. Has Girouard ever threatened you or anyone else's lives if they spoke of the circumstances of how the detainees were killed?
A. When we were at the Combat Out Post #2 we talked it over briefly. SSgt. Girouard, Specialist H____, Private First Class M____, Private First Class C____ and Specialist G____ were all there. He said to be loyal and not to go bragging or spreading rumors about the objective. He said to act like grown men and be quiet professionals. After that he said if he found out who told anyone anything about it he would find that person after he got out of jail and kill him or her. I laughed about it and most of the squad smiled and blew it off. . . .
Q. Is there anything you want to add to this statement?
A. No.

Conclusion. *At trial, SSgt. Girouard was acquitted of the premeditated murder of three Iraqi detainees, and acquitted of conspiracy to commit murder. He was convicted of negligent homicide, obstruction of justice, and conspiracy to obstruct justice. He was sentenced to a reduction in rank to private, the loss of all pay and allowances, ten years confinement, and a dishonorable discharge. At separate general courts-martial, two coaccused who actually shot the victims were convicted and sentenced to eighteen years confinement and dishonorable discharges. A fourth coaccused, who was not so deeply involved, was convicted of lesser charges and sentenced to nine months confinement and a bad conduct discharge.*

The soldier who provided the foregoing statement testified in the trials of the others. Pursuant to a grant of immunity, charges against him were dropped.