THE SOLDIER'S DILEMMA: A LOOK AT THE DEVELOPMENT AND SCOPE OF THE SUPERIOR ORDERS DEFENCE AND ITS POTENTIAL TO RESOLVE THE DILEMMA

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The soldier's dilemma: A look at the development and scope of the superior orders defence and its potential to resolve the dilemma.

'the position of a soldier may be, both in theory and practice, a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.' – A. V. Dicey[1]

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[1] Albert Venn Dicey 'Introduction to the Study of the Law of the Constitution' (2013) 1 *Oxford: Oxford*

CHAPTER I: INTRODUCTION AND CONTEXT

There exists a dilemma faced by soldiers of all ranks, although more specifically the lower and mid-ranking soldiers, during times of armed conflict. It is trite that soldiers are duty-bound to obey the orders of their superior or commanding officers, even those orders that might not be lawful. That is the very nature of the military system. During the Second World War ('WWII'), for example, Nazi soldiers held an unconditional belief in the supremacy of Adolf Hitler and the authority of his rules.[2] This was referred to as the *Fuhrerprinzip*.[3] In Japan, soldiers were trained to obey the orders of their commanding officers without question.[4] In terms of Japanese laws during WWII, any orders given to subordinate soldiers were deemed to be issued directly by the Emperor of Japan[5] and so to disobey a superior order was to disobey the authority of the Emperor.

Fear was instilled into the minds of soldiers that were they to question or disobey a direct order from their superior then their punishment would be severe.[6] In the international sphere, however, the commission of unlawful acts by soldiers might result in their prosecution before an international tribunal, such as the Nuremberg or Tokyo Tribunals in the mid-20th century, or the International Criminal Court today, for example. Thus exists a dilemma: if a soldier intentionally disobeys the orders of their superior officer then they face being court-martialed in their own country. But, if they obey these orders and carry out unlawful acts that potentially amount to international crimes, such as war crimes or crimes of aggression, then they face prosecution in the international sphere. This dilemma is oft referred to as the moral dilemma of soldiers, or the soldier's dilemma.

When soldiers do come before an international tribunal, they may raise the defence of superior orders. Soldiers raise this defence in order to either escape or limit their liability for the commission of international crimes. In terms of this defence,

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[2] Tessa McKeown 'The Defence of Superior Orders in International Criminal Law: The Eichmann Trial and Kant's Philosophy' (2014) *Faculty of Law, Victoria University of Wellington* at 5.
[3] Ibid.
[4] Cheah Wui Ling 'The superior orders defence at the post-war trials in Singapore' in K Sellars (ed) *Trials for International Crimes in Asia* (2015) (100-120) Cambridge: Cambridge University Press at 108.
[5] Ibid.
[6] Ibid at 115.

soldiers should not be found guilty for such crimes when they were purely following the orders of their superior officers.[7]

So long as the world is plagued by armed conflicts will the soldier's dilemma and the defence of superior orders remain relevant. The raising of the superior orders defence, whether successful or not, has been documented throughout history. One of the first documented instances of the defence was in the late 15th century in the Holy Roman Empire, during the international war crimes trial of Peter von Hagenbach.[8] The defence continued to be raised in the First World War ('WWI'), and then gained notoriety in WWII during the Nuremberg and Tokyo Trials. It has since been pleaded in subsequent armed conflicts such as the Vietnam War as well as after the Yugoslav Wars. It has even been raised in national trials, such as in Italy and Israel. The most recent instance of the superior orders defence is as a result of the current crisis that has affected many countries today: Russia's invasion of Ukraine, which began in February of 2022.

Four days after Russia invaded Ukraine, 21-year-old Russian Sergeant Vadim Shyshimarin shot and killed a 62-year-old Ukrainian civilian, Oleksandr Shelipov, in Chupakhivka, a village to the east of Kyiv.[9] Shyshimarin was taken to a Kyiv court in May where he pleaded guilty to the murder of Shelipov.[10] In his defence Shyshimarin admitted that he and a group of Russian soldiers were attempting to run from Ukrainian soldiers when they came across Shelipov. Faced with the fear and the not improbable assumption that Shelipov would report the location of the Russian group, Shyshimarin claimed that he was ordered to shoot and kill the man.[11] He did.

Although Shyshimarin did not expressly raise the defence of superior orders in an attempt to limit his liability, the defence is still relevant in this case.

Although it is unlikely that a lower-ranking soldier such as Shyshimarin will ever fully escape liability for his actions, it is also important to try to imagine what goes through the mind of a soldier in his position. He has been trained to obey the

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[7] Martha Minow 'Living up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence' (2007) 52(1) *McGill Law Journal* at 17.
[8] Gregory S Gordon 'The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law' 16 February 2012, available at *http://dx.doi.org/10.2139/ssrn.2006370*, accessed on 5 September 2022.
[9] Valerie Hopkins 'A Russian soldier pleads guilty to killing a civilian and violating the laws and customs of war' *The New York Times* 18 May 2022, available at *https://www.nytimes.com/2022/05/18/world/europe/russian-soldier-war-crime-ukraine-law.html,* accessed on 6 September 2022.
[10] Ibid.
[11] Ibid.

orders of his superiors without question and to expect retribution for disobedience. However, this blind obedience, particularly when the order effectively authorises an international crime, may lead to his prosecution at the international level. There likely is not that much time during the conflict available for a soldier to ponder these possibilities and so he simply does what he is trained to do and carries out his orders. International crimes such as war crimes and crimes of aggression, for example, can never be excused, but should a soldier be vilified for simply carrying out the orders of his superiors?

In this paper the question of whether the soldier's dilemma faced by soldiers, particularly lower-ranking soldiers, such as Vadim Shyshimarin, can be resolved by legal means, and if so to what extent, will be explored. In order to answer this question this paper will look at the scope and development of the superior orders defence in the national and international legal sphere in order to offer some clarity on the defence. This will be achieved by looking at the application of the scope of the defence throughout history, more specifically, throughout the 20th and 21st centuries. The trial of Peter von Hagenbach in 1474, considered to be one of the very first war crimes trials documented,[12] and how the superior orders defence was applied will be discussed. This will be followed by a discussion of the *Dover Castle*[13] and *Llandovery Castle*[14] cases from WWI, which recognised the defence as legitimate. The view of the defence appeared to change, particularly at the international level, with WWII and the establishment of the Nuremberg and Tokyo Tribunals, where the defence was declared to be illegitimate and soldiers were prohibited from raising it in their relevant tribunals.[15] After WWII, there were various approaches to and applications of the defence under both international and national law until the introduction of the Rome Statute,[16] which established the International Criminal Court ('ICC'). The Rome Statute recognises and codifies the defence of superior

[12] Gregory S Gordon op cit note 8.
[13] *Dover Castle* (1922) 16 *American Journal of International Law* at 704 ('*Dover Castle* case').
[14] 'The *Llandovery Castle* case' (1921) Case No. 235, Full Report (CMD. 1450), *Annual Digest 1923-1924* at 45 ('*Llandovery Castle* case').
[15] United Nations, *Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European axis,* 8 August 1945 ('London Charter') at art 8 and United Nations, *International Military Tribunal for the Far East Charter,* 19 January 1946 ('Tokyo Charter') at art 6.
[16] United Nations General Assembly, *Rome Statute of the International Criminal Court* (as amended 2010), 17 July 1998 ('Rome Statute').

orders where an order 'was not manifestly unlawful.'[17] The addition of the defence to the Rome Statute is a controversial one, as some international scholars are of the opinion that to recognise the defence as legitimate is to depart from customary international law, which provides that the defence is not a legitimate one. There are other international scholars that disagree with this view and opine that there is no rule in customary international law that provides that the defence is illegitimate. Some of the cases and examples that will be considered and discussed do not directly involve low-ranking soldiers, but rather higher-ranking soldiers, however it is important that they be included and discussed in order to provide a fully rounded context of the defence.

After looking at the history of the defence, this paper will then provide a discussion on the degrees of liability that have been attributed to the defence, and which one is best placed to resolve, if at all, the soldier's dilemma. There are three forms of liability, or three approaches, that have been developed and recognised over time: the absolute defence, also known as the *respondeat superior* doctrine, the absolute liability approach, and the conditional liability approach. According to the *respondeat superior* approach, the superior orders defence is a legitimate one and when a soldier obeys his superior officer, he will never be found liable for his actions.[18] The absolute liability approach, on the other hand, which appears to be the favoured approach at the international level, holds that the defence is not legitimate and should not be recognised.[19] The conditional liability approach finds its place in the middle of the three approaches, where the defence is considered legitimate,[20] however it will not be of help to a soldier who knew that the order that he was given was illegal,[21] or where the order was manifestly illegal.[22] The latter approach to the conditional liability approach is also referred to as the principle of manifest illegality, or the manifest illegality rule.[23]

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[17] Ibid at art 33(1)(c).
[18] James B Insco 'Defence of Superior Orders before Military Commissions' (2003) 13 *Duke J Comp and International Law* 389 and 392.
[19] Ibid at 390.
[20] Ibid at 393.
[21] Paola Gaeta 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' (1999) 10 *European Journal of International Law* (172-191) at 172.
[22] Ibid at 175.
[23] Ibid.

The tentative answer to the question to which this paper seeks to respond is that the defence of superior orders should not be looked at in terms of the *respondeat superior* or absolute liability approaches, but rather in terms of the conditional liability approach. This approach appears to be the best possible solution to the soldier's dilemma as it still recognises the superior orders defence as legitimate, but offers a more limited approach. The conditional liability approach, by following the manifest illegality rule, still respects and upholds the nature of the military system and the duties to which soldiers are bound.[24]

Following Chapter I of this paper, which provides the introduction and context of the paper and its topic, Chapter II will provide a brief introduction to the superior orders defence as a whole. Chapter III will then discuss the history of the defence and how it has been raised over time, and how the various courts and tribunals, both national and international, have dealt with it. Some have fully rejected the defence whereas others have taken it into consideration, especially as a mitigating factor in the determination of the accused's punishment. Some courts and tribunals have accepted it completely. This chapter will include and discuss the cases of Peter von Hagenbach, the *Dover Castle* and *Llandovery Castle* cases of WWI, the Nuremberg and Tokyo Trials and their respective Charters, and the subsequent Nuremberg Principles, which were developed consequent to the conclusion of the Nuremberg Trials. The trials of former Nazi soldiers in the United States, also known as the 'subsequent Nuremberg Trials' will be discussed. This will be followed by a discussion of the trials relating to the Vietnam War, which bore some of the most notorious cases involving the superior orders defence. This will be followed by a discussion of domestic prosecutions in Israel, which includes the trial of former high-ranking member of the *Schutzstaffel*, also known as the *SS*, Adolf Eichmann. Following this will be a discussion of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') and their respective Charters. The trial of Erich Priebke, another former Nazi soldier, will be discussed and then the Rome Statute of the International Criminal Court, one of the leading pieces of international legislation today, which codifies the

[24] James B Insco op cit note 18 at 393.

defence,[25] will be discussed. This Chapter will conclude with a discussion of the Russo-Ukraine War and the application of the defence.

Chapter IV will then look at the current status of the superior orders defence in law. The defence has been codified in various international statutes, most important being the Rome Statute. Chapter IV will also consider the status of the defence in customary international law.

Chapter V will provide further analysis of the cases and examples described in Chapter III, while also delving into a detailed discussion of the three forms of liability that are attributed to the superior orders defence. This chapter will consider the ability, if any, of each approach to resolve the soldier's dilemma.

Chapter VI will then conclude this paper by providing a brief summation of the paper and its recommendations.

CHAPTER II: WHAT IS THE DEFENCE OF SUPERIOR ORDERS?

The defence of superior orders is one that is used in both national and international criminal law[26] and is possibly one of the oldest defences that has been raised in a military tribunal.[27] It is raised by a subordinate soldier in order to escape or reduce liability for the commission of an act, done under the orders of a superior officer, which violates international or national law.[28] The defence is thus raised when a soldier is accused of having committed international crimes during an armed conflict.[29]

In terms of this defence, a soldier is entitled to presume that all orders given to him by his superiors are lawful and if they are proven to be unlawful, then he will be exempt from punishment, unless any reasonable person could have seen that the

[25] Rome Statute supra note 16 at art 33.
[26] Ziv Bohrer 'The Superior Orders Defense: Principle-Agent Analysis' (2012) 41(1) *Georgia Journal of International and Comparative Law* (1-74) at 3.
[27] Christopher M Henson 'Superior Orders and Duress as Defenses in International Law and the International Criminal Tribunal for the Former Yugoslavia' (2004) *Department of Political Science, University of North Texas* at 9.
[28] Ibid.
[29] Christopher K Penny 'Obeying Restraints: Applying the Plea of Superior Orders to Military Defendants before the International Criminal Court' (2010) 48 *Canadian Yearbook of International Law* (3-38) at 3.

order was clearly unlawful.[30] In such a case, the subordinate will not be entitled to make use of the defence.

This defence has been raised throughout history, with varying methods of application and results, as will be discussed further on in this paper. What can be seen from the application of the defence of superior orders is that, although undoubtedly a very important defence, particularly for soldiers of lower ranks, it is also a very controversial one.[31] One of the main reasons for this controversy is in its justification. This defence finds justification in that, in a military environment, a subordinate soldier is under a strict obligation to obey the orders of his superior officers.[32] As discussed in Chapter I of this paper, this gives rise to the moral dilemma faced by soldiers. Some international lawyers and scholars as well as world-renowned philosophers, on the one hand, believe that a soldier's duty to his superiors is one that is absolute and cannot be broken.[33] English philosopher Thomas Hobbes advocates for this view. He held that '[w]hen I do, by order, an act which is wrong for the one who commands it, it is not my wrongdoing, as far as the commander is my legitimate master.'[34]

Hobbesian theory therefore promotes the ideology that soldiers have a duty to their superiors and to their state and, as such, culpability for any violations of law that the soldier may commit falls solely on the state and superior officers.[35]

On the other hand, however, English philosopher John Locke does not promote this absolutist approach.[36] He believes that one has a duty to obey the law, and when one is obedient to the law, then they are said to have allegiance.[37] When one violates the law then there is no obedience.[38] Locke thus promotes the idea that superior orders is not absolute and legality is more important.[39]

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[30] Mark J Osiel 'Obeying Orders: Atrocity, Military Discipline, and the law of War' (1998) 86(5) *California Law Review* (939-1130) at 962-963.
[31] Tessa McKeown op cit note 2 at 3.
[32] Paola Gaeta op cit note 21 at 173.
[33] Tessa McKeown op cit note 2 at 4.
[34] Thomas Hobbes 'On the Citizen' (1651) quoted in M Cherif Bassiouni *Introduction to International Criminal Law* (2012) 2 ed *Koninklijke Brill, Leiden* at 408.
[35] Tessa McKeown op cit note 2 at 4.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid.

It is unlikely that these debates and this controversy will ever fully be resolved. This lack of certainty regarding the defence does not, however, negate its existence and legitimacy, as will be seen throughout this paper.

CHAPTER III: HISTORY AND DEVELOPMENT OF THE DEFENCE

1. Peter von Hagenbach

The trial of Peter von Hagenbach in 1474 is considered to be one of the very first war crimes trials in history.[40] Von Hagenbach served the Duke Of Burgundy, or 'Charles the Bold,' and in his employment acted as governor of the Duke's territories in the Alsace region in France.[41] Over the course of his employment, von Hagenbach was accused of perpetrating a number of atrocities, including murder and the mass rape of women.[42] He was put to trial before a tribunal in the Holy Roman Empire.[43] In his argument his counsel stated that,

> Sir Peter von Hagenbach does not recognise any other judge and master but the Duke of Burgundy from whom he received his Commission and his orders. He had no right to question the orders which he was charged to carry out, and it was his duty to obey. Is it not known that soldiers owe absolute obedience to their superiors?[44]

His defence was so persuasive that the attorney for the prosecution attempted to withdraw all the charges against von Hagenbach.[45] The judges reportedly deliberated for a lengthy period of time and it was apparent that one of the judges was no longer confident in von Hagenbach's guilt.[46] Ultimately, however, he was found guilty and was condemned to death by beheading.[47] In coming to their

[40] Gregory S Gordon op cit note 8 at 1.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid at 33.
[45] Ibid.
[46] Ibid at 34.
[47] Ibid.

decision the tribunal relied on the 'laws of God and man'[48] and stated that von Hagenbach's actions were contrary to those laws.

The tribunal ultimately rejected the defence of superior orders,[49] however it is evident that the case was not so straightforward and it required much deliberation on the part of the judges to come to the conclusion to reject the defence.

2. Henry Wirz

Henry Wirz was a captain of the American Confederate Army during the American Civil War,[50] which began in 1861[51] and concluded in 1865.[52] He was brought before a Military Commission[53] for his involvement in the mistreatment of the prisoners of war at Andersonville, who were in his custody.[54]

During this time, in 1863,[55] Francis Lieber, a professor at the Columbia School,[56] drafted the Lieber Code.[57] The Lieber Code was essentially a code of conduct for the American military,[58] as well as a codification of the American laws of war.[59] The Lieber Code also set out rules for the treatment of prisoners.[60] Unfortunately, the Lieber Code did not contain any provisions dealing with the defence of superior orders, therefore it was unclear whether or not the defence could be raised by a defendant when on trial for the commission of alleged war crimes.[61] The general view is that, by excluding the defence of superior orders, Lieber was

[48] Tessa McKeown op cit note 2 at 3.
[49] Leslie C Green 'Superior Orders and the Reasonable Man' (1970) 8 *Canadian Yearbook of International Law* (61-103) at 77.
[50] Christopher M Henson op cit note 27 at 9.
[51] Dorling Kindersley (DK) _History: Year By Year 2 ed (2018) Penguin Random House at 308.
[52] Ibid at 312.
[53] Eni A Alobo 'Developmental Trends of the Defence of Superior Orders: A Critical Appraisal of the Statute of the International Criminal Court' (2012) 9(3) *LWATI: A Journal of Contemporary Research* (107-125) at 114.
[54] Ibid.
[55] Alan M Wilner 'Superior Orders as Defense to Violations of International Criminal Law' (1966) 26(2) *Maryland Law Review* (127-142) at 131.
[56] Eni A Alobo op cit note 53 at 114.
[57] General Orders No. 100: Instructions for the Government of the Armies of the United States in the Field 1863 ('Lieber Code').
[58] Alan M Wilner op cit note 55 at 131.
[59] Ibid.
[60] Eni A Alobo op cit note 53 at 114.
[61] Ibid.

leaving the application of the defence, and whether or not it was a legitimate defence, to the discretion of the courts[62] as well as the state.[63]

When brought before the Military Commission, one of the defences raised by Wirz was that of superior orders.[64] In his defence he said that,

> I think I may also claim as a self-evident proposition that if I, a subaltern officer, merely disobeyed the legal orders of my superiors in the discharge of my official duties, I cannot be held responsible for the motives that dictated such orders.[65]

The prosecution did concede to the fact that Wirz was indeed acting in terms of superior orders,[66] however the prosecution held that an officer of superior rank cannot order his subordinate to carry out any orders that are illegal.[67] If the subordinate carries out an illegal order then both the superior and the subordinate need to be held accountable.[68] The prosecution went on to respond, rather facetiously, to Wirz's claims that he should not be held liable because of his low rank by saying that,

> And notwithstanding his earnest appeal, made to you in his final statement, begging that he, a poor subaltern, acting only in obedience to his superior, should not bear the odium and punishment deserved, with whatever force these cries of a desperate man, in a desperate and terrible strait, may come to you, there is no law, no sympathy, no code of morals, that can warrant you in refusing to let him have all justice, because the lesser and not the greater criminal is on trial.[69]

The Military Commission agreed with the prosecution and held that subordinate soldiers cannot, even if the orders they followed are illegal, escape justice simply because of their duty to obey their superiors.[70] Captain Henry Wirz was

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[62] Alan M Wilner op cit note 55 at 131.
[63] Eni A Alobo op cit note 53 at 114.
[64] Howard Levie 'The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders' in Michael N Schmitt and Leslie C Green (ed) *Levie on the Law of War of International Law Studies* vol 70 (1991) (269-291) at 270.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Eni A Alobo op cit note 53 at 114.

subsequently found to be guilty for the criminal acts in his personal capacity,[71] and was accordingly sentenced to death.[72]

3. Dover Castle

Before the outbreak of WWI, the general view, specifically that of American, English and French law, was that the superior orders defence was an absolute defence.[73] One of the leading authorities for this view was that of Professor Lassa Oppenheim.[74] Oppenheim stated that,

> If criminal members of the armed forces commit violations by order of their Government, they are not war criminals and cannot be punished by the enemy…[75] In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.[76]

The law in Germany at that time held a similar view, but added some conditions to the approach. The German Military Penal Code of 1872[77] was one of the leading authorities on the defence of superior orders. According to article 47,

> Where a penal law is violated through the execution of an order, in a matter connected with the service, the superior officer giving the order is alone accountable. The inferior, however, who obeys the order, incurs a penalty as a participator, in the following cases:
>
> 1. Where he has exceeded the order given him.
> 2. Where it was known to him that the order of the superior had reference to an act which had in view a civil or military crime or offense.[78]

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[71] Ibid.
[72] Howard Levie op cit note 64 at 270.
[73] Matthew R Lippman 'Humanitarian Law: The Development and Scope of the Superior Orders Defense' (2001) 20(1) *Penn State International Law Review* (153-252) at 159.
[74] Ibid.
[75] Lassa Oppenheim *Inter Law, A Treatise: War and Neutrality* 2 ed (1912) 310.
[76] Marcus Abrahamsson 'The Defence of Superior Orders: Article 33 of the ICC Statute – a departure from customary international law?' (2018) *Faculty of Law, Lund University* at 18-19.
[77] Military Penal Code (Militär-Strafgesetzbuch) for the German Empire: With the ordinance establishing it, issued June 20, 1872: to take effect from Oct. 1, 1872 ('German Military Penal Code').
[78] Ibid at art 47.

One of the first cases from the 20th century that involved the defence of superior orders is the *Dover Castle* case.[79] In 1917, the HMHS Dover Castle, a hospital ship, was torpedoed and subsequently sunk by a U-Boat, commanded by German *Kapitanleutnant* Karl Neumann.[80] Neumann pleaded the superior orders defence, claiming that his superiors had informed him that British hospital ships were no longer protected by the 1907 Hague Convention VIII,[81] because they were allegedly being used to transport British troops.[82] It was ultimately discovered that his superiors were incorrect in this allegation.

Neumann's case came before the Imperial Court of Justice (*'Reichsgericht'* – Germany's then-Supreme Court),[83] who relied on German law which held that subordinate soldiers were compelled to obey the orders of their superior officers, and which also held that only the commanding officers can be held liable.[84] The *Reichsgericht* ultimately acquitted Neumann based on German law, because, of the exception to this rule of law, Neumann's actions fell beyond the scope.[85] According to these exceptions, Neumann would be liable had he ventured beyond the parameters of his orders and had he not taken any measures to avoid or limit death or injury.[86] Neumann was held to not have met these exceptions.

Therefore, the *Reichsgericht* found that Neumann's reliance on his superiors was acceptable and that his actions would have been lawful had the information been correct.[87] Essentially, Neumann would only be liable had he been aware that the information was false.[88] The decision of the *Reichsgericht* was, not surprisingly, poorly received by the Allied countries.[89]

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[79] *Dover Castle* (1922) 16 *American Journal of International Law,* at 704.
[80] Hilaire McCoubrey 'From Nuremberg to Rome: Restoring the Defence of Superior Orders' (2001) 50(2) *International and Comparatice Law Quarterly* (386-394) at 387.
[81] 1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines.
[82] Hilaire McCoubrey op cit note 80 at 387.
[83] Ibid.
[84] Matthew R Lippman (2001) op cit note 73 at 166 and the German Military Penal Code supra note 77 at art 47.
[85] Matthew R Lippman (2001) op cit note 73 at 166.
[86] Ibid.
[87] Ibid.
[88] Ibid at 388.
[89] Ibid.

4. Llandovery Castle

The *Llandovery Castle* case[90] also involved a hospital ship that was torpedoed and sunk by a U-Boat, however the U-Boat also shot and killed all of the survivors of the ship.[91] The Commander of the U-Boat, *Kapitanleutnant* Patzig, disappeared before the trial, however his subordinate officers raised the superior orders defence.[92]

Patzig's case came before the German court, which relied on article 47 of German Military Penal Code, which provided that the superior officer is exclusively responsible for the commission of an international crime where his orders would result in a violation of international law.[93] A subordinate officer would only be found liable if he knew that the order he received was in violation of international, civil or military law.[94]

Unlike Neumann of the *Dover Castle* case, Patzig and his subordinates were unsuccessful in their claim of superior orders, as the court held that the order to massacre the survivors of a ship was so clearly unlawful that their actions could not be defended.[95]

5. Anton Dostler

To say that WWII is an infamous war is an understatement, as it will always be remembered for the estimated 40 to 50 million people who lost their lives[96] as well as one of history's most notorious genocides, the Holocaust. With this war came a number of historic decisions made in national and international tribunals.

An important case that dealt with the defence of superior orders occurred before the conclusion of WWII. This case has sparked great interest among

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[90] *Llandovery Castle* (1922) 16 *American Journal of International Law* at 708.
[91] Hilaire McCoubrey op cit note 80 at 388.
[92] Ibid.
[93] Matthew R Lippman (2001) op cit note 73 at 168.
[94] Ibid.
[95] Hilaire McCoubrey op cit note 80 at 388.
[96] The Editors of Encyclopaedia Britannica, *How many people died during World War II?* Britannica, available *at https://www.britannica.com/question/How-many-people-died-during-World-War-II,* accessed on 2 November 2022.

international law scholars, as the accused was the very first German officer to be tried, and ultimately executed, exclusively by the United States authorities.[97]

On 22 March 1944, 15 American soldiers, members of the 2677th Special Reconnaissance Battalion, had landed at Stazione di Framura, a railway station in Liguria, Italy.[98] These soldiers had landed well within German territory, with the intention of destroying the railway line.[99] Unfortunately, two days later they were captured by, and ultimately surrendered to the Germans.[100] The soldiers that were tasked with watching over and questioning the Americans were given an order by their commanding officer, General Anton Dostler, to shoot American captives immediately.[101] Anton Dostler was the commander of the 75th German Army Corps.[102] The American soldiers were ultimately executed by firing squad, sans any sort of trial or judicial proceedings.[103]

Dostler was captured by the Americans upon the end of the war. In his trial he raised the defence of superior orders,[104] pleading that his commanding officer, Adolf Hitler, ordered that captured Americans were to be executed immediately upon their capture.[105]

The military tribunal tasked with prosecuting Dostler held that he had failed to uphold his orders, as the American soldiers were not executed immediately; they were in fact executed two days after their capture.[106] Because of his failure to follow this order, he could not claim that he was acting under orders and subsequently could not use the defence of superior orders.[107] Additionally, the tribunal focused on the 1929 Convention Relative to the Treatment of Prisoners of War,[108] which provides that soldiers are forbidden from carrying out any acts of retaliation against

[97] Frederic L Borch 'To Be Shot to Death by Musketry: The Trial and Execution of General Anton Dostler' (2018) 2 *Army Law at* 12.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid at 13.
[102] Ibid at 12.
[103] Ibid at 13.
[104] Matthew R Lippman (2001) op cit note 73 at 210.
[105] Frederic L Borch op cit note 97 at 13.
[106] Matthew R Lippman (2001) op cit note 73 at 210.
[107] Ibid.
[108] Geneva Convention Relative to the Treatment of Prisoners of War, 27 July 1929, 47 Stat. 2021, T.S. 846.

prisoners of war[109] and as such, the superior orders defence could not help Dostler escape liability.[110]

Dostler's trial lasted four days and upon its conclusion he was held to be guilty[111] and was 'to be shot to death by musketry.'[112]

6. Nuremberg Trials

When WWII ended, the Allied Powers set out to prosecute the perpetrators of the atrocities carried out by the Axis Powers in the Nuremberg Tribunals and the Tokyo Tribunals. The Allies understandably feared that the Axis Powers would raise the defence of superior orders to justify their actions[113] and so, when drafting the Charters specific to each Tribunal, included provisions excluding the defence.

The Nuremberg Trials, which took place between 1945 and 1946, was established by the Charter of the International Military Tribunal at Nuremberg[114] ('London Charter').

Article 8 of the London Charter provides that,

> The fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[115]

As such, when the defendants were brought before the Nuremberg Tribunal, they were not permitted to plead superior orders, as it was not considered, in terms of the Charter, to be a valid defence.

Two of the cases that came before the Nuremberg Tribunal were those of Wilhelm Keitel and Alfred Jodl.

Wilhelm Keitel was the Chief of the *Oberkommando der Wehrmacht,* or the Supreme Command of the Armed Forces.[116] Keitel was one of Hitler's most trusted

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[109] Ibid at art 2 para 3.
[110] Shane Darcy 'The Evolution of the Law of Belligerent Reprisals' (2003) 175 *Military Law Review* (184-251) at 198.
[111] Frederich L Borch op cit note 97 at 14.
[112] Ibid.
[113] Hilaire McCoubrey op cit note 80 at 386.
[114] London Charter supra note 15.
[115] Ibid at art 8.

and key advisors in the military.[117] Keitel was involved in and approved of many of the war crimes committed by the Nazis, particularly the *Nacht und Nebel* directive, which held that any citizen of Germany that was believed to be working against Germany would disappear without a trace at the hands of the German government.[118] Shortly after the Germans surrendered to the Allied Powers was Keitel arrested.[119]

During the Nuremberg Trials Keitel was charged, among a host of other charges, with the commission of crimes against humanity.[120] He raised the defence of superior orders, claiming to have simply obeyed orders in line with his oath to his commanding officer, Hitler.[121] Keitel also admitted to having full knowledge that his orders were unlawful, however he maintained that he was in no position and had no authority to disobey them.[122]

Alfred Jodl was the Chief of the Operations Staff[123] of the *Oberkommando der Wehrmacht*.[124] Jodl assisted Hitler and Keitel in the production of most of Germany's campaigns during the war, and more specifically, he ordered the deaths of many prisoners and hostages and ordered the commission of other international crimes.[125]

In his closing statement at the Nuremberg Trials, Jodl raised the defence of superior orders, providing that,

> I believe and avow that a man's duty toward his people and fatherland stands above every other. To carry out this duty was for me an honour, and the highest law.[126]

In making its decision regarding both Keitel and Jodl, the Tribunal referred to article 8 of the London Charter. The Tribunal remained firm in its stance that defendants were prohibited from raising the defence, especially where their actions

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[116] 'Keitel, Wilhelm' Oxford Reference, available at *https://www-oxfordreference-com.ezproxy.uct.ac.za/view/10.1093/acref/9780191890949.001.0001/acref-9780191890949-e-1232,* accessed on 2 November 2022.
[117] John C Fredriksen 'America's Military Adversaries: From Colonial Times to the Present' (2001) *ABC-CLIO* at 272.
[118] Ibid
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Matthew R Lippman (2001) op cit note 73 at 183.
[123] Ibid at 182.
[124] The Editors of Encyclopaedia Britannica, Alfred Jodl, 2022, available at *https://www.britannica.com/biography/Alfred-Jodl,* accessed on 2 November 2022.
[125] Ibid.
[126] Matthew R Lippman (2001) op cit note 73 at 182.

were so heinous in nature that they were without justification.[127] Both Keitel and Jodl were subsequently found guilty and sentenced to death.

7. Tokyo Trials

The Allied Powers also sought to prosecute offenders from the Empire of Japan and thus the International Military Tribunal (Far East) at Tokyo ('Tokyo Tribunal') was established. The Tokyo Tribunal was brought into existence by the Charter of the International Military Tribunal (Far East) at Tokyo[128] ('Tokyo Charter'), which took much inspiration from the London Charter. It took a very similar position on superior orders to the London Charter. It effectively reaffirmed the London Charter's provision[129] by providing that,

> Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[130]

Despite reaffirming the London Charter's position on the defence, the Tokyo Charter does seem to take a more flexible approach to the defence.[131] This is because, while the London Charter provides that a subordinate's superior orders 'shall not free him from responsibility,'[132] the Tokyo Charter says that the defence, alone, is not enough to protect the subordinate from liability.[133] It might seem that the Tokyo Charter, by saying this, is undermining the London Charter, however this cannot be said to be the case. When it came to the actual trials, the Tokyo Tribunal

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[127] Ibid at 184.
[128] Tokyo Charter supra note 15
[129] Julian Seal 'Superior Orders as Defense before the International Criminal Court' (2012-2013) 12 *ISIL Year Book of International Humanitarian and Refugee Law* (209-252) at 210.
[130] Tokyo Charter supra note 15 at art 6.
[131] Julian Seal op cit note 129 at 241.
[132] London Charter supra note 15 at art 8.
[133] Tokyo Charter supra note 15 at art 6.

did not go into much depth regarding the defence,[134] however it took the position of the Nuremberg Tribunal and completely rejected the defence.[135]

Because the Tokyo Tribunal followed the approach of the Nuremberg Tribunal, it would have been difficult for the defence teams to use the flexible approach of article 6[136] to their benefit. However, they persisted.

Matsui Iwane was a commander-in-chief of the Imperial Japanese Army[137] and was charged at the Tokyo Tribunal for the commission of crimes against peace as well as war crimes.[138] He was charged as a result of his involvement in the Nanjing Massacre in 1937, where members of the Imperial Japanese Army invaded the Chinese city of Nanjing.[139] It has been estimated that nearly 300 000 civilians were killed, and nearly 80 000 women were raped.[140]

The approach taken by his defence, as well as the defence for most of the accused, consisted of three steps.[141] The first step was to convince the Tribunal that the accused were not acting of their own volition, but were forced to act by their superior officers.[142] The second step was to argue that the accused were unaware of the illegality of their orders,[143] and finally, the third step, was that to disobey the orders of their superiors would result in severe punishment.[144] The intention of these steps was to show that the accused had no knowledge of the illegal nature of the orders and to showcase the moral dilemma faced by soldiers.[145]

Matsui Iwane's defence reiterated that he was subordinate to the Central Authorities,[146] and was obliged to obey all orders in terms of the Japanese Army Criminal Code, among others.[147]

The prosecution rejected the argument by the defence, saying that international law did not, in any way, recognise the defence of superior orders, and that it could

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[134] Julian Seal op cit note 129 at 241.
[135] Ibid.
[136] Tokyo charter supra note 15 at art 6.
[137] Bing Bing Jia 'The Two Approaches to the Superior Orders Plea' in K Sellars (ed) *Trials for International Crimes in Asia* (2015) (248-274) *Cambridge: Cambridge University Press* at 255.
[138] Ibid.
[139] 'Nanking Massacre'*Yale University* 17 January 1997, available at *https://news.yale.edu/1997/01/17/nanking-massacre,* accessed on 17 October 2022.
[140] Ibid.
[141] Bing Bing Jia op cit note x at 255.
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Ibid.
[146] Ibid at 256.
[147] Ibid.

not be used in the Tribunals due to the provisions of the Charter.[148] Matsui Iwane was subsequently convicted and executed by hanging.

8. Nuremberg Principles

Following the Nuremberg Trials, the International Law Commission created the Nuremberg Principles,[149] which are guidelines codifying the principles that were developed throughout the Nuremberg Trials. Relevant to the defence of superior orders, the Principles provide that,

> The fact that a person acted pursuant to an order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.[150]

As of the establishment of the Nuremberg Principles, the status of the superior orders defence is that it is not a legitimate defence.

9. The 'subsequent Nuremberg Trials'

Following the conclusion of the Nuremberg and Tokyo Tribunals, there were still perpetrators of the WWII atrocities that had yet to be prosecuted. These perpetrators were prosecuted by different Allied countries, based on which areas were occupied by which countries.[151] The Nazi criminals yet to be prosecuted and held accountable for their involvement in WWII were placed under the jurisdiction of the United States[152] and were to be tried in the so-called 'subsequent Nuremberg Trials.'[153]

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[148] Ibid.
[149] United Nations, International Law Commission, *Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,* 1950 ('Nuremberg Principles').
[150] Ibid at Principle IV.
[151] M Keonie Medici & Joshua P Scheel 'Training the Defense of Superior Orders: Honoring the Legacy of the International Military Tribunal at Nuremberg after 75 Years' (2020) 6 *Army Lawyer* (34-38) at 35.
[152] Ibid.
[153] Ibid.

These subsequent trials implemented by the US followed the United States Control Council Law Number 10[154] ('law No. 10'), which followed the same approach as the London Charter,[155] providing that,

> The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.[156]

The US held twelve trials for war crimes.[157] The *Einsatzgruppen* case[158] was the ninth case held in these trials.[159] The *Einsatzgruppe* was a special task force branch of the *SS*,[160] which was responsible for the murder of millions of Jews, gypsies and homeless peoples,[161] among others, across Eastern Europe.[162] The US Military Government for Germany sought to prosecute the commanders of the various *Einsatzgruppe* and created Tribunal II.[163] There were 24 defendants who were all commanding officers and leaders of the various *Einsatzgruppe,* and were charged with having committed crimes against humanity, war crimes, and for belonging to criminal groups.[164] All of the defendants in this case raised the defence of superior orders.[165] The defendants argued that according to the status of the superior orders defence in international law at that time, the defence was a legitimate

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[154] Control Council Law No. 10, Reprinted in *VI Trials of War Criminals Before The Nuernberg Military Tribunals Under Control Council Law No 10 XVIII* (1952) ('Law No. 10').
[155] Matthew Lippman 'Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War' (1996) 15(1) *Dickinson Journal of International Law* (1-112) at 20.
[156] Law No. 10 supra note 154 at art II(4)(B).
[157] United States Holocaust Memorial Museum, Washington, DC 'Subsequent Nuremberg proceedings' *United States Holocaust Memorial Museum, Holocaust Encyclopedia*, available at *https://encyclopedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings,* accessed on 12 November 2022.
[158] United States of America v. Otto Ohlendorf et al. case #9.
[159] United States Holocaust Memorial Museum up cit note 157.
[160] Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Volume IV, "The Einsatzgruppen Case"
[161] Jackson Nyamuya Maogoto 'The Superior Orders Defence: A Game of Musical Chairs and the Jury is Still Out' (2007) 10(2) *Flinders Journal of Law Reform* (185-210) at 199.
[162] Robert Manning 'Einsatzgruppe and Collaborator Horror: Thinking the Holocaust's 'Explicit Presence' in the Philosophy of Emmanuel Levinas' (2022) 36(1) *Holocaust and Genocide Studies* (74-88) at 74.
[163] *Defendant Erich Naumann at the Einsatzgruppen Trial,* (1998) United States Holocaust Memorial Museum, available at *https://collections.ushmm.org/search/catalog/pa1042230,* accessed on 12 November 2022.
[164] Ibid.
[165] Trials of War Criminals Before the Nuernberg Military Tribunals op cit note 154 at 222.

one and therefore the contents of the London Charter and Law No. 10 were not applicable with regards to the superior orders defence.[166]

Doctor Hans Gawlik was a defence attorney for one of the defendants, Erich Naumann,[167] who was the commander of *Einsatzgruppe* B.[168] In referring to members of the German army as well as civil servants, Gawlik emphasised that '[i]t was the supreme duty of both to obey, and unconditionally comply with, the orders given by superior authorities.'[169]

In a free democratic state, subordinate soldiers tasked with carrying out an unlawful order were able to appeal to a superior officer, one superior to their immediate commanding officer.[170] The principles developed by the Nuremberg Tribunals and London Charter stemmed from such states where subordinate soldiers had the ability, and the duty to disobey any unlawful orders.[171] Gawlik stressed that in a state where all orders are ultimately issued by a dictator such as Hitler, who possessed a monopoly over all executive powers,[172] subordinate soldiers were in no position to disobey orders.[173]

Paul Blobel was the commander of *Einsatzkommando* 4a,[174] a branch of *Einsatzgruppe* C. His attorney, Doctor Willie Heim, brought up a speech by Heinrich Himmler in which soldiers' undying loyalty and obedience to the Fuhrer was enforced. Himmler stated that,

> I want to lay down one directive. Should you ever know of a man who is disloyal to the Fuehrer or to the Reich, be it only in his thoughts, you have to see to it that this man is excluded from the order and we shall see to it that he loses his life.[175]

Heim argued that Blobel had no authority to refuse to carry out superior orders, as he 'would lose his liberty, or he would even have been shot dead by a

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[166] Ibid at 329.
[167] Matthew R Lippman (2001) op cit note 73 at 186.
[168] *Defendant Erich Naumann at the Einsatzgruppen Trial* op cit note 163.
[169] Trials of War Criminals Before the Nuernberg Military Tribunals op cit note 154 at 335.
[170] Ibid at 336.
[171] Matthew R Lippman (2001) op cit note 73 at 187.
[172] Ibid.
[173] Trials of War Criminals Before the Nuernberg Military Tribunals op cit note 154 at 336.
[174] Paul Blobel, *Shoah Resource Centre, The International School for Holocaust Studies*, available at *https://www.yadvashem.org/untoldstories/documents/Perpetrators/Paul_Blobel.pdf,* accessed on 12 November 2022.
[175] Trials of War Criminals Before the Nuernberg Military Tribunals op cit note 154 at 87.

summary court martial.'[176] The National Socialist Party went so far as to threaten the family members of its soldiers in order to fully ensure unconditional obedience.[177]

The Tribunal rejected the argument that the defendants can fully escape liability on the basis of the superior orders defence being a legitimate defence and that the defendants had no choice but to obey their orders.[178] The Tribunal held that a soldier is not a part of a machine that is unable to reason on his own.[179] The belief that a soldier is bound to obey every order given to him by his superior officer is merely a myth.[180] The Tribunal went on to say that a soldier is bound only to those orders that are of a lawful nature.[181]

The Tribunal provided a set of criteria that needed to be met in order for a defendant to raise the superior orders defence, specifically when their argument is that they had no choice but to obey their orders. The soldier either had to have been coerced into carrying out the unlawful orders,[182] or he had to have 'approved of the principle involved in the order.'[183] If the soldier approved of what the order entailed then he cannot raise the defence of superior orders.[184] This does, however, seem to border on the defence of duress, which is a defence separate to that of superior orders.

The Tribunal then set out a more definitive test to consider when faced with the superior orders defence. The Tribunal asks,

> Did he agree with the order or not? If he did not and thus was compelled by chain of command and fear of drastic consequences to kill innocent human beings, the avenue of mitigation is open for consideration. If, however, he agreed with the order, he may not, as already demonstrated in the general opinion, plead superior orders.[185]

The *High Command*[186] case was the twelfth and final case of the Subsequent Nuremberg Trials. There were fourteen defendants, all high-ranking members of the

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[176] Ibid.
[177] Ibid.
[178] Julian Seal op cit note 129 at 213.
[179] Trials of War Criminals Before the Nuernberg Military Tribunals op cit note 154 at 470.
[180] Ibid.
[181] Ibid.
[182] Ibid at 480.
[183] Ibid.
[184] Ibid.
[185] Ibid at 517-518.
[186] United States v. Wilhelm von Leeb et al. Case #12.

German High Command of the Armed Forces,[187] who were charged with the commission of war crimes, crimes against humanity, crimes against peace as well as with the conspiracy to commit such international crimes.[188] These charges had to do with various operations in which the defendants took part. One of the operations was the Commissar Order, where the High Command ordered that political operatives of the Soviet Union that had been captured and were being held as prisoners of war were to be executed immediately.[189] The defendants were also involved in the persecution of various minority groups, including the Jewish peoples.[190]

The defendants raised the defence of superior orders.[191] During the trial, many of the defendants admitted that they were aware of the potentially unlawful nature of some of their orders and that they may be in contravention of international law.[192] The defendants' knowledge of the unlawful nature of their orders would mean that the use of the superior orders defence would be unsuccessful, according to article 47(2) of the German Military Penal Code. However, the defendants attempted to refute this provision of the Penal Code because many of their orders were issued directly by Hitler, who was the leader of the state and deemed to be superior to the rule of law, and therefore the orders were legal.[193]

This would mean that liability would be placed solely in the hands of Hitler. The Tribunal in this case rejected the argument by the defendants for the reason that sole responsibility on one's supreme superior officer would effectively be making a mockery of international law and the way in which it monitors conflicts and ensures accountability for the actions of combatants.[194]

The Tribunal once again rejected the defence of superior orders.[195] It stated that,

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[187] Julian Seal op cit 129 at 239.
[188] Ibid.
[189] Robert B Bernheim 'The Commissar Order and the Seventeenth German Army: From Genesis to Implementation – 30 March 1941-31 January 1942' (2004) *Department of History, McGill University, Montreal* at 1.
[190] John Jay Douglass 'High Command Case: A Study in Staff and Command Responsibility' (1972) *The International Lawyer, American Bar Association* (686-705) at 691.
[191] Ibid at 696.
[192] Ibid.
[193] Ibid.
[194] Matthew Lippman (1996) op cit note 155 at 29.
[195] Leslie C Green op cit note 49 at 87.

> The defendants in this case who received obviously criminal orders were placed in a difficult position but servile compliance with orders clearly criminal, for fear of some disadvantage or punishment not immediately a threat cannot be recognised as a defence.[196]

10. Vietnam War

Some of the most famous instances of the use of the superior orders defence post-WWII occurred during the Vietnam War.

From the late 1950s, Vietnam was a nation divided.[197] North Vietnam, under the leadership of Ho Chi Minh, was governed by a communist regime.[198] South Vietnam, under the leadership of Emperor Bao Dai, on the other hand, was democratic.[199] North Vietnam wished to impose the communist system throughout the entirety of Vietnam.[200] South Vietnam was vehemently opposed to this plan and garnered support from many states, including the United States.[201] Ho Chi Minh created the National Liberation Front, referred to as the Viet Cong by the US, to help bring the North and South together under one communist system.[202] The Viet Cong was an insurgent group that often made use of guerilla tactics.[203]

The purpose of the US's involvement in the Vietnam War was to prevent the spread of the communist ideology into South Vietnam.[204] The United States was one of many belligerent states fighting to protect South Vietnam's independence.[205] The US officially joined the War in 1965 with the arrival of its first army units in Vietnam, until 1973, when its units left Vietnam.[206]

One of the most infamous cases of the use of the superior orders defence was when it was raised by Lieutenant William L. Calley,[207] when he was court-

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[196] John Jay Douglass op cit note 190 at 696.
[197] Elizabeth M Jenaway and Steven Windisch 'And the Last Straw Falls: The Cumulative Influence of Disillusionment Among Former Viet Cong Insurgents' (2022) *Studies in conflict and terrorism* ahead-of-print (1-23) at 1.
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Elizabeth M Jenaway op cit note 197 at 1.
[203] Ibid.
[204] Michael Kort 'The Vietnam War Reexamined' (2018) *Cambridge: Cambridge University Press* Print at 1.
[205] Ibid.
[206] Ibid.
[207] *United States v. William L. Calley* [1973] 22 USCMA 534.

martialed for his involvement in the My Lai Massacre. On 16 March 1968, the Charlie Company of the US were sent into My Lai, a region in the South of Vietnam, to find communist fighters of the Viet Cong.[208] In this search the soldiers killed what is estimated to be more than 500 unarmed Vietnamese civilians, most of whom were women, children[209] and the elderly.[210]

Calley was the leader of his platoon, and Captain Ernest Medina was the commanding officer of the Charlie Company.[211] The Company was to attack the Viet Cong and shortly before the massacre, Medina told the Company that all civilians had been evacuated from the Sơn Mỹ Village.[212] This information was ultimately proved incorrect, as the Company, upon entering the village, was greeted by mainly civilians, who were murdered by way of bullets to the head.[213]

As a result of this massacre, Calley was called to be court-martialed two years later before a jury.[214] Calley's main defence was that he acted under superior orders[215] and as a result, did not have the requisite criminal intent.[216] In his defence he claimed that,

> I was ordered to go in there and destroy the enemy. That was my job on that day. That was the mission I was given. I did not sit down and think in terms of men, women, and children. They were all classified the same, and that was the classification that we dealt with, just as enemy soldiers.[217]

Calley's counsel argued that, because of his below-average IQ, he should not be held to the standards of a person 'of ordinary sense and understanding'[218] and

[208] Dorling Kindersley op cit note 51 at 426.
[209] Ibid.
[210] Jean-François Caron 'Disobedience in the Military Legal and Ethical Implications' (2019) 1 *Springer International Publishing* at 25.
[211] Natalia M Restivo 'Defense of Superior Orders in International Criminal Law as Portrayed in ree Trials: Eichmann, Calley and England' (2006) 18 *Cornell Law School Graduate Papers* at 9.
[212] Ibid.
[213] Seymour M Hersch, *The Massacre at My Lai: A mass killing and its coverup,* The New Yorker, 14 January 1972, available at *https://www.newyorker.com/magazine/1972/01/22/coverup,* accessed on 22 October 2022.
[214] Warrant Officer Class Two Brad Copelin 'Defending the Indefensible:The Defence of Superior Orders for War Crimes' (2009) VI(1) *Australian Army Journal* at 49.
[215] Ibid.
[216] Matthew R Lippman (2001) op cit note 73 at 217.
[217] Brad Copelin op cit note 214 at 49.
[218] Martha Minow op cit note 7 at 41.

should rather be held against the standard of 'commonest understanding.'[219] His counsel called forward the work of Colonel William Winthrop, one of the US's leading commentators on military law.[220] Winthrop wrote that,

> [F]or the inferior to assume to determine the question of the lawfulness of an order given to him by a superior would, of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline.[221]

This once again brought forward the issue of the military environment and the dilemma faced by soldiers.

Calley's defence was rejected on the premise that any person, held against any standard, would have been able to see that Calley's orders were 'so palpably illegal'[222] and therefore the standard against which Calley should be held is a non-issue.[223]

Ultimately, the jury did not agree with Calley's defence and the court held that it was clear to a reasonable person that his orders were illegal, and that any reasonable person would have refused to obey such orders.[224] The court provided that,

> The acts of a subordinate done in compliance with an unlawful order given to him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.[225]

Calley was convicted of premeditated murder and assault with the 'intent to commit murder'[226] and initially sentenced to life in prison.[227]

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[219] Ibid.
[220] D H N Johnson 'The Defence of Superior Orders' (1980) 9 *Australian Year Book of International Law* (291-314) at 300.
[221] Ibid.
[222] Martha Minow op cit note 7 at 41.
[223] Ibid.
[224] Brad Copelin op cit note 214 at 49.
[225] Robert Emmett Quinn & William Horace Darden 'Opinion: United States v. William L. Callet Jr' (1974) 8(3) *International Lawyer* (523 – 539) at 530.
[226] Matthew R Lippman (2001) op cit note 73 at 216.

What is interesting to note about Calley's case is the reaction from the American public following his conviction. Many Americans objected to Calley's conviction, which lead to then-President Richard Nixon's involvement.[228] Nixon ordered that Calley be released.[229] A poll was conducted in early 1970s to investigate public opinion on the superior orders defence.[230] Two-thirds of the sampled Americans were of the belief that soldiers such as Calley who were involved in a massacre such as My Lai should be able to escape liability if they were merely acting under superior orders.[231]

In another case connected to the My Lai Massacre, Sergeant Charles Hutto was put on trial for assault, with the intention to commit murder,[232] for the killing of a group of villagers from My Lai who had been taken as hostages by the US troops.[233] In his trial, Hutto claimed that he was simply acting upon the orders of Captain Medina,[234] and it was his belief that the orders he had received were legal in nature.[235] Hutto was ultimately acquitted.[236]

Another case borne from the Vietnam War was the trial of Private Charles Keenan[237] in the case of *United States v Keenan.*[238] Keenan's conviction was as a result of his involvement in the deaths of two Vietnamese civilians.[239] Keenan's Squad Leader, Corporal Stanley J. Luczko, had shot, at close-range, a Vietnamese woman who had been caught by US troops,[240] and then ordered Keenan to 'finish her off.'[241] Keenan obeyed this order, however he defended his actions claiming to have believed that the woman had already died.[242] They then encountered another Vietnamese civilian, who was once again shot by Luczko.[243] Luczko then ordered Keenan to shoot the man.[244] At his trial, Keenan argued that he had merely

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[227] Ibid.
[228] Aubrey M Daniel 'The Defense of Superior Orders' (2018) 3 *Army Lawyer* (39-53) at 39.
[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Ibid at 50.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] Ibid.
[237] Matthew R Lippman (2001) op cit note 73 at 220.
[238] United States v. Keenan 39 C. M. R. 108 (1969).
[239] Matthew R Lippman (2001) op cit note 73 at 221.
[240] Ibid.
[241] Ibid.
[242] Ibid.
[243] Ibid.
[244] Ibid.

defended his superior orders, in accordance with his training. The court rejected Keenan's argument, holding that,

> The general rule is that the acts of a subordinate done in good faith and in compliance with a supposed duty or order are justifiable. This justification does not exist however, when these acts [sic] are manifestly beyond the scope of his authority, or the order was of such a nature that a man of ordinary sense and understanding would know it to be illegal.[245]

11. Domestic Prosecutions in Israel

Kafr Qasim is a small Arab village in Israel, close to the border of Jordan.[246] During the Suez War, in 1956, a curfew was imposed on the Arab villages close to the border of Jordan, including Kafr Qasim.[247] This order was issued by Colonel Yissachar Shadmi.[248] Major Schmuel Malinki, a battalion commander of the Border Police, was the officer immediately subordinate to Shadmi, and was instructed to impose and enforce the curfew.[249] The legalities of this decision are unclear, as most information regarding this operation is classified.[250] What is understood to have happened is that Malinki ordered his subordinate soldiers to shoot any Arab person caught violating the curfew.[251] Many of his subordinates were taken aback by this decision,[252] however Malinki was merely passing down orders issued by Shadmi.[253] Many civilians working on nearby farms were unaware of this curfew and returned only after 5pm, when the curfew started.[254] 49 civilians were killed.[255]

Malinki and seven other Israeli officers were taken before a District Military Court and convicted of murder.[256] They then went before the Military Court of Appeal of Israel,[257] which followed the lead of the District Court and adopted the doctrine of

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[245] United States v Keenan supra note 238 at 117 n. 3.
[246] Danny Orbach 'Black Flag at a Crossroads: The Kafr Qasim Political Trial (1957-58) (2013) 45(3) *International Journal of Middle East Studies* (491–511) at 493.
[247] Ibid at 494.
[248] Ibid.
[249] Ibid.
[250] Ibid.
[251] Ibid.
[252] Ibid at 495.
[253] Ibid.
[254] Ibid.
[255] Ibid.
[256] Matthew R Lippman (2001) op cit note 73 at 224.
[257] Eni A Alobo op cit note 53 at 111.

the manifestly unlawful order.[258] At the time of the trial there was a rule in the Israeli Army that an order that is manifestly unlawful cannot be obeyed.[259] What is important to note is that at that time, most people within the Israeli military system were completely unaware of this rule, due to the chaotic nature of the Israeli army and lack of respect for the notion of the rule of law.[260]

The Court of Appeal held that the order to kill innocent civilians in order to enforce a curfew was 'an order to commit a crime of murder.'[261] The Court of Appeal noted that soldiers are faced with a moral dilemma[262] and upheld the doctrine of the manifestly unlawful order.[263] In an attempt to resolve the dilemma the District Military Court, approved by the Court of Appeal, provided that,

> [T]he distinguishing mark of a "manifestly unlawful order" should fly like a black flag above the order given, as a warning saying "Prohibited." Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only by the eyes of legal experts, is important here, but a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself…[264]

Following this was the trial of Adolf Eichmann. Adolf Eichmann was a high-ranking Nazi official and is considered to be one of the leading brains behind the Holocaust, also referred to as the 'Final Solution to the Jewish Problem'[265] in Europe. After WWII concluded, Eichmann fled Germany and ultimately found himself living in Argentina. The Israeli Security Service located Eichmann in 1960 and brought him to Israel in order to stand trial for his crimes in the Supreme Court of Israel.[266]

The main defence put forth by Eichmann was that he was merely obeying the orders of his superiors. It is well known that in Nazi Germany, orders given by Hitler were deemed to be supreme law.[267] The Court rejected Eichmann's defence, as they

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[258] Danny Orbach op cit note 246 at 496.
[259] Ibid at 493.
[260] Ibid.
[261] Matthew Lippman (2001) op cit note 73 at 225.
[262] Ibid
[263] Eni A Alobo op cit note 53 at 111.
[264] Leslie C Green op cit note 49 at 94.
[265] Nicholas N Kittrie 'A Post-Mortem of the Eichmann case – The Lessons for International Law' (1964) 55 *J Crim L and Criminology* at 16.
[266] Matthew Lippman 'The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law' (1982) 5(1) *Hous J International Law* at 6.
[267] Thomas Hobbes op cit note 34 at 408.

said that it was clear that Eichmann acted of his own volition and they subsequently found him to be guilty and sentenced him to death by hanging.

Post sentence, Eichmann penned a letter to the then-president of Israel, Yitzhak Ben-Zvi, pleading for his life.[268] In this letter he repeated that he was merely a low-level soldier in the Nazi regime and he stated that,

> There is a need to draw a line between the leaders responsible and the people like me forced to serve as mere instruments in the hands of the leaders… I was not a responsible leader, and as such do not feel myself guilty… It is also incorrect that I never let myself be influenced by human emotions… Specifically after having witnessed the outrageous human atrocities, I immediately asked to be transferred.[269]

Eichmann's plea for his life was rejected.[270]

12. International Criminal Tribunal for the Former Yugoslavia

Between 1991 and 2001, the Socialist Federal Republic of Yugoslavia was host to ethnic conflicts and insurgencies. There are referred to as the Yugoslav Wars. The Yugoslav Wars were characterised by gross human rights violations and the international community sought to hold the perpetrators of these atrocities accountable.[271] The International Criminal Tribunal for the Former Yugoslavia ('ICTY') was an ad hoc tribunal established by the United Nations in order to prosecute those perpetrators.

The Statute of the ICTY[272] ('ICTY Statute') provides that,

> The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in

[268] Isabel Kershner 'Pardon Plea by Adolf Eichmann, Nazi War Criminal, Is Made Public' 27 January 2016 *The New York Times*, available at ***https://www.nytimes.com/2016/01/28/world/middleeast/israel-adolf-eichmann-holocaust.html,*** accessed on 17 October 2022.
[269] Ibid.
[270] Ibid.
[271] Christopher M Henson op cit note 27 at 4.
[272] United Nations Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002),* 25 May 1993 ('ICTY Statute').

> mitigation of punishment if the International Tribunal determines that justice so requires.[273]

This essentially says that the superior orders defence should not and cannot be used as a tool to remit a soldier of criminal liability, however it can be used in the mitigation of punishment.[274]

The first case to be discussed is that of *Prosecutor v Erdemović*.[275] In 1991, as a 23-year-old man,[276] Drazen Erdemović joined the Yugoslavian Army out of desperation, for his family was suffering from a life of poverty.[277] He alleged that he had attempted to steer clear of army units that were more likely to commit international crimes such as war crimes.[278] In 1995, however, Erdemović and his unit were ordered to execute Muslim men who had surrendered themselves to the Bosnian Army.[279] Erdemović allegedly refused to carry out these orders.[280] Erdemović was apparently told by his commanding officer that, '[I]f you don't wish to do it, stand in the line with the rest of them and give others your rifle so they can shoot you.'[281] Erdemović believed this threat to be legitimate and, concerned for the safety of himself and for his wife and child,[282] carried out his orders.

Erdemović eventually left the Army and, following his leave, took himself to the ICTY and pleaded guilty to the commission of crimes against humanity.[283] In his defence Erdemović actually pleaded that he had acted under duress, for fear of his life.[284] However, the defence of superior orders was brought up and was a critical factor in Erdemović's sentencing trial.[285] The ICTY was aware of the fact that, according to the ICTY Statute, the superior orders defence is excluded as a defence.[286] The ICTY was also aware that, during the Nuremberg Trials, the Nuremberg Tribunal, in addition to not accepting the defence as legitimate, also did

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[273] Ibid at art 7(4).
[274] Ibid.
[275] *Prosecutor v Erdemović* IT-96-22-T (sentencing) (ICTY Trial Chamber 1, 1996), 108 I. L. R. 180 (1998) para 80.
[276] Matthew R Lippman (2001) op cit note 73 at 234.
[277] Christopher M Henson op cit note 27 at 19.
[278] Ibid.
[279] Ibid.
[280] Ibid.
[281] *Prosecutor v Erdemović* supra note 275 para 80.
[282] Ibid.
[283] Matthew R Lippman (2001) op cit note 73 at 235.
[284] Marcus Abrahamsson op cit note 76 at 25.
[285] Jackson Nyamuya Maogoto op cit note 161 at 204.
[286] Ibid and ICTY Statute supra note 272 at art 7(4).

not accept that it could be used as a mitigating factor in the determination of the accused's sentence.[287] The ICTY made a landmark decision in that it accepted the defence as a mitigating factor in determining Erdemović's punishment, due to his status as a lower-ranking soldier in the Yugoslavian Army.[288] It was held that,

> [T]he Trial Chamber therefore accepts that tribunals have considered orders from superiors as valid grounds for a reduction in penalty. This general assertion must be qualified, however, to the extent that tribunals have tended to show more leniency in cases where the accused arguing a defence of superior orders held a low rank in the military or civilian hierarchy. 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.[289]

This was a very important step forwards, specifically for the lower-ranking soldiers in times of armed conflict in that it appears to have established the precedent for considering the superior orders defence in mitigation of punishment.[290] Despite the fact that the superior orders defence was not recognised by the ICTY Statute,[291] it showed that the international tribunals were aware of the precarious and complex situations in which lower-ranking soldiers found themselves and the dilemma that they faced.[292] The caveat to this, however, was that, '[i]f the order had no influence on the unlawful behaviour because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist.'[293] Therefore, the soldiers had to make it explicitly clear that they were acting under superior orders.

The *Erdemović* case was the foremost case involving the superior orders defence and no other case that came before the ICTY took much note of the defence, however a few cases before the ICTY did touch on the defence when it came to the sentencing aspect of the trials.

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[287] Jackson Nyamuya Maogoto op cit note 161 at 205.
[288] Ibid.
[289] *Prosecutor v Erdemović* supra note 275 para 53.
[290] Christopher M Henson op cit note 27 at 18.
[291] ICTY Statute supra note 272 at art 7(4).
[292] I.e. the soldier's dilemma.
[293] *Prosecutor v Erdemović* supra note 275 para 53.

One such case is that of *Prosecutor v Sikirica et al*.[294] Dragan Kolundžija was initially a guard and was then promoted to shift leader[295] in the Keraterm detention camp in Bosnia and Herzegovina.[296] Kolundžija admitted to being aware that detainees of the camp were being mistreated and abused during his time as shift leader, however there is no evidence to show that Kolundžija was personally involved in the abuse and mistreatment of the detainees.[297] Despite there being insufficient evidence to prove that Kolundžija was involved in the abuse and mistreatment of the detainees, he did admit to and accept responsibility for continuing on in his position as shift leader of the camp while being cognisant of what was being done to the detainees.[298] When it came time for the Prosecution and the Defence to put forth arguments for mitigating circumstances, counsel for Kolundžija brought up the fact that, although the ICTY Statute prohibits defendants from pleading superior orders, the superior orders defence can be raised in consideration of mitigation.[299] Kolundžija's counsel said that,

> … Kolundžija was never a free agent who could exercise discretion: he was conscripted in time of war, he was not a volunteer, and he was ordered to fulfill the task of a reserve unranked police guard at the time. … Kolundžija would have been imprisoned had he deserted. … Kolundžija disagreed with what went on in the camp.[300]

Despite their argument, the ICTY held that the defence of superior orders could not be considered in mitigation of punishment, as not enough evidence was put forth on his behalf.[301]

13. International Criminal Tribunal for Rwanda

[294] International Criminal Tribunal for the Former Yugoslavia (1995c) *Prosecutor v. Sikirica et al.* Sentencing Judgment. IT-95-8-S.
[295] Ibid para 200.
[296] 'Dragan Kolundžija' *United Nations International Criminal Tribunal for the Former Yugoslavia*, available at *https://www.icty.org/en/content/dragan-kolund%C5%BEija,* accessed on 29 November 2022.
[297] *Prosecutor v Sikirica et al.* supra note 294 para 202.
[298] Ibid.
[299] Ibid para 215.
[300] Ibid.
[301] Christopher M Henson op cit note 27 at 18.

Over the course of a few months in 1994, armed Hutu militias in Rwanda killed members of the Tutsi minority group during the Rwandan Civil War in what is known today as the Rwandan Genocide.[302] Upwards of about 500 000 Tutsi deaths are estimated to have occurred.[303]

In order to hold the Hutu militia and its leaders responsible for their vile and shocking actions, the United Nations established another ad hoc tribunal, the International Criminal Tribunal for Rwanda ('ICTR').

There are not many cases, if at all, worth noting that involved the defence of superior orders, however what is important to note is that the Statute of the ICTR[304] ('ICTR Statute') repeats, verbatim, what was provided by the ICTY Statute regarding the superior orders defence.[305] Thus, the ICTR Statute follows the approach adopted by the London Charter and ICTY Statutes, providing that the superior orders defence is not a legitimate defence and that the defendants cannot raise the defence to escape absolute liability, but that the defence can be considered in mitigation of punishment of the defendants.[306]

14. Erich Priebke

Erich Priebke was a mid-level commander of the *SS*, not regarded in high esteem by his fellow soldiers and superior officers. On 24 March 1944, Priebke took part in the Ardeatine Massacre near Rome, Italy,[307] in which members of the *SS* executed 335

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[302] Message of the UNOV/UNODC Director-General/Executive Director Ghada Waly, Commemoration of International Day of Reflection on the 1994 Genocide against the Tutsi in Rwanda, 7 April 2020, United Nations Office on Drugs and Crime, available at *https://www.unodc.org/unodc/press/releases/2020/April/commemoration-of-international-day-of-reflection-on-the-1994-genocide-against-the-tutsi-in-rwanda.html,* accessed on 19 October 2022.
[303] André Guichaoua 'Counting the Rwandan Victims of War and Genocide: Concluding Reflections' (2020) 22(1) *Journal of Genocide Research* (125–141) at 125.
[304] United Nations Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006),* 8 November 1994 ('ICTR Statute').
[305] Ibid at art 6(4).
[306] London Charter supra note 15 at art 8, ICTY Statute supra note 272 at art 7(4), ICTR Statute supra note 304 at art 6(4).
[307] Daniel Stahl 'Two Ways of Dealing with State Atrocities in Hunt for Nazis: South America's Dictatorships and the Prosecution of Nazi Crimes' (2018) *Amsterdam University Press* (277-314) at 289.

men and boys.[308] Priebke was captured and placed in a British prisoner of war camp, from which he escaped in 1945[309] and fled to Argentina.[310]

Eventually, in 1995, Priebke was located and extradited to Italy at the age of 82.[311] Priebke was brought before an Italian military tribunal where he was charged with his involvement in the Ardeatine Massacre.[312]

In his defence, Priebke's lawyers argued that, had Priebke disobeyed his orders and refused to partake in the execution of those boys and men, he would have suffered retribution at the hands of his commanding officers and most likely would have been shot.[313] His defence was successful and the Italian tribunal acquitted Priebke of all charges. The tribunal agreed that Priebke's involvement in the Massacre constituted criminal activity,[314] however, it was not deemed to be manifestly unlawful, because of his binding obligations to his Fuhrer.[315]

15. Rome Statute

The International Criminal Court ('ICC') is an international tribunal with the jurisdiction to prosecute individuals for the commission of international crimes. The ICC was established by way of the Rome Statute.[316] The Rome Statute establishes the four major international crimes of genocide,[317] crimes against humanity,[318] war crimes[319] and the crime of aggression.[320]

Part 3 of the Rome Statute, which sets out the provisions of the general principles of criminal law,[321] sets out the rules for the superior orders defence as well as the prescription of law. It provides that,

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[308] Sarah T Cornelius 'The Defense of Superior Orders and Erich Priebke, Patterns of Prejudice' (1997) 31(1) *Patterns of Prejudice* (3-19) at 3.
[309] Richard Raiber 'Generalfeldmarschall Albert Kesselring, Via Rasella, and the 'Ginny Mission'' (1997) 56(1) *Militärgeschichtliche Mitteilungen; Freiburg* (69-106) at 33, note 119.
[310] Ibid.
[311] Sarah T Cornelius op cit note 308 at 3.
[312] Ibid.
[313] Ibid.
[314] Mark J Osiel op cit note 30 at 946.
[315] Ibid at 947.
[316] Rome Statute supra note 16.
[317] Ibid at art 6.
[318] Ibid at art 7.
[319] Ibid at art 8.
[320] Ibid at art 8 *bis.*
[321] Ibid at Part 3, General Principles of Criminal Law.

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
   (a) The person was under a legal obligation to obey the orders of the Government or the superior in question;
   (b) The person did not know that the order was unlawful; and
   (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.[322]

The decision to legitimize the defence has been seen as a controversial one by some international scholars. The arguments of such scholars will be discussed in Chapter IV.

16. Russo-Ukraine War

This paper opened with mention of Vadim Shyshimarin, a young sergeant in the Russian Army who was brought before a Kyiv court for the murder of a Ukrainian civilian[323] during the ongoing international armed conflict between Russia and Ukraine. Shyshimarin, in the first war crimes trial to be held as a result of the Russo-Ukraine War,[324] was brought before the court according to the Criminal Code of Ukraine ('CCU').[325]

Shyshimarin did not explicitly raise the superior orders defence in his testimony, however this defence is still relevant to the case. According to Shyshimarin, the soldiers that ordered him to shoot the civilian were not his immediate superiors,[326] and after initially refusing to obey, he ultimately carried out the order after being pressured by his fellow soldiers.[327] He claimed to have not

[322] Ibid at art 33.
[323] Valerie Hopkins op cit note 9.
[324] Iryna Marchuk 'Domestic Accountability Efforts in Response to the Russia–Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine' (2022) 20(4) *Journal of International Criminal Justice* (787–803) at 797.
[325] Criminal Code of Ukraine, Verkhovna Rada Gazette, 2001, No. 25-26.
[326] Iryna Marchuk op cit note 324 at 795.
[327] Ibid.

acted intentionally, and knew that the order to shoot was illegal, however he simply acted under 'psychological pressure.'[328]

His defence was rejected, as the court believed that Shyshimarin did, indeed, act with the requisite intent.[329] Further, the court brought up the defence of superior orders, which is mentioned in article 41 of the CCU. According to article 41(4) of the CCU, 'a person, who obeyed a patently criminal order or command, shall be criminally liable on general grounds for the acts committed in pursuance of such order or command.'[330] Additionally, the CCU absolves anyone of liability in instances where they refused to carry out a 'patently criminal order or command.'[331] Therefore, Shyshimarin could not rely on the defence of superior orders. Shyshimarin was ultimately found guilty and sentenced to life imprisonment.[332] This sentence has been criticised, as it is the highest penalty that can be imposed, and due to the fact that Shyshimarin was cooperative throughout the proceedings and because he was so young and was one of the lowest ranking soldiers in the Russian Army.[333]

CHAPTER IV: THE DEFENCE OF SUPERIOR ORDERS IN LAW TODAY

1. Statute

Over time the defence of superior orders has found codification in a number of international treaties and conventions. As discussed in Chapter III, the defence of superior orders has been mentioned or recognised in some respect in the London Charter,[334] the Tokyo Charter,[335] the Nuremberg Principles,[336] and more recently, the ICTY[337] and ICTR Statutes[338] as well as the Rome Statute,[339] as well as in various national legislation.

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[328] Ibid.
[329] Ibid.
[330] Criminal Code of Ukraine supra note 325 at art 41(4).
[331] Ibid at art 41(3).
[332] This sentence has since been appealed and reduced. See note 458.
[333] Iryna Marchuk op cit note 324 at 796.
[334] London Charter supra note 15 at art 8.
[335] Tokyo Charter supra note 15 at art 6.
[336] Nuremberg Principles supra note 149 at Principle IV.
[337] ICTY Statute supra note 272 at art 7(4).
[338] ICTR Statute supra note 304 at art 6(4).
[339] Rome Statute supra note 16 at art 33.

2. Customary International Law

According to the Statute of the International Court of Justice[340] ('ICJ Statute'), customary international law,[341] along with international conventions[342] and the general principles of law that are recognised by states,[343] is one of the main sources of international law. For a rule of international law to be considered customary international law, there needs to be state practice and *opinio juris.*[344] The requirement of state practice refers to the use of a rule by various states.[345] *Opinio juris* is the state's belief that the law requires they abide by certain practices or behavior.[346]

The codification of the superior orders defence in article 33 of the Rome Statute is a controversial one. By legitimising the defence in article 33, it has ignited great controversy amongst international law scholars. One of the main critics is International Law expert Paola Gaeta, who argues that the codification and legitimisation of the defence by the Statute constitutes a deviation from customary international law.[347] Gaeta is of the opinion that the decisions emanating from the Nuremberg Trials on the defence constitutes customary international law and thus provides that the defence of superior orders is not a legitimate one. The London Charter set a sort of precedent by providing that the defence is not legitimate and can therefore not be raised,[348] as subsequent international charters, including the Tokyo Charter, the ICTY Statute and the ICTR Statute all followed suit.[349] On the other hand, the situation at the national level is very different, as different states have come to different conclusions regarding the defence and whether or not it is legitimate. The general, but unofficial, consensus does appear to be that the defence is legitimate and can be raised under certain conditions, as can be seen by the Vietnam War cases in the US, the domestic prosecutions in Israel, Italy's prosecution

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[340] United Nations, *Statute of the International Court of Justice,* 18 April 1946.
[341] Ibid at art 38(b).
[342] Ibid at art 38(a).
[343] Ibid at art 38(c).
[344] TW Bennett and J Strug *'Introduction to International Law'* (2013) *Juta* Cape Town at 17.
[345] There are various opinions on what constitutes state practice, however the consensus, based on the decision in *Asylum Case (Colombia v. Peru),* International Court of Justice (ICJ), 20 November 1950 at 276-277, is that the practice does not need to be entirely uniform.
[346] TW Bennett and J Strug op cit note 344 at 19.
[347] Paola Gaeta op cit note 21.
[348] London Charter supra note 15 at art 8.
[349] Tokyo Charter supra note 15 at art 6, ICTY Statute supra note 272 at art 7(4), and ICTR Statute supra note 304 at art 6(4).

of Erick Priebke and even Ukraine's prosecution of Vadim Shyshimarin. However, Gaeta opines that because the international tribunals deal with international crimes while the national courts deal with all classes of crimes, the two levels cannot be compared to one another.[350] Therefore, she says, the decisions made at the national level in the national courts of various states should not be relevant when considering what comprises customary international law and therefore it is the customary international law rule that the defence of superior orders is not a legitimate and full one.[351]

Gaeta puts forth fair points, however, one the other hand one should remember that the various international tribunals were established to prosecute those crimes that were committed in very specific, and very different contexts. According to those critical of Gaeta's opinion, these international tribunals upon which Gaeta relies for her argument are supranational tribunals and therefore it cannot be said that their decisions constitute customary international law, as customary international law is founded upon the practice of states.[352] For example, it has been contended that the results of the Nuremberg Trials with regards to the superior orders defence cannot be considered as constituting or contributing to international law, because of the very specific context in which the Nuremberg Tribunals were established.[353] When one considers the factors that are required for a rule of customary international law to be established,[354] there is not yet enough evidence to show that most states are of the opinion that the defence is not legitimate and additionally, one can argue that states may not be of such an opinion. Therefore, according to other international law scholars, it could be argued that there is no state practice nor *opinio juris* to conclude that a customary international law rule on the defence exists and thus the Rome Statute could not have departed from customary international law, as there was no customary international law rule to begin with.

Both sides to this argument make valid points, which are worth further and deeper analysis, however the question of whether or not the Rome Statute has departed from customary international law, and what customary international law

[350] Paola Gaeta op cit note 21 at 183.
[351] Ibid at 186.
[352] TW Bennett and J Strug op cit note 344 at 17.
[353] James W Grayson 'The Defence of Superior Orders in the International Criminal Court' (1995) 64(2) *Nordic Journal of International Law* (243-260) at 247-248.
[354] These factors being state practice and *opinio juris*.

actually says about the legitimacy of the superior orders defence is not the focus of this paper. The point of including these arguments and including this chapter as a whole is to show that the defence of superior orders does exist in international law as well as national law and it is therefore worth the discussion on whether the soldier's dilemma can be resolved.

CHAPTER V: THE THREE APPROACHES TO THE SUPERIOR ORDERS DEFENCE

What can be taken from Chapter III of this paper in the discussion of the history of the defence, is that the defence has been applied in an inconsistent and, at times even unpredictable, manner. Despite this inconsistency, the defence of superior orders has also been developed over time. Through this evolution, three forms of this defence and liability that can be attributed to it have been developed in both national and international law: *respondeat superior*, absolute liability, and conditional liability. This chapter will proceed to define these approaches and discuss their positive aspects as well as their shortcomings.

1. *Respondeat Superior*

The first form of the defence is that it is an absolute, or complete, defence.[355] This is also referred to as the doctrine of *respondeat superior*. According to this defence, it is the duty of the subordinate soldier to obey all orders issued by his superiors, regardless of the legality, or illegality, of the order.[356] As such, the subordinate soldier can never be held liable for carrying out his superior orders,[357] only the superior will be held responsible.[358]

[355] Rebecca Jonassen 'The defence of superior orders in new zealand law: soldier's dilemma' (2002) 9(3) *Auckland University Law Review* (643-671) at 654.
[356] Ziv Bohrer (2012) op cit note 26 at 12.
[357] Marcus Abrahamsson op cit note 76 at 8.
[358] Ibid at 17.

This doctrine is one that has been around for hundreds of years,[359] and, prior to the outbreak of WWI, was the general approach taken by American, English and French law.[360] As discussed in Chapter III, the leading authority for the view that the defence is absolute is Professor Lassa Oppenheim, who justifies this approach in that soldiers are bound by law to obey their superiors and therefore the law cannot also require that the subordinate soldiers be punished for their obedience.[361] Those in agreement with this approach also justify it by saying that subordinate soldiers, particularly those of the lowest ranks, are ill-informed of the intricacies of military law[362] and that they are not in a position to competently and confidently consider the legalities of their orders.[363]

Although this was the general view at the time, the *respondeat superior* doctrine has not seen much application throughout history, particularly because it is an extremely controversial approach to the defence. Its controversial nature was emphasised after the events of WWI came to an end, where support for the doctrine of *respondeat superior* waned, as the approach clearly has its deficiencies. Coleman Phillipson, an English legal scholar, fought for the abolition of the doctrine and poignantly called out its potential for chaos by saying,

> [T]his argument carried to its logical conclusion would lead to ineptitude and absurdity; the successive shifting of responsibility would exculpate everyone until we reached the ultimate cause – in the case of Germany let us say, for example, the Kaiser. Can it, then, be seriously held that several millions of men may act contrary to law established, and perpetrate horrors and atrocities, and that they should be considered entirely guiltless on the ground that they carried out the admittedly illegitimate commands of their supreme authority? The safety and stability of a nation or of a family of nations are incompatible with such an exaggerated and preposterous notion of vicarious responsibility.[364]

Coleman's view was only strengthened with WWII and the events that unfolded. However, when brought before Military Tribunals, members of the Nazi

[359] Ibid at 18.
[360] Matthew R Lippman (2001) op cit note 73 at 159.
[361] Marcus Abrahamsson op cit note 76 at 19.
[362] Julian Seal op cit note 129 at 212.
[363] Ibid.
[364] Coleman Phillipson 'International Law and the Great War' (1915) *T. Fisher Unwin, Limited* at 260-261.

Party still attempted to bring in the doctrine of *repsondeat superior* and emphasise just how little a choice subordinate soldiers had. For example, counsel for the defence in the *Einsatzgruppen* case pushed this narrative.[365] However the Tribunal wholly rejected this position,[366] and the argument that soldiers do not have a choice in obeying orders, saying that,

> The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery. It is a fallacy of wide-spread consumption that a soldier is required to do everything his superior officer orders him to do.[367]

It has been argued that, in advocating for the superior orders defence to be an absolute defence, this will have the effect putting the laws of the military and the requirements of complete obedience well above the rule of law,[368] and that this idea is archaic and has no place in modern law.[369] This appears to be true and it is unrealistic to expect that the only person that can be held accountable for the commission of international crimes is the supreme leader or commander, such as Adolf Hitler or Emperor Shōwa during WWII.

2. Absolute Liability

While the doctrine of *respondeat superior* advocates for the defence of superior orders to be considered a legitimate and full defence, the absolute liability approach counters this and argues that the defence is not a legitimate one and that defendants should not be, and ultimately are not,[370] permitted to raise it. This approach, essentially, recognises that a subordinate soldier is duty-bound to obey the orders of his superior, however that duty disappears when an order is unlawful.[371]

Compared to the doctrine of *respondeat superior*, the absolute liability doctrine has received far more support throughout history. The first example from

[365] Trials of War Criminals Before the Nuernberg Military Tribunals op cit note 154 at 335.
[366] Julian Seal op cit note 129 at 213.
[367] Trials of War Criminals Before the Nuernberg Military Tribunals op cit note 154 at 470.
[368] Julian Seal op cit note 129 at 213.
[369] Ibid.
[370] Paola Gaeta op cit note 21 at 178.
[371] Marcus Abrahamsson op cit note 76 at 20.

history, the trial of Peter von Hagenbach, is evidence of this, as the defence of obedience to orders was rejected by the tribunal of the Holy Roman Empire,[372] despite von Hagenbach's persuasive testimony and some deliberation on the part of the tribunal, due to von Hagenbach's actions being, unquestionably, in opposition to those 'laws of God and man.'[373]

Hundreds of years later, in the 19th century, the defence was once again raised, in the context of the American Civil War. The main laws applicable during this time were those contained within the Lieber Code,[374] governing the American military,[375] however the Code made no mention of the superior orders defence and so when Henry Wirz raised this defence, it was up to the discretion of the court to determine its legitimacy.[376] The Military Commission decided in favour of the prosecution and held that the defence was not a legitimate one and that absolute liability should be placed on Henry Wirz for his actions.[377]

Another case at the national level, that of Anton Dostler, also approved of the absolute liability approach. This was a landmark decision and according to the military tribunal of the US military, the placing of blame on one's superior officers would not allow soldiers to escape prosecution for committing war crimes.[378]

This approach really gained momentum during and after WWII, specifically at the international level. It started to gain traction with the introduction of the London Charter, which prohibited the raising of the defence, however it can be used in mitigation of punishment.[379] The Tokyo Charter adopted the approach taken by the London Charter.[380] In the following decades the ICTY Statute and the ICTR Statute appeared to consider the London Charter to have established a precedent and as such these Charters also confirmed the absolute liability approach.[381]

The predominant reason for excluding the defence from the London Charter, was that the accused were already high-ranking military and political officers. As such, their most superior officer was Adolf Hitler who, conveniently, by the time the

[372] Leslie C Green op cit note 49 at 77.
[373] Tessa McKeown op cit note 2 at 3.
[374] Lieber Code supra note 57.
[375] Alan M Wilner op cit note 55 at 131.
[376] Ibid.
[377] Eni A Alobo op cit note 54 at 114.
[378] Frederich L Borch op cit note 97 at 15.
[379] London Charter supra note 15 at art 8.
[380] Tokyo Charter supra note 15 at art 6.
[381] ICTY Statute supra note 272 at art 7(4) and ICTR Statute supra note 304 at art 6(4).

Trials commenced, had already perished.[382] This same line of thinking was applied during the drafting of the Tokyo Charter, where the Tokyo Tribunal also sought to exclude the defence because the most superior officer of the Imperial Japanese Army was the Emperor, Emperor Shōwa, and no one, neither Allies nor Japanese, wanted to risk prosecuting him.[383]

Despite the approach of absolute liability being taken during the Nuremberg Trials, defendants still attempted to raise the defence. The two trials discussed, those of Wilhelm Keitel and Alfred Jodl are evidence of such attempts. These defendants were adamant in raising the defence of superior orders, emphasising the oaths that they pledged to their commanding officers and Hitler.[384] Despite Keitel and Jodl's insistence that they had no choice but to obey, the Nuremberg Tribunal still found them to be guilty, as the superior orders defence was not a valid one, according to the London Charter.[385]

However, an interesting point to note is that the Tribunal held that an important factor to consider is whether or not the defendants actually had a moral choice when carrying out their superior orders.[386] The Tribunal held that a moral choice existed for defendants that were in such a position that they would not face immediate reprisal for disobedience.[387] Because the defendants, Keitel and Jodl specifically, in the Nuremberg Tribunals were all high-ranking military and political officers, they all appeared to be in such a position and therefore would not be able to plead the defence of superior orders to escape liability.

This moral choice test is one that would be helpful in determining the liability of lower-ranking soldiers, because it is more likely that their positions in the military were more precarious than those of Keitel and Jodl, and the fear of reprisal from their commanding officers was more prominent. The problem, however, is that the Nuremberg Tribunals did not go any further in defining this test. It therefore would not be of much assistance to lower-ranking soldiers, and this appears to be true, as the moral choice test has not been raised or had much of an impact on courts that were tasked with prosecuting these soldiers.[388]

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[382] Hilaire McCoubrey op cit note 80 at 389.
[383] Ibid.
[384] John C Fredriksen op cit note 117 at 272 and Matthew R Lippman (2001) op cit note 73 at 182.
[385] London Charter supra note 15 at art 8.
[386] John C Fredriksen op cit note 117 at 182.
[387] Ibid at 185.
[388] Ibid.

Ultimately the superior orders defence was not developed over the course of the Nuremberg Trials, as the London Charter prohibited defendants from raising it.[389] It could have been used as a mitigating factor in determining the punishment of the accused,[390] however the Tribunal, in most cases, declined to consider it because the actions of the defendants were so clearly contrary to international and humanitarian law.[391] The Nuremberg Tribunal held that the defence of superior orders was in violation of the law of all states.[392]

As already mentioned, the Tokyo Charter followed the approach of the London Charter, and, much like with the Nuremberg Trials, defendants continued to attempt to raise the defence of superior orders, despite being prohibited by the Tokyo Charter.[393] Matsui Iwane, like Keitel and Jodl, attempted to raise the defence in an attempt to limit liability for his involvement in the Nanjing Massacre, due to his allegiance to the Japanese Army and his Emperor. However, his attempts were ultimately unsuccessful.

Essentially, the effect of the Nuremberg and Tokyo Tribunals on the superior orders defence, despite the difference in wording in the respective Charters, was that it was not a legitimate defence and the subordinate would be absolutely liable for the crimes committed,[394] thus recognising the absolute liability approach.

The Nuremberg Principles, created based on the results of the Nuremberg Trials, codified the absolute liability approach.[395]

The subsequent Nuremberg Trials held in the US were governed mainly by Law No. 10, which followed the approach of the London Charter,[396] prohibiting use of the defence except in consideration of the defendant's sentences. However, as with the Nuremberg and Tokyo Trials, defendants still made every effort to raise the defence of superior orders. Defence counsels for the defendants emphasised how little choice soldiers had in obeying their orders, especially given the fact that they served the dictatorship of Hitler and the Nazi Party.[397] Despite the defence being excluded by Law No. 10, the Tribunal still entertained the defendants in the raising of

[389] London Charter supra note 15 at art 8.
[390] Ibid.
[391] Matthew R Lippman (2001) op cit note 73 at 184.
[392] Martha Minow op cit note 7 at 19.
[393] Tokyo Charter supra note 15 at art 6.
[394] Paola Gaeta op cit note 21 at 178.
[395] Nuremberg Principles supra note 149 at Principle IV.
[396] Trials of War Criminals Before the Nuernberg Military Tribunals op cit note 154 at art II(4)(B).
[397] Matthew R Lippman (2001) op cit note 73 at 187.

the defence and set out criteria, discussed in Chapter III, that needed to be met in order for a successful plea of superior orders.

The statutes of the ICTY and ICTR both followed the approach taken by the London and Tokyo Charters, codifying the absolute liability approach,[398] but allowing consideration of the defence for sentencing purposes.[399] Ultimately, the overall point taken from the ICTY with regards to the defence of superior orders is that the defence could only be considered in mitigation of punishment if counsel for the defendant could prove that he had only committed the acts for which he was being charged because of his orders.[400] If counsel for the defendant could prove this, then this would limit the liability and the *mens rea* of the defendant.[401]

Cases from the 15th century, 19th century and early 20th century, as discussed above, are evidence that, initially at the national level, the approach to the superior orders defence was that it was not a legitimate defence and that absolute liability had to be applied to all defendants. Following these cases, this approach was then supported and codified at the international level by the supranational bodies of the Nuremberg and Tokyo Tribunals, the ICTY and the ICTR. Therefore, at that point in time, specifically surrounding the period of WWII, it became the international standard that the defence is prohibited. This was the view prior to the introduction of the Rome Statute.[402]

Like the doctrine of *respondeat superior*, this approach has its supporters and it has its critics. As already discussed, this approach was taken in order to prevent high ranking officials from escaping liability for their role in the atrocities stemming from WWII.[403]

Additionally, one of the main justifications for prohibiting the use of the defence is that a soldier is capable of reasoning and that he is able to assess the legality of his orders.[404] This justification, however, introduces one of the absolute liability's most obvious shortcomings, in that it assumes that a subordinate soldier is easily able to discern a legal from an illegal order.[405] Soldiers, especially lower-

[398] ICTY Statute supra note 272 at art 7(4) and ICTR Statute supra note 304 at art 6(4).
[399] Ibid.
[400] Ibid.
[401] Christopher M Henson op cit note 27 at 18.
[402] James B Insco op cit note 18 at 390.
[403] Hilaire McCoubrey op cit note 80 at 389.
[404] Paola Gaeta op cit note 21 at 178.
[405] James B Insco op cit note 18 at 391.

ranking soldiers, do not have a well-rounded or thorough knowledge of military law, let alone international law.[406] It is also highly probable that the subordinate soldier held the belief that their superior officer would have had a firmer and more high-level grasp of the law and therefore they are more likely to assume that any and all orders they receive are legal and that there is therefore no need for them to assess the nature of the orders.[407] The reality, however, is that oftentimes not even the higher ranked officials have such a grasp of the law.[408]

Another shortcoming of the absolute liability approach is that it may cause soldiers to question all of their orders,[409] leading to hesitation in obeying these orders.[410] This has the effect of stunting the efficiency of the military,[411] which could have dire consequences on the security and safety of a state as a whole.[412] A state may lose confidence in its military, especially where soldiers are hesitant to obey any order for fear of them being illegal and for fear of prosecution.[413] This is resultantly counterproductive to the notion that one of the main goals of this approach is to protect the rule of law.[414]

What can also be gathered from the history of this approach is that, even if international or national legislation prohibited defendants from raising the defence of superior orders, it still did not stop them from raising the defence. This can be seen from the cases of Keitel, Jodl, Iwane and Erdemović, to name a few examples. A lot of time was still spent on discussing the merits and applicability of the defence. It therefore appears a bit redundant to expressly prohibit the use of the defence, but then still proceed to discuss it and develop it, like with the prosecution of Erdemović.

3. Conditional Liability

The third approach to the defence of superior orders, and one that has the potential to, at least in a limited respect, resolve the soldier's dilemma, is that of conditional

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[406] Ziv Bohrer 'England and the Superior Orders Defence—Choosing the Middle Path' (2012) 12(2) *Oxford University Commonwealth Law Journal* (273-294) at 276.
[407] Ibid at 277.
[408] James B Insco op cit note 18 at 391.
[409] Julian Seal op cit note 129 at 215.
[410] James B Insco op cit note 18 at 392.
[411] Julian Seal op cit note 129 at 215.
[412] James B Insco op cit note 18 at 392.
[413] Aubrey M Daniel op cit note 228 at 45 n. 40.
[414] Ziv Bohrer (England and the Superior Orders Defence) op cit note 406 at 276.

liability. According to this approach, the defence of superior orders is deemed a legitimate defence,[415] but it will not be applicable in the instance where the subordinate soldier was aware that the order he was given was illegal,[416] or where the order was manifestly illegal.[417]

This approach can seem rather confusing because it is not as straightforward as the above two approaches, where the defence is either accepted or it is not. With the conditional liability approach, as seen in the name, the defence is deemed legitimate, but can only be pleaded upon certain conditions. These conditions have not quite been agreed upon. Many scholars and lawyers have different views about how the conditional liability approach should be defined.

The *Dover Castle* and *Llandovery Castle* cases, both tried after WWI under national German law are two of the first instances showing support for the conditional liability approach. These two cases show that prior to WWII the application and outcome of the superior orders defence was very broad and unpredictable.[418] Even though Professor Oppenheim's *respondeat superior* doctrine constituted the general view at the time, the German Military Penal Code,[419] while showing support for Oppenheim's view, did change it slightly by adding some caveats. Therefore these two cases set the precedent for the beginning of the 20th century, providing that the superior orders defence was a legitimate one and that, generally, the subordinate soldier cannot and will not be held liable for obeying the orders of his commanding officers. The *Llandovery Castle* case introduced an exception to the defence, which provided that if there were no doubt that the orders were unlawful, then the defence would not be valid.[420] Essentially, if the subordinate soldier knew that his orders were unlawful or would violate international or national law, then the defence would not stand. This exception introduced by the *Llandovery Castle* case touched on the concept of manifest illegality. Ultimately the court in *Llandovery Castle* did not make use of the manifest illegality standard as the main

[415] Paola Gaeta op cit note 21 at 175.
[416] Ziv Bohrer (2012) op cit note 26 at 31.
[417] Paola Gaeta op cit note 21 at 175.
[418] Ibid.
[419] German Military Penal Code supra note 77.
[420] The *Llandovery Castle* case, Annual Digest 1923-1924, Case No. 235, Full Report, 1921 (CMD. 1450) at 45.

test, but rather as an additional test, to see whether the soldiers were actually aware of the illegality of their orders.[421]

The conditional liability approach gained further support during the Vietnam War, where different cases involving the superior orders defence bore different results. In the *Calley*[422] case, despite arguing that he merely followed orders, William Calley was found guilty of premeditated murder.[423] Charles Hutto was acquitted based on his genuine belief that the orders he followed were legal.[424] Charles Keenan, from the *Keenan*[425] case, also following orders, was convicted for his involvement in the killing of two Vietnamese civilians.[426] Of these three cases discussed, where the defence of superior orders was raised, only one defendant was successful. This shows that neither the *respondeat superior* nor absolute liability doctrines were followed, because the defence was recognised. Calley was held to be guilty because, according to the jury, any reasonable person would have been able to tell that the orders they received were illegal.[427] The court used the phrase 'man of ordinary sense and understanding.'[428] By using this phrase, the court set a very low standard that needed to be met.[429]

Hutto's defence was accepted because he was able to show that his belief in the legality of his orders was genuine.[430] Keenan's defence was rejected on the grounds that a reasonable person would have been cognisant that the order was illegal, or where the order was manifestly illegal[431] and that he acted beyond his authority.[432]

Domestic prosecutions that occurred in Israel also showed support for the conditional liability approach. At the time of the Kafr Qasim case, the general rule in the Israeli Army was that soldiers were prohibited from following manifestly unlawful orders.[433] When prosecuting Schmuel Malinki, the Court brought attention to this rule and provided further clarification by saying that the illegal nature of an order must 'fly

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[421] Marcus Abrahamsson op cit note 76 at 28.
[422] *United States v William L. Calley* supra note 207.
[423] Matthew R Lippman (2001) op cit note 73 at 216.
[424] Aubrey M Daniel op cit note 228 at 50.
[425] *United States v Keenan* supra note 238.
[426] Matthew R Lippman (2001) op cit note 73 at 221.
[427] Robert Emmett Quinn op cit note 225 at 530.
[428] Ibid.
[429] Marcus Abrahamsson op cit note 76 at 29.
[430] Aubrey M Daniel op cit note 228 at 50.
[431] United States v Keenan supra note 238 at 117 n. 3.
[432] Ibid.
[433] Danny Orbach op cit note 246 at 493.

like a black flag' over the order,[434] i.e. it must be so blatantly obvious that the order was illegal. The Court said that that it is not enough that the illegality of an order is clear to legal experts,[435] but that a soldier of any rank, particularly those of lower ranks, are able to distinguish a legal from an illegal order.[436] The Court provided this clarification as it was cognisant of the soldier's dilemma and made attempts to resolve this dilemma. The clarification set by the Court is objective in that they considered how a reasonable soldier would perceive the order, and is subjective, as they consider the beliefs and situation of the accused soldier.[437] This is a flexible standard that was suggested should be taken, as it offers leniency towards the soldiers of lower-ranking positions.[438] Although Malinki was convicted, this judgment did take into account the fact that many soldiers are unaware of their military and national laws, and so by upholding the manifest illegality rule, more leniency is actually being shown towards the soldiers of lower ranks.

The trial of Adolf Eichmann was another prosecution that followed domestic Israeli law. Eichmann's case differed from other domestic prosecutions, as he was a high-ranking Nazi official. However, he still raised the defence of superior orders due to the strict obedience he owed his Fuhrer.[439] The Court allowed Eichmann's defence but ultimately rejected his argument. While it did reject Eichmann's argument, the Court still analysed the superior orders defence and its merits.

In coming to this conclusion, the Court undertook a deep consideration of the superior orders defence and pointed out three problems that are associated with the defence.[440]

The first problem that the Court pointed out is that, in order to maintain order within the military structure, a subordinate should not disobey the orders of his superior.[441] The second issue is that if the order is unlawful and the soldier obeys it, the result of this could be damaging in the eyes of the public, and therefore the soldier should only obey his superior's orders when he is certain that the orders are lawful.[442] The third and final problem touches on the soldier's dilemma, where if the

[434] Leslie C Green op cit note 49 at 94.
[435] Ibid at 94.
[436] Ibid.
[437] Matthew Lippman (2001) op cit note 73 at 226.
[438] Ibid at 228.
[439] Thomas Hobbes op cit note 34 at 408.
[440] Natalia M Restivo op cit note 211 at 6.
[441] Ibid at 7.
[442] Ibid.

soldier disobeys his superior's order then he risks being court-martialed, however if he obeys the order and that order is unlawful, he risks punishment in the international sphere.[443]

When considering these three problems the Court came to the conclusion that it all, in fact, depends on the mental and psychological state and capabilities of the accused soldier and whether or not he was aware of the order's unlawfulness at the time the order was given.[444] The Court ultimately rejected Eichmann's defence on a number of grounds. The first was that the orders Eichmann received to execute the Jewish people were so manifestly unlawful[445] and secondly, that Eichmann was fully aware that the orders he was carrying out and the war in which he was involved was truly atrocious.[446] Eichmann had full knowledge of the crimes that he was committing and how the rest of the world viewed them that he could not reasonably rely on the defence of superior orders.

The result of Eichmann's trial in Israel and the Supreme Court's rejection of the superior orders defence was viewed as support for the overall international view that just because a soldier follows superior orders does not mean that they are permitted to rely on this defence when they are being prosecuted for their crimes.[447] The Court rejected the superior orders defence in Eichmann's case but also touched on, and codified,[448] the concept of manifest illegality. Essentially, if an order is manifestly illegal then soldiers cannot justifiably rely on this defence.[449]

The trial of Nazi Erich Priebke, which occurred near the end of the 20th century in Italy, discussed the concept of manifest illegality but came to a very different conclusion than the above cases. Priebke's raising of the defence of superior orders was successful in this case because the tribunal accepted that he had no other option but to obey, but most importantly, that his orders were not manifestly unlawful on the basis that he was following the orders of Hitler, his Fuhrer.[450]

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[443] Ibid.
[444] Ibid.
[445] Ibid.
[446] Ibid.
[447] Tessa McKeown op cit note 2 at 12.
[448] Massimo Scaliotti 'Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility - Part 2' (2002) 2 *International Criminal Law Review* (1-46) at 131.
[449] Tessa McKeown op cit note 2 at 12.
[450] Osiel op cit note 30 at 947.

Until this point, the conditional liability approach had really only seen application and support at the domestic or national level. This changed, however, with the establishment of the ICC and its accompanying statute, the Rome Statute. The Rome Statute recognised the defence of superior orders, officially declaring it a legitimate defence, subject to certain conditions. According to article 33 of the Rome Statute, set out in Chapter III of this paper, the defence will generally not be accepted unless the person or defendant was legally obliged to follow their superior orders,[451] the person was unaware that the order they were given was unlawful,[452] or if the order was not manifestly unlawful.[453]

Another point to note is that the superior orders defence, according to the Rome Statute, is only applicable to war crimes and crimes of aggression, as article 33 declares that genocide or crimes against humanity are always deemed to be manifestly unlawful.[454] This is an interesting addition which also adds to the controversial nature of article 33, however it does not appear to stem from any rule of customary international law, according to some points made by Mark Klamberg in his commentary on the International Criminal Court and its laws.[455] The main justification for the exclusion of the superior orders defence with regards to crimes against humanity and genocide is that these international crimes are simply so patently illegal in the eyes of any person.[456]

The ongoing Russo-Ukrainian War will potentially provide the legal community with more international jurisprudence if perpetrators are brought before the International Criminal Court, but as of today, the main prosecutions of Russian soldiers have occurred in terms of the domestic law of Ukraine. Ukraine's Criminal Code allows for a defendant to escape liability to an extent where the defendant refused to carry out an order that was 'patently criminal.'[457]

One of the first trials stemming from this conflict, that of Vadim Shyshimarin, culminated in Shyshimarin being found guilty of his crimes and given a life sentence,

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[451] Rome Statute supra note 16 at art 33(1)(a).
[452] Ibid at art 33(1)(b).
[453] Ibid at art 33(1)(c).
[454] Ibid at art 33(2).
[455] Mark Klamberg 'Commentary on the Law of the International Criminal Court' (2017) *Torkel Opsahl Academic EPublisher* at 337, note 326.
[456] Charles Garraway 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied' (1999) 81(836) *Inter Review of the Red Cross* (785-794) at 791.
[457] Criminal Code of Ukraine supra note 325 at art 41(3).

which has since been reduced.[458] This penalty has been criticised and Shyshimarin's trial has also been criticised for the court's application of the superior orders defence. Chris Jenks, a Professor of Law, writing for the Lieber Institute,[459] was one of these critics. He referred to article 41(5) of the CCU, which provides that,

> Where a person was not and could not be aware of the criminal nature of an order or command, the criminal liability for the act committed in pursuance of such order or command shall arise only with respect to the person who gave the criminal order or command.[460]

Jenks believes that this should have absolved Shyshimarin, at least in some part, of criminal liability, because the order could not have appeared 'patently criminal'[461] to Shyshimarin, given his age, his low rank and his severe lack of experience.[462] Regardless of such criticism, Shyshimarin was sentenced, however this is evidence that the problems faced by soldiers, and the soldier's dilemma, is becoming more relevant and more people are talking about it.

What can be seen from the above examples is that the conditional liability approach has found support in and has been practiced and developed mainly at the national level and was then codified at the international level by the Rome Statute.

A recurring theme in these examples is the idea of manifest illegality, which is a standard of the conditional liability approach and is one of the most discussed standards. It provides that a soldier will only be held accountable for the obedience of superior orders where the orders were manifestly illegal.[463] Thus, the soldier is entitled to assume that all superior orders are legal and he can therefore raise the defence of superior orders, however he cannot raise the defence where the orders

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[458] Dan Bilefsky 'A Ukrainian appeals court reduces the life sentence of a Russian soldier tried for war crimes' *The New York Times* 29 July 2022, available at *https://www.nytimes.com/2022/07/29/world/europe/a-ukrainian-appeals-court-reduces-the-life-sentence-of-a-russian-soldier-tried-for-war-crimes.html,* accessed on 9 January 2023.
[459] Chris Jenks 'Ukraine Symposium – The Atrocity Crimes Advisory Group & Ukrainian Prosecutions of Russian POWs – Part 1' *Lieber Institute West Point* 22 June 2022, available at *https://lieber.westpoint.edu/atrocity-crimes-advisory-group-ukrainian-prosecutions-russian-pows-part-1/,* accessed on 2 December 2022.
[460] Criminal Code of Ukraine supra note 325 at art 41(5).
[461] Ibid.
[462] Chris Jenks op cit note 459.
[463] Mark J Osiel op cit note 30 at 946.

were manifestly illegal.[464] An order that is manifestly illegal is one where it, on its surface, is clearly unlawful.[465]

One of the most important aspects of this rule is that it recognises the nature of the military and that it is the duty of soldiers to obey their superior officers,[466] but also that they still need to obey the rule of law.[467] Thus, when considering whether or not an order was manifestly illegal, one would look at situation in which the soldier was placed, his beliefs, his experience, and any other information affecting his behaviour when carrying out his orders.[468] It is interesting to see how this rule has been interpreted in different cases. Malinki was not a high-ranking member of the Israeli Army, and the Court was aware of the pressure put on soldiers, however they still deemed his orders to be manifestly unlawful.[469] On the other hand, in Priebke's situation, the Italian Tribunal decided that his orders were not manifestly unlawful because of his lower position in the ranks of the *SS* and that he faced a great deal of pressure and the fear of reprisal for disobedience. In the My Lai Massacres, a few of the cases dealt with the superior orders defence and came to different conclusions. Calley's use of the superior orders defence were unsuccessful, however Hutto's, in comparison, was successful. Both of these cases considered whether or not the superior orders issued were manifestly illegal, which is evidence that the manifest illegality rule is subjective and that it depends on the discretion of the various courts.[470]

Unsurprisingly, this rule is controversial and has been criticised. One criticism, advanced by Paola Gaeta is that this standard is not actually relevant, particularly in instances where international crimes such as war crimes have been committed.[471] Because of the very nature of war crimes, any order to commit a war crime or what amounts to one is, by implication, so blatantly illegal.[472] It therefore appears that it would be redundant to refer to a war crime as "manifestly unlawful." But from what history has shown us, and what has been discussed in this paper through the history

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[464] James B Insco op cit note x at 393.
[465] Ibid.
[466] Ibid
[467] Ibid.
[468] Matthew Lippman (2001) op cit note 73 at 226.
[469] Eni A Alobo op cit note 53 at 111.
[470] Paul Eden 'Criminal Liability and the defence of Superior Orders' (1991) 108(4) *South African Law Journal* (640-655) at 646.
[471] Paola Gaeta op cit note 21 at 185.
[472] Ibid.

of the defence, soldiers have different understandings of what is unlawful, especially when one considers a lower-ranking and inexperienced soldier. This soldier might not be aware that his orders constitute a war crime. Additionally, as already discussed, the Rome Statute, in article 33, declared that war crimes and crimes of aggression are not always manifestly illegal – only crimes of genocide and crimes against humanity are immediately manifestly illegal.

Mark J Osiel, Professor of Law, writing for the California Law Review,[473] has also criticised this approach, and has gone so far as to reject it. He argues that the manifest illegality approach actually has the effect of preventing the law from developing, and is also an obstacle to the improvement of military culture and laws,[474] as it will also encourage soldiers to not learn more about the rules they are bound to follow.[475]

What is also an obvious issue is that this test is subjective,[476] vague, and lacks a clear definition[477] and it follows that courts will have different approaches to this test, as seen when one looks at the trial of Erich Priebke in Italy in comparison to the trial of Schmuel Malinki in Israel as well as the My Lai cases.

CHAPTER VI: WHICH APPROACH BEST SOLVES THE SOLDIER'S DILEMMA?

In the previous chapter, all three of the approaches to the defence of superior orders that have appeared and developed throughout history were discussed and analysed. This chapter seeks to determine whether or not any of these approaches are best placed to resolve, at least to some degree, the soldier's dilemma.

The doctrine of *respondeat superior* is an unrealistic and inappropriate approach to the defence of superior orders, as it is referred to as being an underinclusive approach by some scholars.[478] This is an accurate description, because this approach has the effect of not holding any soldiers accountable for the commission of international crimes, even in the instances where these soldiers

[473] Mark J Osiel op cit note 30.
[474] Ibid at 991.
[475] Ibid.
[476] Matthew Lippman (2001) op cit note 73 at 226.
[477] Lydia Ansermet 'Manifest Illegality and the ICC Superior Orders Defense: Schuldtheorie Mistake of Law Doctrine as an Article 33(1)(c) Panacea' (2014) 47(5) *Vanderbilt Journal of Transnational Law* (1425-1464) at 1453.
[478] James B Insco op cit note 18 at 393.

carried out orders of which the illegalities they were fully aware.[479] This is evidenced by the London and Tokyo Charter's reasons for prohibiting the raising of the defence, where, if the defence were to be allowed, then in order to place responsibility on the perpetrators of the WWII atrocities, the chain of command would have to be followed. In such an instance, only Adolf Hitler and Emperor Shōwa would be held liable for the commission of these atrocities.[480]

It is true that the *respondeat superior* approach would completely resolve the soldier's dilemma. If this doctrine were the accepted standard in national and international law, soldiers would be free to obey their orders, regardless of the nature of these orders, because they would know that their reliance on superior orders would immunise them from prosecution. This, however, is simply not an option in a world consistently plagued with international and non-international armed conflicts. No soldier would be held accountable for any of his or her actions.[481] To only hold one person responsible for the genocide of the Jewish peoples or for the bombing of Pearl Harbour, for example, is simple not tenable.

The absolute liability approach to the defence of superior orders, an objective approach[482] at first glance, seems like the most appealing approach to take, especially for national and international prosecutors. However it is not an appealing approach in the eyes of lower-ranking and subordinate soldiers. The absolute liability approach is referred to as being overinclusive,[483] in contrast to the doctrine of *respondeat superior*, because it assigns blame to all soldiers, even when those soldiers are or were not in a position to assess the nature of their orders.[484] This approach fails to account for the psychological and mental stress under which soldiers, specifically those of lower ranks, are placed during an armed conflict, as well as in the military environment.[485] The absolute liability approach, although ideal in the eyes of the prosecution, does not resolve the soldier's dilemma to any extent,

[479] Ibid.
[480] Hilary McCoubrey op cit note X at 389.
[481] James B Insco op cit note 18 at 393.
[482] Janek Kucharski (2018) '"I Was Following Orders": An Ancient Greek Archetype of Modern War Crime Legislation' (2018) 23(102) *The European Legacy* (60-76) at 62.
[483] James B Insco op cit note 18 at 393.
[484] Ibid.
[485] Ziv Bohrer (England and the Superior Orders Defence) op cit note 406 at 278.

because it does not take into account the fact that the soldier may have been forced into obeying orders or was under duress at the time.[486]

The conditional liability approach to the superior orders defence constitutes a middle ground between the *respondeat superior* doctrine, an inappropriate and untenable approach, and the absolute liability approach, which does not address and therefore does not resolve the soldier's dilemma at all. The conditional liability approach ensures accountability but also takes note of the pressures faced by soldiers.

The soldier's dilemma is based on the fact that soldiers are bound to obey their superior's orders and if they fail to do so, they face the risk of being court-martialed.[487] But, if they carry out their orders and their orders are later found to be illegal, the soldiers risk being prosecuted at the international level.[488] Soldiers are thus placed in a precarious position, essentially a Catch-22 situation. The conditional liability approach, despite its criticisms, is therefore the best approach. To be more specific, however, the most appropriate approach to the superior orders defence and the approach with the most promise in its potential to resolve the soldier's dilemma is to apply the manifest illegality standard.

The Rome Statute, by codifying the defence and more specifically the manifest illegality approach in article 33 for the commission of war crimes and crimes of aggression, is a monumental step forwards for these soldiers who find themselves in this Catch-22 situation. This is because it, on the one hand, understands the complex relationships between subordinate soldiers and their commanding officers and their duty to obey, and also how these soldiers are trained to react and obey their superior orders.[489] These soldiers are trained to assume that all the orders they are given are legal and to not question them.[490] Then, on the other hand, the manifest illegality standard does not undermine the rule of law at the national or international level.[491] Article 33[492] therefore encourages prosecutors, courts and juries to consider the context in which soldiers find themselves.[493]

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[486] Martin Redish 'Nuremberg Rule of Superior Orders' (1968) 9(1) *Harvard International Law Journal* (158-181) at 176.
[487] Natalia M Restivo op cit note 211 at 7.
[488] Ibid.
[489] Hilaire McCoubrey op cit note 80 at 393.
[490] Natalia M Restivio op cit note 211 at 2.
[491] James B Insco op cit note 18 at 393.
[492] Rome Statute supra note 16 at art 33.
[493] Matthew Lippman (2001) op cit note 73 at 226.

Jeffrey Blackett, writing for the Royal United Services Institution Journal, has poignantly described the benefits of this approach. He said that,

> [T]he law can recognise the military dilemma and grant the subordinate a defence in criminal proceedings in all cases where he acted in obedience to superior orders except those where the actions required of him were objectively manifestly illegal. In these cases the subordinate's training and background should be taken into account at least to mitigate his sentence…[494]

When a young soldier or a soldier of mid to low-level ranks is in the midst of an armed conflict and is given orders which may, possibly unbeknownst to them, amount to war crimes or crimes of aggression, their military training will tell them to obey these orders. The manifest illegality standard recognises that this soldier is not in the position to question such orders and a court, in applying this standard, will take this factor into consideration. However, if the soldier is aware that the orders he has received are clearly unlawful, then the superior orders defence will not be available to him.

The doctrine of *respondeat superior* and the absolute liability doctrine are two extremes that are either too unrealistic or do not address the soldier's dilemma in any way. The conditional liability approach, and the manifest illegality standard, allows the pressures faced by soldiers and how this pressure inhibits their decision-making capabilities to be taken into consideration and will allow courts or juries to gauge whether or not the orders were manifestly illegal.

A looming issue is the fact that the manifest illegality rule has not yet found a definitive definition in history or jurisprudence. This is evidenced by the *Dover Castle* and *Llandovery Castle* cases, where it was held that a soldier simply had to know that his orders were unlawful.[495] In the Vietnam War cases, a 'man of ordinary sense and understanding'[496] would have to have known of the unlawful nature of the order. This is clearly a low standard,[497] because it seems to conflate civilians with soldiers, who find themselves in entirely different situations. Another Vietnam War case held

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[494] Commander Jeffrey Blackett LLB RN (1994) 'Superior orders—the military dilemma' (1994) 139(1) *The RUSI Journal* (12-17) at 17.
[495] The *Llandovery Castle* case op cit note 90 at 45.
[496] Robert Emmett Quinn op cit note 225 at 530.
[497] Marcus Abrahamsson op cit note 76 at 29.

that a reasonable person had to know that the order was illegal.[498] This is, once again, a low standard and one not easily clarified because it would be easy for a civilian to tell that an order is unlawful, especially when they are not situated in the midst of an armed conflict and have superior officers to which they must answer. Israeli domestic courts have described that the illegal nature of an order must 'fly like a black flag.'[499]

There are many examples of different interpretations of the manifest illegality rule, which even the Rome Statute does not clarify. However it appears that the basic element is that the order should be blatantly and obviously illegal. This definition deserves some concrete clarification, but at least it will allow courts and juries to exercise their discretion based on the circumstances.

As discussed in the previous chapter, this standard has its shortcomings, however in terms of the soldier's dilemma, the shortcomings are outweighed by the standard's potential to resolve the dilemma. It is unlikely that any subordinate soldier, like Vadim Shyshimarin, will ever completely escape liability. However, as long as their position in the military is taken into account and the position in which they find themselves is acknowledged, there will always be some glimmer of hope for these soldiers. The conditional liability approach to the superior orders defence, and more specifically the manifest illegality rule, is therefore best suited to resolve, in some respects at least, the soldier's dilemma.

CHAPTER VII: CONCLUSION

If you were placed in the middle of an armed conflict, equipped with a rifle and little knowledge of the law, and were told to execute the group of civilians standing before you, would you do it? It might seem simple enough to maintain that you would refuse to carry out these orders, but what if you were then told that if you did not obey your orders, you would be court-martialed, or even shot? If you did, then, carry out the order, you may face the possibility of being brought before an international tribunal and punished for your involvement in the commission of international crimes. This situation in which you may find yourself is the soldier's dilemma.

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[498] United States v Keenan supra note 238 at 117 n. 3.
[499] Leslie C Green op cit note 49 at 94.

When soldiers, after carrying out their superior orders, are brought before international or national tribunals, they raise the defence of superior orders. The superior orders defence is one that has been around for hundreds of years. So long as this world is plagued by international and non-international armed conflicts will the superior orders defence remain relevant. While the defence exists so too will the soldier's dilemma continue to exist and plague soldiers. This defence is infamous and came to the forefront of legal and civilian minds alike with World War II and the atrocities committed by the Axis Powers. It was so prevalent during this time that it has been, and still is, referred to as the Nuremberg Defence.

Attention has once again been brought to the defence as a result of the very recent and very relevant Russo-Ukrainian War. This was illustrated by this paper with a discussion of a young Russian sergeant, Vadim Shyshimarin, who has received a severe prison sentence for the commission of war crimes, committed under superior orders.[500] His case has reminded the world of the plight faced by soldiers and the psychological pressure placed upon them during conflict. Fear is instilled into the minds of these soldiers and more often than not are they forced to act upon orders, despite their questionable nature, for fear of reprisal from their superiors and other soldiers.

As a civilian, one can sympathise with these soldiers for the precarious positions in which they find themselves, especially given the fact that many of the soldiers in the examples discussed in this paper did not join the war effort voluntarily. Rather, they were drafted or obliged to fulfill their country's mandatory military service requirements.

This paper sought to answer the question of whether the soldier's dilemma could find resolution by way of the superior orders defence. In answering this question this paper first defined the defence of superior orders as one used in national and international criminal law, which is raised by soldiers in an effort to reduce liability, in whole or in part, for the commission of or involvement in international crimes performed on the orders of superior officers.[501]

This paper then looked at the development of the defence through its application over time. One of the first recorded instances of the use of the defence

[500] Iryna Marchuk op cit note 324 at 795.
[501] Christopher M Henson op cit note 27 at 9.

was in 1474,[502] when Peter von Hagenbach was brought before a tribunal of the Holy Roman Empire for his involvement in the atrocities committed under the reign of Charles the Bold.[503] Another example of the use of the defence was the trial of Henry Wirz, a captain in the American Civil War.[504] In both of these cases the defence was rejected and the defendant was sentenced to death.

The defence of superior orders was also raised in a number of trials relating to World War I. In two of the cases discussed relating to WWI, the raising of the defence of superior orders bore different outcomes, however it was clear that the defence was viewed as legitimate and one of the general views was that the approach to be taken was that of *respondeat superior*. This narrative changed with World War II.

After WWI, the Allied Forces were concerned that perpetrators of the brutalities carried out during the war would raise the defence of superior orders, and so the Allies came together to establish the Nuremberg and Tokyo Tribunals. The respective Charters for those Tribunals all explicitly excluded the use of the defence, thus introducing the concept of absolute liability.[505] Nonetheless, defendants still made attempts, although unsuccessful, to raise the defence. This paper discussed the various cases tried at the Nuremberg and Tokyo Tribunals, as well as the principles developed as a result of the Trials, being the Nuremberg Principles. This paper also considered the so-called 'subsequent Nuremberg Trials.'

All of these examples discussed illustrate how the defence of superior orders gained notoriety during and after WWII. As a result, various international tribunals and commissions adopted the approach taken by the Nuremberg and Tokyo Tribunals, considering them to have set a precedent. These other tribunals and commissions held that the defence of superior orders was not legitimate and could not be raised by defendants. Tribunals taking this approach included the International Criminal Tribunal for the former Yugoslavia as well as the International Criminal Tribunal for Rwanda.

Following WWII, varying approaches to the superior orders defence developed. Some of the most infamous uses of the defence came about due to the Vietnam War. Other famous uses of the defence occurred in Israel and Italy. Despite

[502] Gregory S Gordon op cit note 8.
[503] Ibid.
[504] Christopher M Henson op cit note 27 at 9.
[505] London Charter supra note 15 at art 8 and Tokyo Charter supra note 15 at art 6.

differing results, these national-level prosecutions took a different approach to that developed with WWII. These prosecutions made use of the conditional liability approach, which was then codified by the Rome Statute in article 33, which also adopted the manifest illegality rule.[506]

This paper then finished off its discussion of the history and development of the defence with a discussion on the ongoing Russian invasion of Ukraine, which involves the prosecution of Vadim Shyshimarin.

This paper then looked at the status of the defence in the law today. Statute as well as customary international law was considered. The main pieces of legislation at the international level include the London Charter, Tokyo Charter, Nuremberg Principles, ICTY and ICTR Statutes, and most relevant, the Rome Statute and in addition, various national legislation contains references to the superior orders defence. When it comes to customary international law, however, there is a debate as to whether or not there exists a customary international law rule regarding the superior orders defence. This paper considered the arguments by some international scholars that there is a customary international law rule that provides that the defence of superior orders is not a legitimate one.[507] However there is also a very strong argument that there is not such a rule, due to the fact that these scholars base their arguments on the decisions of supranational tribunals and not national tribunals and their decisions, which constitute state practice, which is one of the main requirements for there to be a rule of customary international law.[508]

This paper then discussed the three forms of responsibility, or the three different approaches, attached to the defence. The first approach, being the doctrine of *respondeat superior*, is one where the defence is deemed to be absolute.[509] The second approach, that of absolute liability, delegitimises the defence.[510] The third approach, conditional liability, constitutes a middle ground and recognises the defence as legitimate,[511] but subject to certain conditions.[512] This paper considered the advantages of each approach, as well as their shortcomings.

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[506] Rome Statute supra note 16 at art 33(1)(c).
[507] Paola Gaeta op cit note 21.
[508] TW Bennett and J Strug op cit note 344 at 17.
[509] Rebecca Jonassen op cit note 355 at 654.
[510] Paola Gaeta op cit note 21 at 178.
[511] Ibid at 175.
[512] Ziv Bohrer (2012) op cit note 26 at 31.

In purporting to answer the question posed in Chapter I, this paper concluded that the conditional liability approach is the approach best suited to resolve the soldier's dilemma, as it takes into consideration the nature of the military and the precarious position in which soldiers find themselves and it then balances these considerations against the supremacy of the rule of law.

The defence of superior orders is a controversial one, and will continue to be for as long as this world faces armed conflicts. However, despite its controversies and the criticisms surrounding it, the defence is a legitimate one thanks to its codification in the Rome Statute. Soldiers are therefore permitted to continue raising this defence when they are brought before international tribunals or military commissions to answer for their involvement in the commission of international crimes.

CHAPTER VIII: BIBLIOGRAPHY

PRIMARY SOURCES

LEGISLATION

International

Geneva Convention Relative to the Treatment of Prisoners of War, 27 July 1929, 47 Stat. 2021, T.S. 846.

1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines.

United Nations, *Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European axis,* 8 August 1945.

United Nations, *International Military Tribunal for the Far East Charter,* 19 January 1946.

United Nations, *Statute of the International Court of Justice,* 18 April 1946.

United Nations General Assembly, *Rome Statute of the International Criminal Court* (as amended 2010), 17 July 1998.

United Nations, International Law Commission, *Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,* 1950.

United Nations Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002),* 25 May 1993.

United Nations Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006),* 8 November 1994.

National

United States of America

General Orders No. 100: Instructions for the Government of the Armies of the United States in the Field 1863 (‘Lieber Code’).

Ukraine

Criminal Code of Ukraine, Verkhovna Rada Gazette, 2001, No. 25-26.

Germany

Military Penal Code (Militär-Strafgesetzbuch) for the German Empire: With the ordinance establishing it, issued June 20, 1872: to take effect from Oct. 1, 1872.

CASE LAW

International

Asylum Case (Colombia v. Peru), International Court of Justice (ICJ), 20 November 1950.

International Criminal Tribunal for the Former Yugoslavia (1995c) *Prosecutor v. Sikirica et al.* Sentencing Judgment. IT-95-8-S.

Prosecutor v. Erdemovic, IT-96-22-T (sentencing) (Int'l Crim. Trib. Yug., Trial Chamber **1,** 1996), 108 I.L.R. 180 (1998).

Germany

The *Llandovery Castle* case, Annual Digest 1923-1924, Case No. 235, Full Report, 1921 (CMD. 1450).

United States of America

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

United States v. Wilhelm von Leeb et al. Case #12.

United States v. William L. Calley [1973] 22 USCMA 534.

SECONDARY SOURCES

BOOKS AND JOURNAL ARTICLES

Abrahamsson, Marcus 'The Defence of Superior Orders: Article 33 of the ICC Statute – a departure from customary international law?' (2018) *Faculty of Law, Lund University*.

Alobo, Eni A 'Developmental Trends of the Defence of Superior Orders: A Critical Appraisal of the Statute of the International Criminal Court' (2012) 9(3) *LWATI: A Journal of Contemporary Research* (107-125).

Ansermet, Lydia 'Manifest Illegality and the ICC Superior Orders Defense: Schuldtheorie Mistake of Law Doctrine as an Article 33(1)(c) Panacea' (2014) 47(5) *Vanderbilt Journal of Transnational Law* (1425-1464).

Bennett, TW and J Strug *'Introduction to International Law'* (2013) *Juta* Cape Town.

Bernheim, Robert B 'The Commissar Order and the Seventeenth German Army: From Genesis to Implementation – 30 March 1941-31 January 1942' (2004) *Department of History, McGill University, Montreal*.

Blackett, Commander Jeffrey LLB RN (1994) ‘Superior orders—the military dilemma’ (1994) 139(1) *The RUSI Journal* (12-17).

Bohrer, Ziv ‘England and the Superior Orders Defence—Choosing the Middle Path’ (2012) 12(2) *Oxford University Commonwealth Law Journal* (273-294).

Bohrer, Ziv ‘The Superior Orders Defense: Principle-Agent Analysis’ (2012) 41(1) *Georgia Journal of International and Comparative Law* (1-74).

Borch, Frederic L ‘To Be Shot to Death by Musketry: The Trial and Execution of General Anton Dostler’ (2018) 2 *Army Law.*

Caron, Jean-François ‘Disobedience in the Military Legal and Ethical Implications’ (2019) 1 *Springer International Publishing*.

Control Council Law No. 10, Reprinted in *VI Trials of War Criminals Before The Nuernberg Military Tribunals Under Control Council Law No 10 XVIII* (1952) (‘Law No. 10’).

Copelin, Warrant Officer Class Two Brad ‘Defending the Indefensible:The Defence of Superior Orders for War Crimes*’* (2009) VI(1) *Australian Army Journal*.

Cornelius, Sarah T ‘The Defense of Superior Orders and Erich Priebke, Patterns of Prejudice’ (1997) 31(1) *Patterns of Prejudice* (3-19).

Daniel, Aubrey M ‘The Defense of Superior Orders’ (2018) 3 *Army Lawyer* (39-53).

Darcy, Shane ‘The Evolution of the Law of Belligerent Reprisals’ (2003) 175 *Military Law Review* (184-251).

Dicey, Albert Venn ‘Introduction to the Study of the Law of the Constitution’ (2013) 1 *Oxford: Oxford University Press*.

Dorling Kindersley (DK) *History: Year By Yea*r 2 ed (2018) Penguin Random House.

Dover Castle (1922) 16 *American Journal of International Law.*

Douglass, John Jay ‘High Command Case: A Study in Staff and Command Responsibility’ (1972) *The International Lawyer, American Bar Association* (686-705).

Eden, Paul ‘Criminal liability and the defence of superior orders’ (1991) 108(4) *South African Law Journal (*640-655).

Fredriksen, John C ‘America’s Military Adversaries: From Colonial Times to the Present’ (2001) *ABC-CLIO*.

Gaeta, Paola ‘The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law’ (1999) 10 *European Journal of International Law* (172-191).

Garraway, Charles ‘Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied’ (1999) 81(836) *Inter Review of the Red Cross* (785-794).

Grayson, James W ‘The Defence of Superior Orders in the International Criminal Court’ (1995) 64(2) *Nordic Journal of International Law* (243-260).

Green, Leslie C ‘Superior Orders and the Reasonable Man’ (1970) 8 *Canadian Yearbook of International Law* (61-103).

Guichaoua, André ‘Counting the Rwandan Victims of War and Genocide: Concluding Reflections’ (2020) 22(1) *Journal of Genocide Research* (125–141).

Henson, Christopher M ‘Superior Orders and Duress as Defenses in International Law and the International Criminal Tribunal for the Former Yugoslavia’ (2004) *Department of Political Science, University of North Texas*.

Hobbes, Thomas ‘On the Citizen’ (1651) quoted in M Cherif Bassiouni *Introduction to International Criminal Law* (2012) 2 ed *Koninklijke Brill, Leiden*.

Insco, James B ‘Defence of Superior Orders before Military Commissions’ (2003) 13 *Duke J Comp and International Law*.

Jenaway, Elizabeth M and Steven Windisch ‘And the Last Straw Falls: The Cumulative Influence of Disillusionment Among Former Viet Cong Insurgents’ (2022) *Studies in conflict and terrorism* ahead-of-print (1-23).

Jia, Bing Bing ‘The Two Approaches to the Superior Orders Plea’ in K Sellars (ed) *Trials for International Crimes in Asia* (2015) (248-274) *Cambridge: Cambridge University Press*.

Johnson, D H N ‘The Defence of Superior Orders’ (1980) 9 *Australian Year Book of International Law* (291-314).

Jonassen, Rebecca ‘The defence of superior orders in new zealand law: soldier's dilemma’ (2002) 9(3) *Auckland University Law Review* (643-671).

Kittrie, Nicholas N ‘A Post-Mortem of the Eichmann case – The Lessons for International Law’ (1964) 55 *J Crim L and Criminology*.

Klamberg, Mark ‘Commentary on the Law of the International Criminal Court’ (2017) *Torkel Opsahl Academic EPublisher*.

Kort, Michael ‘The Vietnam War Reexamined’ (2018) *Cambridge: Cambridge University Press* Print.

Kucharski, Janek (2018) '"I Was Following Orders": An Ancient Greek Archetype of Modern War Crime Legislation' (2018) 23(102) *The European Legacy* (60-76).

Levie, Howard 'The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders' in Michael N Schmitt and Leslie C Green (ed) *Levie on the Law of War of International Law Studies* vol 70 (1991) (269-291).

Ling, Cheah Wui 'The superior orders defence at the post-war trials in Singapore' in K Sellars (ed) *Trials for International Crimes in Asia* (2015) (100-120) Cambridge: Cambridge University Press.

Lippman, Matthew 'Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War' (1996) 15(1) *Dickinson Journal of International Law* (1-112).

Lippman, Matthew R 'Humanitarian Law: The Development and Scope of the Superior Orders Defense' (2001) 20(1) *Penn State International Law Review* (153-252).

Lippman, Matthew 'The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law' (1982) 5(1) *Hous J International Law*.

Llandovery Castle (1922) 16 *American Journal of International Law.*

'The *Llandovery Castle* case' (1921) Case No. 235, Full Report (CMD. 1450), *Annual Digest 1923-1924* at 45 ('*Llandovery Castle* case').

Maogoto, Jackson Nyamuya 'The Superior Orders Defence: A Game of Musical Chairs and the Jury is Still Out' (2007) 10(2) *Flinders Journal of Law Reform* (185-210).

Manning, Robert 'Einsatzgruppe and Collaborator Horror: Thinking the Holocaust's 'Explicit Presence' in the Philosophy of Emmanuel Levinas' (2022) 36(1) *Holocaust and Genocide Studies* (74-88).

Marchuk, Iryna ‘Domestic Accountability Efforts in Response to the Russia–Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine’ (2022) 20(4) *Journal of International Criminal Justice* (787–803).

McCoubrey, Hilaire ‘From Nuremberg to Rome: Restoring the Defence of Superior Orders’ (2001) 50(2) *International and Comparatice Law Quarterly* (386-394).

McKeown, Tessa ‘The Defence of Superior Orders in International Criminal Law: The Eichmann Trial and Kant’s Philosophy’ (2014) *Faculty of Law, Victoria University of Wellington.*

Medici, M Keonie & Joshua P Scheel ‘Training the Defense of Superior Orders: Honoring the Legacy of the International Military Tribunal at Nuremberg after 75 Years’ (2020) 6 *Army Lawyer* (34-38).

Minow, Martha ‘Living up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence’ (2007) 52(1) *McGill Law Journal.*

Oppenheim, Lassa *Inter Law, A Treatise: War and Neutrality* 2 ed (1912).

Orbach, Danny ‘Black Flag at a Crossroads: The Kafr Qasim Political Trial (1957-58) (2013) 45(3) *International Journal of Middle East Studies* (491–511).

Osiel, Mark J ‘Obeying Orders: Atrocity, Military Discipline, and the law of War’ (1998) 86(5) *California Law Review* (939-1130).

Penny, Christopher K ‘Obeying Restraints: Applying the Plea of Superior Orders to Military Defendants before the International Criminal Court’ (2010) 48 *Canadian Yearbook of International Law* (3-38).

Phillipson, Coleman ‘International Law and the Great War’ (1915) *T. Fisher Unwin, Limited*.

Quinn, Robert Emmett & William Horace Darden ‘Opinion: United States v. William L. Callet Jr’ (1974) 8(3) *International Lawyer* (523 – 539).

Raiber, Richard ‘Generalfeldmarschall Albert Kesselring, Via Rasella, and the 'Ginny Mission’’ (1997) 56(1) *Militärgeschichtliche Mitteilungen; Freiburg* (69-106).

Redish, Martin ‘Nuremberg Rule of Superior Orders’ (1968) 9(1) *Harvard International Law Journal* (158-181).

Restivo, Natalia M ‘Defense of Superior Orders in International Criminal Law as Portrayed in ree Trials: Eichmann, Calley and England’ (2006) 18 *Cornell Law School Graduate Papers*.

Scaliotti, Massimo ‘Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility - Part 2’ (2002) 2 *International Criminal Law Review* (1-46).

Seal, Julian ‘Superior Orders as Defense before the International Criminal Court’ (2012-2013) 12 *ISIL Year Book of International Humanitarian and Refugee Law* (209-252).

Stahl, Daniel ‘Two Ways of Dealing with State Atrocities in Hunt for Nazis: South America’s Dictatorships and the Prosecution of Nazi Crimes’ (2018) *Amsterdam University Press* (277-314).

Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Volume IV, “The Einsatzgruppen Case”.

Wilner, Alan M ‘Superior Orders as Defense to Violations of International Criminal Law’ (1966) 26(2) *Maryland Law Review* (127-142).

INTERNET SOURCES

Bilefsky, Dan ‘A Ukrainian appeals court reduces the life sentence of a Russian soldier tried for war crimes’ *The New York Times* 29 July 2022, available at *https://www.nytimes.com/2022/07/29/world/europe/a-ukrainian-appeals-court-reduces-the-life-sentence-of-a-russian-soldier-tried-for-war-crimes.html* accessed on 9 January 2023.

Blobel, Paul, *Shoah Resource Centre, The International School for Holocaust Studies*, available at *https://www.yadvashem.org/untoldstories/documents/Perpetrators/Paul_Blobel.pdf*, accessed on 12 November 2022.

‘Defendant Erich Naumann at the Einsatzgruppen Trial’*, United States Holocaust Memorial Museum* 1998, available at *https://collections.ushmm.org/search/catalog/pa1042230*, accessed on 12 November 2022.

‘Dragan Kolundžija’ *United Nations International Criminal Tribunal for the Former Yugoslavia*, available at *https://www.icty.org/en/content/dragan-kolund%C5%BEija,* accessed on 29 November 2022.

The Editors of Encyclopaedia Britannica, Alfred Jodl, 2022, available at *https://www.britannica.com/biography/Alfred-Jodl,* accessed on 2 November 2022.

The Editors of Encyclopaedia Britannica, *How many people died during World War II?* Britannica, available at *https://www.britannica.com/question/How-many-people-died-during-World-War-II,* accessed on 2 November 2022.

Gordon, Gregory S ‘The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law’ 16 February 2012, available at http://dx.doi.org/10.2139/ssrn.2006370, accessed on 5 September 2022.

Hersch, Seymour M, *The Massacre at My Lai: A mass killing and its coverup,* The New Yorker, 14 January 1972, available at *https://www.newyorker.com/magazine/1972/01/22/coverup,* accessed on 22 October 2022.

Hopkins, Valerie 'A Russian soldier pleads guilty to killing a civilian and violating the laws and customs of war' *The New York Times* 18 May 2022, available at *https://www.nytimes.com/2022/05/18/world/europe/russian-soldier-war-crime-ukraine-law.html,* accessed on 6 September 2022.

Jenks, Chris 'Ukraine Symposium – The Atrocity Crimes Advisory Group & Ukrainian Prosecutions of Russian POWs – Part 1' *Lieber Institute West Point* 22 June 2022, available at *https://lieber.westpoint.edu/atrocity-crimes-advisory-group-ukrainian-prosecutions-russian-pows-part-1/,* accessed on 2 December 2022.

'Keitel, Wilhelm' *Oxford Reference*, available at *https://www-oxfordreference-com.ezproxy.uct.ac.za/view/10.1093/acref/9780191890949.001.0001/acref-9780191890949-e-1232,* accessed on 2 November 2022.

Kershner, Isabel 'Pardon Plea by Adolf Eichmann, Nazi War Criminal, Is Made Public' *The New York Times*, 27 January 2016, available at *https://www.nytimes.com/2016/01/28/world/middleeast/israel-adolf-eichmann-holocaust.html,* accessed on 17 October 2022.

Message of the UNOV/UNODC Director-General/Executive Director Ghada Waly, Commemoration of International Day of Reflection on the 1994 Genocide against the Tutsi in Rwanda, 7 April 2020, United Nations Office on Drugs and Crime, available at *https://www.unodc.org/unodc/press/releases/2020/April/commemoration-of-international-day-of-reflection-on-the-1994-genocide-against-the-tutsi-in-rwanda.html,* accessed on 19 October 2022.

'Nanking Massacre' *Yale University* 17 January 1997, available at *https://news.yale.edu/1997/01/17/nanking-massacre,* accessed on 17 October 2022.

United States Holocaust Memorial Museum, Washington, DC ‘Subsequent Nuremberg proceedings’ *United States Holocaust Memorial Museum, Holocaust Encyclopedia*, available at *https://encyclopedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings,* accessed on 12 November 2022.