Goettingen Journal of International Law 2 (2010) 3, 871-892

Defending the Emergence of the Superior Orders Defense in the Contemporary Context

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doi: 0.3249/1868-1581-2-3-liang

Abstract

The defense of superior orders is one of the most controversial defenses to be pleaded under criminal law. In effect, it condones ignorance of the law and allows a subordinate to escape criminal liability on a basis other than culpability. It may therefore come as a surprise that sixty years after the Nuremberg and Tokyo trials, the resort to superior orders has re-emerged as a complete defense for certain types of crimes. I argue that this defense is based on sound policy reasons of military necessity, and should be made available on the condition that the order is not 'manifestly illegal'. In contrast to blunt absolutist approaches, the manifest illegality doctrine presents the most workable test for distinguishing between the culpability of conduct committed by soldiers in circumstances of exigency. This 'middle-way' successfully balances the dichotomous ends of legality and military efficiency and should be the preferred test under international law.

A. Introduction

As one of the most controversial pleadings within criminal law, the defense of superior orders has waxed and waned in its application in the history of international law. The resort to this defense, sometimes termed the 'Nuremberg defense', has achieved infamy through its frequent invocations by war criminals on trial for the most heinous of crimes. It may therefore come as a surprise that sixty years after the Nuremberg and Tokyo trials, the resort to superior orders has re-emerged as a complete defense in contemporary times. This paper examines the polemic and attempts to define the most appropriate and workable means of presenting such a defense. This paper is structured as follows. Part II identifies the basis of the problem that the defense of superior orders is designed to resolve. Part III offers a brief summary of the current and historical operation of the defense under international law. Part IV canvasses the varying forms in which criminal liability can be attributed when a crime has been committed pursuant to an order, and concludes that an approach based on manifest illegality is the preferred format for constructing a superior orders defense. Finally, Part V looks to the frontiers of the doctrine to examine the implications of extending the defense to civilian orders.

B. Superior Orders and the Soldier's Dilemma

The defense of superior orders is pleaded by soldiers who seek to be excused from otherwise criminal behavior on the basis of policy. This policy

finds its utmost justification in the strict sense of discipline which binds members of the military.[1] The soldier is confronted with an inescapable dilemma. He has a duty to obey the orders of his superior officers or be liable to face disciplinary proceedings in a military court. At the same time, national and international laws threaten to impose individual criminal responsibility for any unlawful acts committed by a soldier while following orders. The full force of this dilemma has been historically recognized by leading jurists. Dicey presents the two extreme alternatives:

> [a soldier] may be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and a jury if he obeys it.[2]

Yet the soldier's dilemma not only derives from a legal duty that encases his actions, but from the process of military training and indoctrination which demands a psychological reaction to obey.[3] When a soldier undergoes a period of 'transmogrification' from civilian to military personnel, 'his actions and thoughts are controlled and channeled… [such that] he is taught to have confidence and faith in the military ability of his superiors and to respond without hesitation to their instructions.'[4]

The third factor compounding the soldier's position is the special circumstances, experienced in a military context, that precludes him from ascertaining the legality of an order. In contrast to civilian conditions, where the onus of knowing the law is borne by individuals, during the 'heat of the battle' it is neither feasible for the soldier to analyze the lawfulness of his actions; nor possible for him to have knowledge of the full factual circumstances which may justify the legality of the order.

Notwithstanding the above, the very existence of a dilemma has been questioned.[5] It has been suggested that the dilemma is illusory and easily resolvable: the soldier shall obey only *lawful* orders, and reject any unlawful orders, with an order's illegality providing a complete defense against sanctions imposed for disobedience. However, this view fails to account for the practical realities of being a soldier in two ways. First, a soldier's ability to exercise a fully-informed choice is severely impaired in the exigencies of battle. Second, the choice to disobey may be accompanied by summary punishment, or by the

1 See e.g. *Defence Force Discipline Act 1982* (Cth) s 27(1), *National Defence Act 1985* (Canada) s 83.

2 A. V. Dicey, *Introduction to The Study of The Law of the Constitution*, 10th ed. (1959), 303.

3 See T.C. Brewer, 'Their's not to reason why – some aspects of the defence of superior orders in New Zealand Military Law', 10 *Victoria University Wellington Law Review* (1979-1980) 1, 45, 45.

4 *Id.*

5 W. Solf, 'War Crimes and the Nuremberg Principles', in J. N. Moore *et al.* (eds) *National Security Law* (1990) 391, cited in M. J. Osiel, *Obeying Orders: Atrocity, Military Discipline & the Law of War* (1999) 51.

reality that immediate resignation is not an option.[6] This underscores the grave dilemma that the defense of superior orders seeks to mitigate.

For these reasons, it is said that '[t]he military command structure imposes upon the subordinate an antagonistic and paradoxical necessity to respond'[7] to orders. Among the complexities posed by such a situation, the defense of superior orders emerges as a central means of mediating the conflict of duties faced by a soldier.

Traditional military justifications stress the essentiality of a strict chain of command for the efficacy of military operations.[8] Herein lies the crux of the controversy surrounding the defense. To the extent that validity is given to a defense based on ignorance of the lawfulness of a superior order, legality becomes subjugated to military discipline. Ultimately, therefore, the justification for the superior orders defense hinges on the value that is given to the policy of military efficiency and the degree to which adherence to orders is considered indispensable to the conduct of successful warfare. The persuasiveness of this policy in a contemporary context will be discussed in the latter part of this essay.

C. A Brief History of the Superior Orders Defense under International Law

A great deal of interpretative controversy surrounds the historical position of the superior orders defense under customary international law. For the purposes of background understanding, this section attempts to elicit a brief summary.[9] The trend, until very recently, has been to take an increasingly expansive position on the degree to which subordinates are exposed to criminal liability.

It has been posited that prior to World War One, international law inclined towards a complete defense of obedience to superior orders. Oppenheim stated in 1906 that '[i]n case members of forces commit violations ordered by their commanders, the members cannot be punished, for the

6 The existence of a 'moral option to resign' varies between countries. In the United States for example, the ability to resign is more restrictive than in other Western democracies: see Osiel, *supra* note 5, 51 fn 33.

7 G.-J. Knoops, *Defenses in Contemporary International Criminal Law*, 2nd ed (2007), 43.

8 See Brewer *supra* note 3, 45.

9 For a more detailed discussion of the history of the superior orders defense under international law, see H. Sato, 'The Defense of Superior Orders in International Law: Some Implications for the Codification of International Criminal Law', 9 *International Criminal Law Review* (2009) 1, 117; J. N. Maogoto, 'The Superior Orders Defence: A Game of Musical Chairs and the Jury is Still Out', 10 *Flinders Journal of Law Reform* (2007), 185.

commanders are alone responsible.'[10] This view has been questioned[11] but for a period remained authoritative.[12] After the conclusion of World War One, the Allied powers demonstrated a willingness to move away from the absolute defense position[13] but ultimately acceded the authority to conduct war crime trials to Germany under its Military Penal Code. In response to the pleading of the defense to charges of homicide, the court took the view that the subordinate in *Dover Castle* was not guilty due to a genuine belief in the lawfulness of reprisals,[14] while the defendant in *Llandovery Castle* was guilty because the order he had executed was 'universally known to everybody [...] to be without any doubt whatever against the law'.[15] The position taken thus concurred with the manifest illegality doctrine.

By the end of World War Two the debate again experienced a marked shift. The validation of the resort to superior orders may have exculpated the most heinous of Nazi war crimes. Socially, conscription drawn from all sectors of society had raised the intellectual consciousness of the soldier body. The result was increased autonomy for soldiers to question orders.[16] In examining the codification of the superior orders defense in international instruments thereafter, the overwhelming position has been to reject the defense. The Statute for the International Military Tribunal at Nuremberg marked the first occasion in which the defense was codified in an international instrument. Article 8 provided that

> '[t]he fact that the defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility but may be

10 L. Oppenheim, *International Law*, Volume 2, 1st ed. (1906), 264-265; see also Y. Dinstein, 'International Criminal Law' 20 *Israel Law Review* (1985), 206, 237, which treats Oppenheim as the authority for this position.

11 See e.g., N. C. H. Dunbar, 'Some Aspects of the Problem of Superior Orders in the Law of War' 63 *Juridical Review* (1951), 234, 243, who regards Oppenheim's view as a 'fallacy'.

12 Oppenheim's view was incorporated into the *British Manual of Military Law*, 6th ed (1914) Chapter XIV, art 443 and the *United States Rules of Land Warfare* (1914) art 366.

13 See *Treaty of Peace between the Allied and Associated Powers and Germany*, 28 June 1919 [1920] ATS 1, Arts 228, 229 .

14 'Judgment in the Case of Commander Karl Neumann, Hospital Ship "Dover Castle"', 16 *American Journal of International Law* (1922) 4, 704, 707. Under §47 para 1 of the German Military Penal Code (1917), 'when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible', *Id*. But the court also found that this position 'accords with the legal principles of all other civilized states' at 707.

15 'Judgment in Case of Lieutenants Dithmar and Boldt, Hospital Ship "Llandovery Castle"', 16 *American Journal of International Law* (1922) 4, 708, 722.

16 L. C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed (2008), 337.

considered in mitigation of punishment if the Tribunal determines that justice so requires.'[17]

Bound by the articles of its Charter, the International Military Tribunal also sought to justify the absolute liability position under general customary principles. 'The true test which is found in varying degrees in the criminal law of most nations is not the existence of the order, but whether moral choice was in fact possible.'[18] The use of 'moral choice' by the Tribunal is in fact an allusion to the concept of duress.[19] In qualifying the limited extent to which obedience to superior orders can be said to exist, the Tribunal amalgamated the concept of superior orders under the concept of duress. Elucidating the full extent of the convergence between duress and the defense of superior orders is beyond the scope of this essay.[20] It is emphasized that the modern form of the superior orders defense is based on a legal duty to obey, which is wholly distinct from, but operates in parallel to, the element of compulsion that underlies the doctrine of duress.[21]

The defense of superior orders was rejected in similar terms by the statutes of the Charter of the International Military Tribunal for the Far East[22]

17 *Charter of the International Military Tribunal, annexed to the Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, Art. 8, 82 U.N.T.S. 280, 288 [London Charter].

18 'International Military Tribunal (Nuremberg), Judgment and Sentences' 41 *American Journal of International Law* (1947) 1, 172, 221.

19 See I. Bantekas and S. Nash, *International Criminal Law*. 3rd ed. (2007), 59.

20 The two defenses converge where a soldier obeys an order that is not manifestly illegal while under compulsion to act. The defense of duress provides a further exculpatory avenue for the soldier who is compelled to obey a manifestly illegal order: see *Rome Statute*, 17 July 1998, Art. 31(1)(d), 2187 U.N.T.S. 3, 107 [Rome Statute].

21 The distinction has been stressed by numerous scholars: see, for eg, C. L. Blakesley, 'Atrocity and Its Prosecution: The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda', in T. L.H. McCormack & G. J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997), 220. *Contra* Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed (2005), 142–143, who cites in support *Prosecutor v Erdemovic*, Sentencing Appeals, ICTY Case No. IT-96-22-A, 1997 [33]-[36]: at 143 fn 166 (Joint Separate Opinions of Judges McDonald and Vohrah). However, it is argued that the comments in *Erdemovic* were made in the context of the ICTY Statute, which explicitly forbids superior orders as a defense except when the same factual scenario can be characterized as duress. Judges McDonald and Vohrah themselves admit that 'superior orders and duress are conceptually distinct and separate issues' at [33]-[34].

22 *Charter of the International Military Tribunal for the Far East*, arts 5(a), 5(b), 5(c), 19 January 1946, TIAS 1589.

(IMTFE) and by Control Council Law No. 10,[23] the Allied Control Commission for Germany. Half a century later, the position, and even the wording, remained unchanged in its application within modern day ad-hoc Tribunals: the International Criminal Tribunal for Rwanda,[24] International Criminal Tribunal for the former Yugoslavia,[25] the Panel for Timor-Leste,[26] the Special Tribunal for Lebanon,[27] the Special Court for Sierra Leone[28] and the Iraqi Special Tribunal.[29] The overwhelming preference towards absolute liability has been suggested as evidence of such a position prevailing under customary international law.[30] However, these ad-hoc tribunals were designed to try special international crimes, the seriousness of which may be implicitly regarded as manifestly illegal.[31]

Disagreements in attempts to codify a permanent position suggest otherwise of the existence of such a customary norm. While the absolute liability position has achieved consistent codification in statutes of ad-hoc tribunals, the general application of the superior orders defense remained a topic of constant controversy under customary international law. Within the 1949 Geneva Conventions[32] and the 1977 Protocol I,[33] the strictness of the

23 *Allied Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, enacted 20 December 1945, Art. II.4.b, 3 Official Gazette of the Control Council for Germany (1946), 50-5 [Control Council Law No. 10].

24 *Statute to the International Criminal Tribunal for Rwanda*, art. 6 para. 4, annexed to SC Res 955, UN Doc S/RES/955, 8 November 1994.

25 *Statute to the International Criminal Tribunal for the Former Yugoslavia*, art. 7 para. 4, annexed to SC Res 827, UN Doc S/RES/827, 25 May 1993.

26 Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, Add.3 sec. 21.

27 *Statute of the Special Tribunal for Lebanon*, art. 3 para. 3, annexed to *Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon*, annexed to SC Res 1757, UN Doc S/RES/1757, 30 May 2007.

28 *Statute of the Special Court for Sierra Leone*, 12 April 2002, art. 6 para. 4, annexed to *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002, 2178 U.N.T.S. 137.

29 *Delegation of Authority regarding Establishment of an Iraqi Special Tribunal*, Order No 48, CPA/ORD/9 Dec 2003/48 (2003) ('*IST Statute*'), annexed to Coalition Provisional Authority (Iraq).

30 P. Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law', 10 *European Journal of International Law* (1999) 1, 172; see also Green, *supra* note 16, 339.

31 Gaeta, *supra* note 30, 185–186; A. Cassese, *International Criminal Law*, 2nd ed (2008), 279.

32 International Committee of the Red Cross, *Remarks and Proposals* (1948) *19, 34, 64, 85*; Federal Political Department Berne, *Final Record of the Diplomatic Conference of Geneva of 1949*, Volume II, Section B (1949), 114.

33 See Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Official Records* (CDDH/SR.10) (1978) 307.

Nuremberg standard came under opposition from diplomatic parties.[34] The lack of consensus over the evolution of customary law of the superior orders defense underscored the debate behind the codification of art 33 of the *Rome Statute*,[35] where general codification was finally achieved after a difficult compromise.[36]

D. Alternative Degrees of Attributing Criminal Responsibility: Finding the Right Solution to the Soldier's Dilemma

Three discrete formulations of the superior orders defense have emerged in international law. Both the absolute defense and the absolute liability doctrines draw a bright-line at exculpatory behavior with little reference to the individual circumstances under which the order was executed. These blunt formulations elevate particular policy concerns above the pursuit of a 'just' solution in the individual case. This section attempts to provide a critique of each approach and seeks to articulate why a formulation based on conditional liability would be the most preferable resolution to the soldier's dilemma. It concludes that the 'manifest illegality' principle presents the most workable criterion for a conditional test of criminal liability.

I. Absolute Defense

The *respondeat superior* principle recognizes the difficult predicament of a soldier in being forced upon a strict duty to obey the commands of his superiors. The notion of fairness underpinning such a principle is embodied in St Augustine's acknowledgement that while leaders may wage wars without legitimate cause, for soldiers, the 'conditions of […] service' characterizes their innocence.[37] Indeed, this principle transpired in such times when unwavering obedience was enforced by corporal punishment[38] or even death.[39] Inasmuch as obedience is duty-based, in the 19th Century it was tainted by a pervasive sense

34 Maogoto, *supra* note 9, 185–186; see also L. C. Green, 'The Defence of Superior Orders in the Modern Law of Armed Conflict', 31 *Alberta Law Review* (1993) 2, 320, 330–331.

35 *Rome Statute*, Art. 33(2).

36 *Rome Statute*, Art. 33(2) which deems crimes against humanity and genocides as crimes which are manifestly illegal.

37 St Augustine, *Civitas Dei*, Book 22 Chapter 75, cited in L. C. Green, *Superior Orders in National and International Law* (1976) 5–6.

38 See, e.g., *Wilkes v. Dinsman*, US Supreme Court (1849) 48 U.S. 89, 127 (Woodbury J).

39 See, e.g., *Clark v. State*, Supreme Court Georgia (1867) 37 Ga. 191, 194 (Harris J).

of coercion.[40] Partly because of the dire repercussions inflicted for disobedience, the complete defense doctrine imposes no individual liability on a soldier whenever a crime has been committed under an official order.

The principle was also motivated by practical considerations. Kelsen viewed discipline as being 'possible only on the basis of unconditional obedience of the subordinate to the superior.'[41] Even when unconditional obedience eventually gave way to obedience qualified by the lawfulness of orders, *respondeat superior* functioned to preserve military discipline. Heralding an absolute defense formulation presupposes that by necessity of duty, the acts of a soldier, and therefore his culpability, are subsumed under those of his commander. It assumes, in a utilitarian sense, that following the orders of a central commander would produce the most favorable outcome for all soldiers during the disorientation of a military offensive. In condoning and being under-inclusive of criminal culpability, ignorance of the law is legitimated in this special circumstance.

In addition to policy considerations, the absolute defense finds support in positivist conceptions of authoritarian philosophies. Hobbes writes:

> 'What is ordered by the legitimate King is made lawful by his command and what he forbids is made unlawful by his prohibition. Contrariwise, when single citizens arrogate to themselves to judge right and wrong, they want to make themselves equal to the King, which counters the State's prosperity [...] When 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.'[42]

This conception deems the fundamental legality of an order as solely deriving from the legitimacy of the superior authority.[43] Framed in somewhat patriarchal terms, it is neither necessary nor desirable for a subordinate to question an order as long as it emanates from a *de jure* authority. Yet taken in its entirety, this argument could 'lead to a sort of *reduction ad absurdum'*, by

40 N. Keijzer, 'A Plea for the Defence of Superior Order', 8 *Israel Yearbook on Human Rights* (1978), 78, 82.

41 H. Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals', 31 *California Law Review* (1943), 530, 556 (emphasis added).

42 T. Hobbes, *Elementa Philosophica de Cive*, Ch 12 §§ 1, 2 cited in N. Keijzer, *Military Obedience* (1978), 146-147.

43 For a fuller discussion, see M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd ed. (1999), 454–455.

resulting in a situation where only the Leader of the Armed Forces, or the Head of State, could be held criminally accountable.[44]

Incontrovertibly, the applicability of the defense in its absolute form has fallen out of favor in modern discourse. The expansive jurisdiction of international law, first into the realm of individuals and then to impose criminal liability onto those individuals,[45] has resulted in a trend of individual accountability that is antithetical to the very concept of *respondeat superior*. Corresponding to this has been a progressive reduction in the severity of punishment given out to soldiers, as well as a shift in the nature of warfare, which henceforth relaxed the requirement of strict obedience.[46] Momentum advocating against the automatic immunity approach has accelerated,[47] in part due to the increasingly documented violations of international law in modern warfare. *Respondeat superio*r is clearly insufficient for deterrence purposes, and as such, the crux of the debate has now swiftly progressed beyond the rejection of the complete defense.

II. Absolute Liability

Under the doctrine of absolute liability, the imposition of full responsibility elevates the supremacy of the law above countervailing considerations of military necessity. Acting in obedience is not a defense in itself but can be raised as a mitigating factor in sentencing.

In contrast to Hobbesian thought, the absolute liability approach is grounded in democratic conceptions of legality. Thus, the lawfulness of an order does not derive from the legitimacy of the source, but is ultimately dependent on an overriding higher principle of legality. It was Locke who saw that obedience was only to law (in the form of public will):

> '[A]llegiance being nothing but *obedience according to law*, which when he violates, he has no right to obedience […] and thus he has no will, no power, but that of the law.'[48]

Grotius, following natural law ideals, reached a similar conclusion. He lectured that responsibility lay with the soldiers to desist from illegality. '[I]f

44 Gaeta, *supra* note 30, 175 fn 4.

45 See Cassese, *supra* note 31, 40; H. Sato *supra* note 9, 119.

46 Keijzer, *supra* note 40, 82-83.

47 *Id.*, 83.

48 J. Locke, *The Second Treatise of Civil Government* (first published in 1690), 6th ed. (1764), § 151 (emphasis in original).

the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out.'[49]

The primacy given to legality is the underpinning of common law democratic systems. But in pursuit of this end, the absolute liability approach is over-inclusive and makes subordinates criminally liable even when circumstances preclude the exercise of proper judgment. This is unsatisfactory when measured against Western standards of criminal culpability, which with its 'beyond reasonable doubt standard,' is predisposed towards finding innocence where culpability is subject to reasonable doubt. Discomfort with the extremity of absolute liability may explain why the international community has failed to agree to the permanent codification of this principle, beyond the statutes of the ad-hoc international criminal tribunals.

III. Conditional Liability

Establishing a conditional form of criminal liability on the basis of a distinguishing criterion creates a compromise between the needs of military efficiency and the ideals of legality. By contrast to absolutist positions, conditional liability represents a concerted attempt at finding a just determination for the implicated soldier. In this section, I argue that on practical and doctrinal considerations, the preferred criterion for culpability should be manifest illegality, and not reasonableness.

1. Manifest Illegality

Manifest illegality recognizes the special circumstances that confront a soldier upon receiving an order. Extenuating conditions, *prima facie*, point against circumstances that would make it fair to impose criminal culpability. This does not apply if an order can be objectively regarded as 'manifestly illegal.'

Indeed, manifest illegality has emerged as the dominant test in which the extremes of absolute liability and absolute defense can be moderated.[50] A partial operation of this position is now codified in the *Rome Statute*.[51] Yet manifest illegality is not merely a modern construct: early resorts can be found

49 H. Grotius, *De Jure Belli Ac Pacis Libri Tres* (F. W. Kelsey trans) Vol II (1925 ed), 138.

50 See, for e.g., J. B. Insco, 'Defense of Superior Orders before Military Commissions', 13 *Duke Journal of Comparative and International Law* (2003) 2, 389, 393; P. White, 'Defence of obedience to superior orders reconsidered', 79 *The Australian Law Journal* (2005), 50, 54.

51 *Rome Statute*, Art. 33(1)(c). The defence is only available for war crimes, as crimes against humanity and genocide are both deemed to be manifestly illegal.

in Roman law, where crimes of 'heinous enormity' became disqualified from a plea of superior orders defense.[52]

The strongest objections to manifest illegality concern its relevance. Gaeta and Cassese both argue that, in contrast to the wide variety of crimes tried under national law, the serious nature of international crimes are such that they are all implicitly 'manifestly illegal'.[53] Therefore as a matter of logic the absolute liability position should prevail in the international context. While this assumption holds true in most cases, the contrary can also be conceived of in limited situations. On its face this may appear to be paradoxical, but consider, for example, the war crime of excessive attacks. Article 8(2)(b)(iv) of the *Rome Statute* criminalizes the act of intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury which would clearly exceed the claimed military advantage. The problem is that, in many circumstances, a soldier on the front-line cannot assess the military advantage of the attack he is committing. As such, if the order did amount to a war crime then this cannot be regarded as manifestly unlawful.[54] Examples like these are rare, and in most cases the conduct of the accused may not attract criminal liability due to the lack of the requisite *mens rea*.[55] However, as a matter of doctrinal consistency and practical fairness, it is preferable to allow the existence of a defense, albeit in a limited operation, than to deny the defense wholly on the basis of a questionable assumption.

Further objections centre on defects in the drafting of the defense rather than the principle of the doctrine itself. Under Art. 33(1)(b) of the *Rome Statute*, the accused must 'not know that the order was unlawful' to be able to attract the protection of the defense. Dinstein argues that this renders the defense of superior orders redundant, as in the same situation the soldier's lack of *mens rea* could equally attract the mistake of law defense under Art. 32(2).[56] With respect to this argument, it is first submitted that the operation of the mistake of law defense is limited in scope and would not cover all situations envisaged by Art. 33(1)(b).[57] Second, not knowing the unlawfulness of an order

52 See Osiel, *supra* note 5, 2 fn 6. See generally D. Daube, 'The Defence of Superior Orders in Roman Law 72 *The Law Quarterly Review* (1956), 494; Keijzer, *supra* note 40, 80–82.

53 Gaeta, *supra* note 30, 185–186. Cassese, *supra* note 31, 279.

54 Similar situations may arise, for e.g., under Art 8(2)(b)(xxv) of the *Rome Statute*.

55 See *Rome Statute*, Art. 32(2) for the defence of mistake of law. Cf the views of Y. Dinstein in G. Kirk McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts: A Commentary*, volume 1 (2000), 381–382.

56 Dinstein, *supra* note 55, 381.

57 See K. J. Heller, 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis, 6 *Journal of International Criminal Justice* (2008), 419; G. Werle, *Principles of International Criminal Law*, 2nd ed. (2009), 212.

must be distinguished from a mental state where the defendant entirely lacks the requisite degree of intent and knowledge.[58] The superior orders defense foresees situations where soldiers, because of the exigencies of battle, do not know the unlawfulness of an order due to ignorance that would not normally be excused and would render them culpable.

An additional criticism concerns the reasons behind restrictions in the availability of the defense only for certain types of international crimes. Under the *Rome Statute*, the defense can be invoked for war crimes but not for crimes against humanity or genocide, since the latter two are deemed 'manifestly illegal'.[59] This may reflect the perception that crimes against humanity and genocide are of a more serious nature than war crimes.[60] Yet in many ways the distinction may be regarded as somewhat arbitrary. Given that the elements of crimes against humanity are specified in substantial detail under Art. 7(2)[61], it is oxymoronic to harbor the expectation that it would always appear manifestly illegal to soldiers.[62] Further, since both crimes against humanity and war crimes can be pleaded cumulatively, one can foresee the peculiar situation where a defendant who is indicted for both crimes may automatically resort to the defense for the latter charge but not for the former.[63] In principle, it is difficult to see why such a blanket distinction would be necessary. For cases concerning crimes against humanity or genocide, there is no reason why the Court could not determine, on the facts of the particular case, whether the commission was indeed manifestly illegal. This manner of drafting merely reflects the compromise that has been struck in relation to the acceptance of this defense,[64] but in no way detracts from the soundness of the manifest illegality principle.

Inevitably, the notion of manifest illegality carries inherent assumptions about the universality of morals. It does so by linking culpability with the moral imperative to refrain from the commissioning of an order whose illegality arises at an instance so easily identifiable that it is instinctive. Such an order, by

58 *Rome Statute*, Art. 30(1).
59 *Rome Statute*, Art. 33(2).
60 M. Frulli, 'Are Crimes Against Humanity more Serious than War Crimes?', 12 *European Journal of International Law* (2001) 2, 329. See also Werle, *supra* note 57, 218. *Contra* Gaeta, *supra* note 30, 190, who argue that it is difficult to envisage any international crime which would not be manifestly illegal. See above fn 53.
61 *Rome Statute.*
62 See Dinstein, *supra* note 55, 382; *contra* Cassese, *supra* note 31, 279; see also above fn 53.
63 See Cassese, *supra* note 31, 279.
64 See R. Cryer, 'The Boundaries of Liability in International Criminal Law', 6 *Journal of Conflict and Security Law* (2001) 3, 15 fn 80.

example, is the killing of an enemy soldier who has surrendered or been rendered defenseless.[65]

In elucidating the notion of manifest illegality, remarks by Judge Halevy— accepted in the *Eichmann* trial — reflects the high water-mark definition for this concept:

> 'The 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, the clearly criminal character of […] the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, […].*'[66]

Eichmann had pleaded the absolute form of the defense, having already acknowledged his complicity.[67] By consequence of the court's rejection of *respondeat superior* he was not able to raise the defense in the face of the manifest illegality of his crimes.

In military-court jurisprudence from North America, the manifest illegality principle has been similarly expressed.[68] Such an order is something 'so palpably illegal on its face', seen in the eyes of 'a man of ordinary sense and understanding.'[69] The reference to a 'reasonable man standard' has been repeated in numerous other judgments,[70] mediated according to the defendant's

65 *US v. Kinder* (1954) 14 CMR 742, 770 (U.S. Air Force Board of Review). In *US v. Kinder*, the victim was a Korean intruder in an 'unconscious or semi-conscious state from injuries' and 'was subdued and […] not resistant to the exercise of physical control over him', 769.

66 *Chief Military Prosecutor v Melinki* (1956) 13 Pesakim Mehoziim 90 (District Court), 44 Peksakim Elyonim 362 (Military Court of Appeal) cited in 'Attorney-General of the Government of Israel v Eichmann', 36 *International Law Reports* (1961) 5, 256 (District Court of Jerusalem); *International Law Reports* (1962) 277, 296 (Supreme Court of Israel) (emphasis added).

67 *Attorney-General of the Government of Israel v Eichmann*, 36 *International Law Reports* (1961) 5, 258 (District Court of Jerusalem).

68 See generally, L. C. Green, 'Superior Orders and Command Responsibility', 27 *The Canadian Yearbook of International Law* (1989), 167, 170–171.

69 *US v. Kinder* (1954) 14 CMR 746, 776 (U.S. Air Force Board of Review). For a general discussion of how illegal conduct under a superior order was evaluated according to The Manual for Courts-Martial, US Army, see 769–777.

70 See, e.g., *US v. Keenan* (1969) 39 CMR 117, 118; *US v. Griffen* (1968) 39 CMR 586, 588–589; *US v. Clark* (1887) 31 Fed, 710, 717.

background, age, education and military experience.[71] Professor Green has raised a more detailed list of factors relating to the circumstances which influence the decision to obey, including: the conditions and urgency surrounding the receipt of orders, the period of deployment, the nature of hostilities and the characteristics of the enemy party faced by the soldier.[72] It follows that the higher the rank of the defendant, the less likely it appears that the defense could be successfully pleaded. Indeed, courts have highlighted the enhanced expertise which they consider to be associated with the holding of an officer's rank.[73]

At the heart of the principle is a considered exercise of the different subjective circumstances that contribute to the decision-making process of a soldier. Only after taking this into account can culpability be decided on the objective basis of whether the order could be regarded as manifestly illegal. This demonstrates the capacity of the manifest illegality doctrine to absorb within its evaluation particulars pertaining to the individual case. Compellingly, it substitutes the blunt absolutist approaches with a more nuanced and just determination of individual culpability.

2. A Reasonableness Standard

A broad consensus currently supports the employment of the manifest illegality doctrine. However, some scholars have presented alternative criteria which could impose a higher level of moral responsibility.[74] Professor Osiel has, for example, argued for a 'civilianization' of the current position into a standard based on general notions of reasonableness.[75] This would be applied, at the very least, to officers and non-commissioned officers in developed countries.[76] He contends, from a sociological perspective, that the manifest illegality standard serves as an inadequate deterrent for the commission of atrocities. As a relatively undemanding criterion, it adversely skews the incentives for a soldier to understand the law. In light of this, the next question for consideration is whether it is appropriate for international standards of criminal culpability to experience a further shift in priorities.

71 *US v. Kinder* (1954) 14 CMR 746, 774 (U.S. Air Force Board of Review); see L. C. Green, *supra* note 16, 340.

72 L. C. Green, 'Superior Orders and the Reasonable Man', 8 *The Canadian Yearbook of International Law* (1970), 61, 102; see also N. C. H. Dunbar, *supra* note 11, 261.

73 See, e.g., *Chenoweth v. R* (1954) 1 CMAR 253; *Hryhoriw v. R* (1954) 1 CMAR 277.

74 B. Paskins and M. Dockrill, *The Ethics of War* (1979), 275–276.

75 Osiel, *supra* note 5, 358.

76 *Id.*, 8.

From the very beginning of this debate, it has been clear that Kelsen's reference to the *unconditional* nature of military obedience is no longer justifiable through ethics or practical necessity. The clear rejection of the absolute defense in the early 20th Century by the international community represented a paradigm shift towards individual responsibility.

This was based on the acknowledgement that

> '[t]he 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.'[77]

If such a 'reasoning agent' construct is to be accepted, then prima facie a 'reasonableness' standard is feasible. But the proper question is whether it is desirable, on a policy level, for the international community to further move towards the paradigm of individualism. Two key considerations may influence this.

The first factor relates to a change in the nature of warfare which may diminish the practical importance of military discipline. Osiel argues that '[e]fficacy in combat now depends more on tactical imagination and loyalty to combat buddies than on immediate, unreflective adherence to the letter of superiors' orders […].'[78] Due to this evolution, traditional justifications based on the necessity of military discipline are less persuasive. In examining his proposition, certainly the decentralization of military structure is quite apparent. The pre-modern characterization of the military unit — the blunt, 'machine-like' mass of foot soldiers, [79] has regressed for a number of reasons. After the First World War, militaries underwent increasing specialization that is commensurate with more complex warfare and the availability of new technology. A somewhat decentralized structure features the existence of smaller, independent groups.[80] This predisposed decision-making towards a cooperative design rather than a strict hierarchy.[81] At the same time, due to the advanced technicality of military equipment, superiors have come to rely on the specialized expertise of subordinates.[82] This special expertise has eroded the traditional imperative to follow superior orders unquestioningly. In parallel to

77 *United States v Ohlendorf* (1950) IV *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No.10*, 470 ('*Einsatzgruppen Case'*).

78 Osiel, *supra* note 5, 7.

79 See Keijzer, *supra* note 42, 33–48 for a detailed summary of the key trends in the organizational structure of military organizations from ancient Rome to the modern era.

80 *Id*. 43.

81 *Id*. 43, 65.

82 *Id*.

this has been an inexorable societal emphasis towards accountability. Keijzer cites the creation of independent 'functionaries' such as military ombudsmen, inspector-general and military trade unions as having an indirect ability to undermine the strict authority of superior orders.[83]

While the character of the typical military structure has evolved, the impact of this event should not be over-emphasized. The sophistication of military warfare does not necessarily imply a seismic shift that justifies a disregard for discipline. An effective response to hazardous circumstances is still achieved through the instructions of a central command, and indeed in some cases the sophistication of communications technology has strengthened the ability of superiors to effect on-the-ground coordination.[84] On the whole, the top-down hierarchy continues to loom as the dominant framework, and remains necessary and desirable.[85] As Keijzer reminds us, 'the military organization is an instrument of violence in the hands of the state.'[86] At the crux of this notion is the crucial nexus between political control by the state, and the control of violence itself, which is to be held in check by a strict system of hierarchy. Therefore, a structural decentralization of the military chain of command does not destroy the hierarchical attribution of responsibility which defines the military. The changing nature of warfare alone cannot be a conclusive reason for radically downplaying the importance of military discipline.

The second argument for imposing the reasonableness standard concerns the policy objectives of deterrence. A reasonableness standard imposes a significantly greater onus on an individual soldier to assess the legality of his actions. Traditionally, the commission of atrocities has been regarded as a process 'originat[ing] "from below" as a result of violent passions or [a] process of brutalization unleashed by combat.'[87] The manifest illegality principle can serve as an effective deterrent to these acts because it aligns legal wrongs squarely with basic moral wrongs. However, in totalitarian regimes where criminal acts are sanctioned by the state "from above" and bureaucratized into smaller tasks, the manifest illegality of the conduct may be easily overlooked. Exemplified by the Eichmann trial, the perpetrator here is what Arendt conceives as a creation characterized by the 'banality of evil.'[88] In

83 *Id.* 45.
84 *Id.* 47.
85 *Id.* 46.
86 *Id.*
87 See S. G. Fritz, Book Review for 'Obeying Orders: Atrocity, Military Discipline and the Law of War, Mark J Osiel' 14 *Holocaust and Genocide Studies* (2000) 3, 432; see also Osiel, *supra* note 5, 173.
88 H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994), 287. 'From the viewpoint of our legal institutions and of our moral standards of judgment, [Eichmann's]

this situation, legal wrongs cannot be aligned with moral wrongs. Legally sanctioned acts obscure the capacity of the individual to recognize moral wrongs in themselves.[89] Osiel argues that in these situations, manifest illegality fails in its function to alert against the commission of atrocities. This is because a reasonableness standard is inherently murkier, it encourages individuals to question orders. Instead of unconsciously resolving questions of legal or moral difficulty in favor of obedience, the process of ascertaining reasonableness incentivizes individuals to alert themselves about problems with an order. Acts falling within the grey area between manifest illegality, and probable illegality, may be further prevented.

The arguments behind Osiel's reasonableness standard are most persuasive for 'mass administrative massacres'[90] committed in sophisticated and developed political systems. Whether this can be applied as a general international standard is a different question altogether. Certainly, state sanctioned violence can occur equally in developed and developing states. But in recent times, the international community, and the International Criminal Court, has returned their preoccupation to acts of mass violence within Africa.[91] By contrast to Nazi Germany, the basis for this violence is associated more closely with issues of peace and order than mere bureaucratic ignorance. In these developing states, the threat of external punishment is often more important for the decision to obey than any reasonableness standard set by international law.[92] Clearly, the increased autonomy given to soldiers in professionalized armies has yet to manifest in many developing states. Thus, Osiel himself concludes that the workability of the reasonableness standard is limited in an international setting. In preference, 'the manifest illegality approach provides a useful "floor" for international law, in that it is a norm to which most states can realistically aspire'[93] to notwithstanding that 'much of contemporary warfare occurs in precisely those societies where it may be unrealistic to expect widespread adherence even to this seemingly indulgent requirement.'[94] In the face of these circumstances, the 'manifest illegality'

normality was much more terrifying than all the atrocities put together, for it implied […] that this new type of criminal […] commits his crimes under circumstances that make it well-nigh impossible [for him] to know or feel that he is doing wrong', 276.

89 Osiel, *supra* note 5, 147–148.

90 *Id.*, 151.

91 See e.g., Human Rights Watch, 'Statement by Human Rights Watch to the General Debate of the International Criminal Court's 7th Assembly of States Parties' (15 November 2008) available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-ASP7-GenDebe-HumanRW-ENG.pdf (last visited 9 December 2010) 3-4.

92 Fritz, *supra* note 87, 434–435.

93 Osiel, *supra* note 5, 362.

94 *Id.*, 362 fn 9.

standard remains the most politically acceptable option for the international community.

Finally, as a matter of practicality, the reasonableness test is difficult to accept because the onus it exacts is excessive. Much of the warfare conducted today still entails the exigencies of combat. While this factor can be taken into account in assessing the reasonableness of actions, the inherently uncertain nature of the 'reasonableness' concept detracts from its workability. Such a standard is bound to vary infinitely across social and cultural lines compared to a criterion of 'manifest illegality'. As such it would exacerbate the soldier's dilemma rather than resolve it. When a heavy onus is imposed by lawyers removed from the front-lines of battle, or in a court that considers facts with the benefit of hindsight, the credibility of the standard diminishes along with its adherence in practice. As a final consideration, the utilitarian virtues of deterrence should not compromise the importance of attaining individual justice for soldiers whose duty, ultimately, is to obey.[95] Manifest illegality by resort remains a more concrete and workable standard that can be used internationally; to this end such a test is preferred.

E. Frontiers of the Defense: Obedience to Civilian Orders?

For the majority of this paper, the defense of superior orders has been persistently justified on the basis of the demands of military cohesion and the rigidity of military discipline. It follows that the concept does not fluidly extend to civilian orders, absent of these special circumstances. Surprisingly however, the defense of obedience to civilian orders doctrine has yet to come under rigorous academic scrutiny. This section discusses the application of the defense in the context of civilian orders under the *Rome Statute* and examines whether the position taken is satisfactory.

I. Operation under the Rome Statute

Under the *Rome Statute,* the defense of superior orders can be pleaded 'pursuant to an order of a Government or of a superior, whether military or civilian.'[96] In doing so, it unambiguously signals that the defense is not

95 Osiel argues that the uncertainty of the standard can be alleviated by a multi-factor test which 'specify a limited set of circumstances and their relative priority' (*supra* note 5, 360). However, the multi-factor test itself would involve complex issues of value judgment. This is not a test that can work easily across diverse cultural lines.

96 *Rome Statute,* Art. 33(1).

confined to a military framework. There is an express requirement, to be proven positively, that the subordinate had a legal duty to obey the order,[97] that he or she did not know that the order was unlawful[98] and that it is not manifestly illegal.[99] However, the precise limits of Art. 33 are yet to be settled.

The scope of the defense as applied to civilian orders is unclear. A defendant must have received the order either as part of a chain of command — military or civilian — or the order must be prescribed by law. [100] In civilian contexts, this takes account of orders prescribed by law as well as orders imparted by a governing official that are within authority and not *ultra vires*.[101] But it is unclear whether this includes orders issued by an unofficial, *de facto* authority. On the one hand, it may be a small step to include unofficial commands, if command responsibility already recognizes the level of effective control on the subordinate exerted by the *de facto* body.[102] However, in a defense context, 'control' is more closely aligned with the notion of compulsion and duress, while the receipt of superior orders is a distinct concept based on the legal duty to obey.[103] It follows that such a duty cannot exist in cases of 'unofficial subordination'[104] and therefore, the better view is that *de facto* orders would not validly meet threshold requirements. From the recipient's viewpoint, it is at the very least logically acceptable to allow the defense where the civilian superior '*purports* to exercise official authority.'[105] This would conclusively exclude situations emanating from a private body.

II. How far should the Defense of Superior Orders Extend to Civilian Contexts?

In line with the expansion of command responsibility to civilian commanders,[106] it is warranted that its corollary, the superior orders defense,

97 *Rome Statute*, Art. 33(1)(a).
98 *Rome Statute*, Art. 33(1)(b).
99 *Rome Statute*, Art. 33(1)(c).
100 *Rome Statute*, Art. 33, heading.
101 A. Zimmerman, 'Superior Orders', in A. Cassese *et al*. (eds), *The* Rome Statute *of the International Criminal Court: A Commentary*, Volume I (2002), 968.
102 *Id*. 968–969. See also O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed (2008), 929, who regards command responsibility and superior orders defence as 'represent[ing] two sides of the same coin.'
103 *Rome Statute*, Art. 33(1)(a).
104 E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), 323–324. *Contra* Triffterer, *supra* note 102, 924, who argues that the meaning of government extends to *de facto* governments of the State.
105 Zimmerman, *supra* note 101, 696. Cf. Triffterer, *supra* note 102, 926.
106 See *Rome Statute*, Art. 28(b).

should also be widened to include civilian subordinates.[107] On a doctrinal level, it is accepted that the existence of such a defense for civilians 'can provide for a more nuanced and comprehensive moral response to the (non-) sincerity of the intentions of defendants.'[108] As international law takes an increasingly expansive view of its jurisdiction over individual criminal responsibility, its doctrines should evolve to reflect a more just and flexible approach towards dealing with the actual culpability of an individual.

At the same time, the extension of the application of superior orders to civilian contexts is fraught with conceptual difficulty. This is because the assumptions which underlie the existence of superior orders in the military sphere cannot be directly transferred to a civilian context.

While the legal duty of obedience may apply to a civilian subordinate, a strict system of discipline, and the exigencies surrounding the consummation of the order, is less likely to be present. Precisely for this reason, national laws for civilians generally do not allow ignorance of the law to be an excuse. [109] The superior orders defense operates under the presumption of military conditions. As these conditions cannot be presumed in the civilian context, the onus should be on the civilian subordinate to characterize the situation by analogy to the extraordinary circumstances faced by a soldier that necessitates strict adherence to the chain of command.[110] The imposition of this element of proof is necessary to prevent an excessively broad manifestation of the defense. In any situation where the primacy of legality is subjugated on the grounds of policy, exculpation on a basis other than the actual culpability of the defendant must be treated cautiously. In civilian contexts, where policy arguments of necessity are weak, a circumscribed approach to the defense of superior orders becomes even more acutely justified.

F. Conclusion

The defense of the superior orders represents an attempt at finding a balance between the 'dictates of absolute discipline and efficiency in what is essentially an instrumentality of power and the equally inescapable subjection

107 See Knoops, *supra* note 7, 40–41.

108 Knoops, *supra* note 7, 42. Cf Triffterer, *supra* note 102, 925, who argues that 'it is necessary that […] civilian superiors exercise a degree of control over their subordinates which is similar to that of military commanders.' Contrary to this I argue that effective control is not relevant in the defense context.

109 This is the position in Australia: see, e.g., *A v. Hayden*, High Court of Australia (1984) 156 CLR 532, 554.

110 Zimmerman, *supra* note 101, 969.

of that instrument of power to the authority of the law.'[111] The various characterizations in which the defense has emerged historically are indicative of the difficulties in such an exercise. In spite of this, adopting a test based on manifest illegality resolves many of the problems that arise from the extremity of the absolute liability and absolute defense positions. This is the characterization upon which the re-emergence of the superior orders defense can be justified in contemporary contexts. The justification is ultimately predicated on the acknowledgement of the significant pressures faced by soldiers. Conditions on the battlefield may reasonably impair and restrict the ability to make well thought out decisions. Thus, strict adherence to military command is an essential element of a soldier's duty.

Outside of a situation where strict discipline is the assumed norm, the justification weakens considerably. In examining the frontier of the defense in a civilian context, a conceptual difficulty arises when we consider the underlying basis for the existence of the defense in the first place — given that civilians are not generally subjected to the same pressures or the strict discipline of the military. Therefore, the scope of the superior order defense in the civilian context ought to be limited in deference to preserving doctrinal consistency.

111 H. Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', 21 *British Yearbook of International Law* (1944), 58, 71.