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THE DEFENCE OF SUPERIOR ORDERS, MANIFEST ILLEGALITY PRINCIPLE AND THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Abdul Ghafur Hamid @ Khin Maung Sein

The defence of superior orders has a long and controversial history. Once it was thought that only superiors who gave the illegal orders should be liable and soldiers should be absolutely free from liability. But such an approach has rarely been approved by national and international courts. The Nuremberg Charter, followed by the statutes of the ad hoc *international criminal tribunals adopted four decades later, affirms absolute liability theory and denies superior orders as a defence though it can be a mitigating factor. On the other hand, the Rome Statute establishing the International Criminal Court recognizes limited liability approach and accepts superior orders as a defence if the soldier did not know that the order was illegal and it was not manifestly illegal (manifest illegality principle). The present paper casts doubt on the argument that the manifest illegality principle as enshrined in the Rome Statute is contrary to customary international law. The paper argues that the absolute liability principle as adopted by the Nuremberg Charter do not reflect customary international law of the time because State practice is divided and decisions of domestic courts in most countries are not in favour of it. The paper concludes that in corporation of 'manifest illegality principle in a multilateral treaty like the Rome Statute has the potential of generating the principle to be a rule of customary international law in future.*

I. INTRODUCTION

International criminal law has borrowed extensively from domestic criminal law, in particular in its infancy. However, due the the desirability of impunity for horrendous crimes that shock the international community, international criminal law has rapidly developed into a full-fledged specialized subject of international law. Very much similar to domestic criminal law,

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certain defences are available to the defendants in international criminal proceedings.[1] Among the factors that preclude international criminal liability, 'defence of superior orders' is quite controversial and widely debated.

According to military discipline and under military law a soldier is bound to obey the orders of his superiors without hesitation and without any question. At the same time, it is quite possible that some orders will be illegal and will be a crime under either domestic law or international law. In such cases, the soldier's duty to obey will clash with his duty not to commit a criminal act. He is therefore placed in a very difficult position and caught on the horns of a dilemma. The crucial question is whether he should be exempted from criminal liability even though what he did amounts to a heinous crime.

The present paper traces the history of the defence of superior orders and identifies the three main approaches, namely: (1) the notion of *absolute defence* or *respondeat superior;* (2) the notion of *absolute liability;* and (3) the concept of *limited liability* for following manifestly illegal order. The paper finds that neither of the first two approaches deals with the soldier's dilemma well and they both fail to give a practical solution to the problem. The absolute defence approach has rarely been approved by national or international courts and the absolute liability approach is inconsistent with the demands of military discipline. The paper suggests that the limited liability approach or the *'manifest illegality principle',* which aims at adjusting the conflicting demands of military discipline and the supremacy of the law, is the correct solution to the dilemma.

Although the Nuremberg Charter and the statutes establishing *ad hoc* international criminal tribunals stick to the absolute liability approach, the Rome Statute of the International Criminal Court incorporates the limited liability approach (manifest illegality principle) in its Article 33. The present paper concludes that such incorporation in a multilateral treaty like the Rome Statute has the potential of generating this principle to be a rule of customary international law in future.

II. THE THREE MAIN APPROACHES TO THE DEFENCE OF SUPERIOR ORDERS

The issue of pleading superior order as a defence has been a particularly controversial and debatable one and there has been a •

lack of consistency regarding its applicability under international law. One of the reasons why the defence causes problems is that it demonstrates a tension between national and international law. That is, while soldiers have a legal obligation under national law to obey superior orders without ever questioning them, they also have a corresponding legal obligation under international law to refuse to commit international crimes. Therefore, soldiers can often be placed in an extremely awkward dilemma. The intensity of the dilemma can clearly be seen in the following remarks: "The soldier who refuses to obey an order which is legal from the standpoint of national law may well find himself before a firing squad after being court martialled by his own state"[2]

If we look into the history of the defence of superior orders, we can clearly find that the legal thinking has been developed into three main approaches: (1) the notion of *absolute defence* or *respondeat superior;* (2) the notion of *absolute liability;* and (3) the concept of *limited liability* for following manifestly illegal orders.

(A) Absolute Defence Approach: Respondeat Superior

Professor Oppenheim was the staunchest supporter of the idea of absolute defence of superior orders. This approach is also known as the doctrine of *respondeat superior.* According to this doctrine, a soldier who commits an offence whilst following an order should be entirely exempted from responsibility and it is the superior who has to take all the blame for issuing an illegal order.[3] The rationale behind this approach of course is the utmost upholding of military discipline. There are, however, some shortcomings in this approach. It, for example, fails to assign responsibility in cases where the soldier is aware of the illegality of the order, but nevertheless agrees with it.[4] It favors the principle of military efficiency to the complete neglect of personal criminal accountability. Fortunately, absolute defence approach has rarely been approved by national and international courts.[5]

However, the unprecedented brutality of World War I gave rise to an opposite theory of 'absolute liability' in which individual combatants who commit atrocities should be tried for their crimes without having any recourse whatsoever to the defence of superior orders.

(B) Absolute Liability Approach

This approach absolutely prohibits the defence of superior orders. Obedience to superior orders may only serve as a mitigating factor for sentencing purposes. According to this doctrine, soldiers are not required to obey illegal orders. It is, therefore, diametrically opposed to the absolute defence because its main purpose is to safeguard the supremacy of the law, at the expense of military discipline, ignoring that a successful military is built on a foundation of discipline that demands "total and unqualified obedience [to orders] without any hesitation or doubt."[6] The absolute liability approach asserts that soldiers are legally bound to follow only lawful orders. Thus, it denies that obedience to superior orders creates a defense *per se* when a soldier follows an illegal order.[7]

This absolute liability approach requires the subordinate to scrutinize and understand the practical and legal implications of all his superior's orders. If the subordinate determines the orders are illegal, he must refuse to follow them. Otherwise, the subordinate assumes responsibility for the consequences of his or her actions. The main weakness of this approach is that it is entirely based on the false assumption that the legality of an order is easily discernable to the subordinate. There will be situations where the impropriety of an order is not clear, especially to a subordinate who does not have the same access to material information as his superior. A high-ranking U.S. Army officer recently commented that "I know that if I ever go to war again, the first person I'm taking is my lawyer"'[8] This suggests that even high ranking commanders have difficulty discerning all the legal implications of wartime acts and the difficulty is only amplified at lower levels where subordinates have less access to the intelligence and overall command strategy upon which their orders are based.

Another weakness of the absolute liability approach is that it fails to address the dilemma of how to promote military discipline while maintaining the supremacy of the law.[9] Under such a strict liability regime, it is likely that hesitation in carrying out orders will increase, there will be more instances of insubordination, and in volunteer armed forces, recruiting may be adversely affected. Indeed, as soldiers begin questioning every order, military preparedness erodes, which has devastating effects for a nation's security. This is the main reason why national laws and military

manuals in most of the countries do not acknowledge the absolute liability approach.

It was with the Nuremberg Charter that the absolute liability approach gained international recognition and approval. However, the Nuremberg and Tokyo Charters are seen by many as somewhat of an overreaction by the Allied Powers to the horrific events that took place during the war. It is for that reason that many scholars now question the legitimacy of the two Charters, as well as the trials, as valid precedents in the context of the superior orders defence.[10]

(C) Limited Liability Approach: Liability for Manifestly Illegal Orders (Manifest illegality principle)

Neither of the two approaches stated above deals with the soldier's dilemma well. They both fail in practical application. The absolute defence approach is not in accord with national or international law and the absolute liability approach is inconsistent with the demands of military discipline. As a result, courts have developed a compromise whereby a soldier may rely on the superior orders defence in the event of an order which is manifestly illegal. This solution is usually referred to as the *"manifest illegality principle"* and is aimed at adjusting the conflicting demands of military discipline and the supremacy of the law.

The doctrines of 'respondeat superior' and 'absolute liability' represent two polar extreme positions towards an issue that, in fact, requires a much more nuanced approach. Such a nuanced, 'middle-of-the-road' approach first appeared in the very beginning of the 20th century in the case of *Regina v. Smith.*[11] Smith was a soldier who, acting on the orders of his superior during the Boer War, killed a native. Solomon J held that:

> It is monstrous to suppose that a soldier would be protected where the order is grossly illegal... I think it is a safe rule to lay down that if a soldier honestly believes that he is doing his duty in obeying the command of his superior, and if the orders are not so *manifestly illegal* that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior.[12]

This judgment marks the introduction of what is known as the 'manifest illegality principle' whereby, for the defence to succeed, the accused must demonstrate (1) absence of subjective knowledge of the illegality of the order and (2) that the order was not

'manifestly illegal' in the objective sense that a reasonable person in the same position would not have known the order to be illegal. However, this approach of superior orders did not gain real prominence until the Leipzig Trials following World War I. In the *Llandovery Castle Case,*[13] in which the accused had torpedoed a British hospital ship under superior orders, the court stated:

> It is certainly to be urged in favor of the military subordinates that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including the accused, to be without any doubt whatever against the law.[14]

The limited defense of superior orders or the 'manifest illegality principle' is a compromise that balances the competing aims by promoting discipline in the military while not entirely subverting the supremacy of the law.[15] The principle has a number of merits. First of all, it allows the subordinate to presume that his orders are legal, and obedience to those orders is a defense unless the illegality of the orders is obvious to any person of ordinary understanding.[16] The presumption that orders are legal helps maintain and promote good order and discipline. Since subordinates do not risk incurring liability in most situations, the presumption effectively compensates for the subordinate's lack of information and eliminates the possibility of hesitation and delay in carrying out orders. Thus, the defense of obedience maintains the supremacy of the law by assigning culpability where "moral choice" was in fact possible.[17] Indeed the defense holds commanders responsible for their orders, rather than subordinates.

Assigning the superior presumptive knowledge of the law, and thus liability under the law, should create an incentive for the superior to learn the law and a disincentive to deliver illegal orders. While the defendant can raise the defense in this situation, a prosecutor can attempt to prove that the subordinate did know the law. Just as a subordinate may argue that he subjectively believed an illegal order he obeyed was lawful, the prosecution may introduce evidence about a defendant's subjective knowledge. to demonstrate that he in fact knew the illegality of the order. If the prosecutor succeeds in establishing that the subordinate knew his order was illegal, but followed the order nonetheless, the **defense will not succeed in negating the *mens rea* element of the**

criminal act. It is even possible that a court-martial or military commission could determine that the order was manifestly illegal to a reasonable person in the defendant's subjective situation. It thus seems likely that the defendant who knowingly follows an illegal order will be subject to criminal liability.

The supremacy of the law is upheld with the manifest illegality defense of superior orders, because the defense serves to establish that the defendant does not possess the *mens rea* required for the criminal act for which he is charged. Thus the manifest illegality principle results in a defense, which guides jurists between the conflicting demands of military discipline and the supremacy of the law. The defense promotes military discipline while maintaining the supremacy of the law by focusing on those with the requisite *mens rea.*

III. 'MANIFEST ILLEGALITY PRINCIPLE'AS ILLUSTRATED BY THE DECISIONS OF DOMESTIC COURTS

According to the *"manifest illegality principle"* military orders must be obeyed unless they are manifestly unlawful. The crucial question here is: what is meant by *'manifest illegality'"[7].18* The nature and meaning of the 'manifest illegality principle,' can be gathered from the following leading decisions decided by courts of various countries.

A leading case in English legal history is that of *Regina v. Smith.*[19] During the Boer War a patrol of British soldiers, sent out on a dangerous mission, had an argument with a native who hesitated to find a bridle for them. Smith, one of the soldiers, under orders of his superiors, killed the native on the spot. After the war, a special court tried Smith for murder and acquitted him. The court said, "I think it is a safe rule to lay down that if a soldier believes he is doing his duty in obeying commands of his superior, and *if the orders are not so manifestly illegal that he must or ought to have known they were unlawful,* the private soldier would be protected by the orders of his superior officer."

In *Llandovery Castle* Case,[20] the soldiers, following the orders of their U-boat commander, not only sank the hospital ship but also machine-gunned the survivors in the water. The German Supreme Court held:

> However, the subordinate obeying an order is liable to punishment, if it was known to him that the order of the superior involved the

> infringement of civil or military law... *if such an order is universally known to everybody, including the accused, to be without any doubt whatsoever against the law.* As naval officers by profession [the accused] were well aware... that one is not legally authorized to kill defenceless people... They should therefore be refused to obey.[21]

In *Border Guards Prosecution Case,*[22] two former German Democratic Republic (East Germany) border guards were convicted of unlawful homicide by a Regional Court of the Federal Republic of Germany. The two shot and killed S, a twenty year old citizen of the GDR as he ascended a ladder and placed his hand on the top of a wall separating East from West Berlin. The two guards were under orders to prevent escape and, if necessary, to kill escapees.[23] The admonition regularly repeated to guards was that "in no event are breaches of the border to be permitted. A person violating the border is to be caught or destroyed."'[24]

The Supreme Court noted that the defense of superior orders under East German law was inapplicable in those instances in which the command *"represents a manifestly gross violation of fundamental concepts of justice and humanity."* East as well as West Germany had acceded to the International Covenant on Civil and Political Rights. In the view of the Supreme Court, East Germany's harsh policy towards escapees contravened the Covenant's provisions pertaining to freedom of movement across borders and the arbitrary deprivation of life.[25] The Court determined that the defendants were guilty of unlawful homicide while acting under orders.[26] *The fact that the defendants were not aware of the manifestly illegal nature of the order was not controlling.27*

In US v Kinder,[28] the defendant, Thomas Kinder, was convicted of killing a captured Korean civilian who was not violent or attempting to escape. Kinder argued that he was ordered to kill so as to scare other locals and to boost troop morale.[29] Kinder further conceded that he knew the order was illegal. He was convicted and it was held that no defence if the crime is a result of *an order manifestly unlawful and no reasonable doubt could exist on the part of a man of ordinary sense and understanding.*[30]

My Lai Massacre: The ruling in *US v Kinder* was followed in the famous case of US v *Calley.*[31] In 1968, Lieutenant Calley's platoon swept through the village of My Lai, shooting at everything that moved. The civilians were rounded up and **murdered in cold blood. The estimated number of dead**

Vietnamese was 347.[32] At trial, Calley argued that he lacked *mens rea* because he acted in accordance with orders issued by Captain Ernest Medina. It was proven that no such order was given. In any event, the Court held that even if it existed, Calley could not rely on the superior orders defence if the jury determined that *he knew the order was illegal and that a man of ordinary sense and understanding would have known the orders to be unlawful.*

The most prominent Israeli case involving superior orders was the *Eichmann* case.[33] Eichmann's principal defense was that he was trained and obligated to serve as an obedient and unquestioning subordinate who was expected to carry out every command, regardless of whether the order required repression or murder.[34] The District Court determined that Eichmann knowingly and enthusiastically pursued a clearly criminal course of conduct.[35] The Supreme Court judgment contains a particularly useful discussion of superior orders.[36]

The counsel for the Appellant in the Supreme Court of Israel proposed the defense of obedience to superior orders claiming that Eichmann took the oath of allegiance when he joined the SS and thus Hitler's compulsion to destroy the Jews completely was the order he received by his superior. The court rejects such contention declaring in particular that "the defense that the act was done in obedience to superior orders means., .that the person who performed it had no alternative - either by law or virtue of the regulations of the disciplinary body (army, etc.) of which he was a member-but to carry out the order he received from his superior." The Judge stated that the accused acted independently and even exceeded the tasks that were assigned to him through the official chain of command.

The court in *Eichmann* case says that the question whether to allow superior order defense depends on the mental state of the accused at the time of the offense and in particular *whether the offender knew about the unlawful nature of the order.* The court establishes in accordance with the tendency from the English law that *"such defense is admissible where there was obedience to an order not manifestly unlawful."* Following the suggested criteria the court then declares that the superior orders defense will be rejected for the accused because:

(i) The order for extermination of the Jews was manifestly unlawful and contrary to the "basic ideas of law and justice", and

(ii) The accused was well aware at the time of committing his crimes that he was a party to the perpetration of the most grave and horrible crimes.

To prove such knowledge the court cites Eichmann's own statements where he himself declares that in the extermination of the Jews he sees "one of the gravest crimes in the history of the mankind" also admitting that he had such realization when he committed the crimes: "I already at that time realized that this was something illegal, something terrible..."

In the *Malinki* case,[37] an Israeli Military Court of Appeal affirmed, in part, a district military court's conviction of eight policemen charged with killing forty-three Arab residents of Israel. These killings arose during a curfew imposed on the village of Kafr Qassem.[38] The Court of Appeal ruled that an order to kill peaceful and innocent citizens who were returning home from work on the grounds that this was required to maintain a curfew "is an order to commit a crime of murder".[39] Israeli law significantly recognized that an individual was not criminally responsible for an act or omission carried out in accordance with a superior's orders *unless the command was manifestly unlawful.'40* The Court observed that the values of discipline and the rule of law collided when a soldier was required to obey an illegal order and that this "creates an excruciatingly difficult dilemma" for both the legislature which was charged with creating standards and for the combatant compelled to choose between insubordination and contravention of criminal law.[41]

The Court noted three possible solutions to this dilemma. The imposition of strict liability had the disadvantage of compelling subordinates to examine and explore every command and undermined order and discipline.[42] The recognition of superior orders as a justification would insulate every excess from legal sanction and limit liability to those in command.[43] The preferable position recognized the difficulty of reconciling these competing considerations and struck an intelligent balance by affirming the *obligation of soldiers to obey all but manifestly unlawful orders.*[44] The Court noted that the illegal character of these clearly criminal commands do not require the subtle and nuanced judgment of the trained legal expert.[45] *This was an objective standard based on the perception of a reasonable combatant; the subjective belief of the defendant as well as the belief of other witnesses as to the legality of an order is not*

strictly relevant.[46] In applying this test, a court should consider evidence concerning the circumstances under which a defendant carried out an order, including his knowledge, beliefs, and honest and reasonable mistakes which might have influenced his behavior.[47]

The case of *Malinki* contributed to the jurisprudence of obedience to superior orders by clarifying that *the manifest illegality of an order was to be evaluated in light of the reactions of a reasonable person under the circumstances and context of the command.*

In the Canadian case of *Regina v Finta,*[48] Finta served as a captain in the Royal Hungarian Gendarmerie and was posted to Szeged by the Nazi controlled regime.[49] Finta was charged with carrying out the so-called "Baky Order" and allegedly supervised the deportation of 8,617 Hungarian Jews to Auschwitz where they were subjected to forced labor and extermination. Finta eventually emigrated to Canada where he was charged and acquitted of crimes against humanity and war crimes.[50]

The Supreme Court recognized that military organizations depend upon immediate, instantaneous and unhesitating obedience to superior orders.[51] This has "through the centuries led to the concept that acts done in obedience to military orders will exonerate those who carry them out."[52] Judge Peter Cory, however, noted that this rule has been disregarded in the case of *manifestly illegal orders.*[53] These are *commands which offend the conscience of "any reasonable, right-thinking person; it is an order which is obviously and flagrantly wrong."*[54] *The order cannot be in a "grey area or be merely questionable; rather it must patently and obviously be wrong."*[55]

The following conclusions can be drawn from the above discussions. First, although knowledge of the accused is taken into consideration by some courts, the jurisprudence of the overwhelming majority of courts is that if an order is manifestly illegal, the defence is not available even though the accused does not know about the illegality of the order. Secondly, whether an order is manifestly illegal or not is to be determined objectively. A manifestly illegal order is an order which is obviously and flagrantly wrong. It must be a gross violation of fundamental concepts of justice and humanity. The test is that of a 'reasonable man'. The manifest illegality of an order is to be evaluated in light of the reactions of any *reasonable* or *right-thinking person* under the **circumstances and context of the order.**

IV. IS THERE AN ESTABLISHED RULE OF CUSTOMARY INTERNATIONAL LAW ON THE DEFENCE OF SUPERIOR ORDERS?

Before the World War I, the weight of scholarly opinion was in favour of the *'absolute defence'* approach and English, French and American law insulated a subordinate officer who acted in accordance with superior orders from criminal prosecution. The leading treatise on international law authored by Professor Oppenheim pronounced to that effect.[56] Article 443 of the British Manual of Military Law on superior orders of 1914, drafted by Oppenheim, followed the same idea. Article 443 further provided that individuals issuing illegal orders (superiors) were subject to criminal punishment.[57] This provision was adopted, with only slight modification, as Article 336 of the Rules of Land Warfare approved by the United States Army and issued in April 1914.[58] However, judicial decisions rarely approved the absolute defence approach and as illustrated by the early common law case of *Regina v Smith*[59] decided in 1900, Courts generally preferred the limited defence or 'manifest illegality' principle.

The Period between World War I and World War II

The unprecedented brutality of World War I gave rise to the *'absolute liability'* theory. This theory squarely opposes the 'absolute defence' approach and denies superior orders as a defence. Thus, the period between World War I and World War II witnessed competing perspectives on the superior orders defense.

The Penal Senate of the German Supreme Court at Leipzig in *Dover Castle* held that a subordinate generally was not culpable for carrying out a superior order. The subordinate was liable in only those instances in which he or she went beyond the parameters of the order or carried out a command which he was aware contravened civil or criminal law.[60]

In *Llandovery Castle*, The Penal Senate stressed that a superior officer issuing an order violative of international law was solely responsible.[61] A combatant obeying such an order only was liable "if it was known to him that the order of superior involved an infringement of civil or military law." The subordinate may assume that a superior order is consistent with international standards and is not obliged to question a facially legal command. Subordinates, however, may incur liability in those instances in

which "an order is universally known to everybody ... to be without any doubt whatever against the law." The Penal Senate stressed that the order to fire at defenseless individuals in lifeboats was one of those "rare" and "exceptional" instances in which it was perfectly clear that an order constituted a breach of the law. The command was "universally known" to be contrary to the law of nations. The defendants, as professional naval officers, were well-aware of the relevant law and were obligated to refuse to carry out the command.[62]

These German decisions appeared to balance the desirability of military discipline with recognition that subordinates possessed the responsibility to resist clearly and conspicuously illegal demands and directives. The conclusion then is that before the World War I, the prevailing view on the defence of superior orders was that of the absolute defence and that the practice of domestic courts before and after the World War I inclined more on the 'manifest illegality' principle. Schabas even went so far as to say that prior to World War II, customary international law held that a crime committed as a result of superior orders was excusable to the extent that it fell under the rubric of the 'manifestly illegal' principle.[63]

The World War II and the Nuremberg Charter

During the World War II, the Allies learned of the atrocities being committed by the Nazis and realized that they could not continue to support the absolute defence if they were going to deny it to prospective German defendants in the upcoming trials. In 1944, both the American and British armies modified their respective war manuals. Other countries followed this trend and introduced similar legislation-all in order to ensure that no potential defendant would be able to avoid responsibility by arguing that he was acting under superior orders.

The Charter of the International Military Tribunal at Nuremberg, after extensive negotiations, came into being in 1945. The superior orders defence was addressed in Article 8, which provides:

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

The Article in effect abrogated the defence completely and thus imposing *'absolute liability'*. Accordingly, no prospective defendant could be exempted from responsibility on the basis of obedience to orders.[64] In fact, the Allies were fully aware of the fact that, from 1906 to 1945, obedience to superior orders was an absolute defence in several countries. However, for fear of the fact that the recognition of an absolute defence approach would have led to acquittals rather than convictions, the Allies went from one extreme to another. That is the reason why some scholars argue that the defence of obedience to superior orders was not abolished as a result of the Nuremberg trials but merely excluded due to very unusual circumstances of the aftermath of the World War II. In other words, there was no shift in international legal doctrine after the Nuremberg trials.[65]

The Nuremberg Charter restricts the use of "superior orders" to mitigating punishment only in instances where justice so requires.[66] In trials before the tribunal, defence counsel repeatedly asserted that their clients were following orders, and they did not confine such assertions to the mitigation of punishment. Thus, lawyers for Field Marshal Wilhelm Keitel and Colonel General Alfred Jodl argued that the defendants were following orders and thus not only should have mitigated punishment but also should have no criminal liability.[67] The tribunal explicitly rejected all of these claims and announced that the law of all nations rejected a defence based on superior orders to kill or torture in violation of international law.[68] Some judges at Nuremberg wanted to go further. They urged holding defendants responsible unless they lacked a "moral choice"—a personal capacity to act differently without risking one's own life or the safety of one's family.[69] This concept in contemporary terms has more in common with the defence of duress, and indeed, duress has sometimes been confused with the defence of superior orders.[70]

Yet, after the Nuremberg trials, diplomatic efforts to establish a permanent international criminal court and to codify the rejection of the superior orders defence failed as Western powers and the Soviet Union approached each negotiation in light of Cold War tensions.[71] Despite long meetings with expert committees, the United Nations could not secure agreement on proposed codifications of the laws of war, peace, and security; efforts to formulate principles from Nuremberg failed.[72] Nor

could the International Red Cross summon sufficient support to include the superior orders provision in the 1949 Geneva Conventions or the 1977 Additional Protocols.[73] National representatives disagreed over whether soldiers should ever be expected to think for themselves and decide whether or not to obey orders.[74]

Some experts conclude that this failure by any international group to adopt a formal statement rejecting the defence of superior orders means that the defence is now available.[75] One scholar argues that because international law has not clearly rejected the superior orders defence, defence counsel in war crimes trials who do not assert a defence of superior orders would be "professionally derelict"'[76] Others emphasize that even the Nuremberg formulation preserved the defence in connection with coercion or lack of moral choice, or in limited circumstances.[77]

Most experts, in contrast, emphasize that even though efforts to codify the rejection of the superior orders defence failed, developing international law eliminates the defence in the case of orders that are manifestly illegal.[78] This leaves the defence available to soldiers who can show that the orders they followed were not clearly and obviously illegal.

We can draw two conclusions from the above discussions. First, the approach of the Nuremberg Charter on the defence of superior orders did not have the effect of codifying the pre-existing customary international law because from 1906 to 1945 obedience to superior orders was an absolute defence in several countries. Second, the approach of the Charter has not crystallized or generated a new customary international law because State practice is divided and decisions of domestic courts in most countries are not in favour of the absolute liability theory.

The Impact of the *ad hoc* International Criminal Tribunals

Four decades later, the United Nations Security Council followed the Nuremberg Tribunal's rejection of superior orders when it authorized the ad hoc International Criminal Tribunal for the Former Yugoslavia ("ICTY").[79] Article 7(4) of the *ICTY Statute* directly mirrored Article 8 of the Nuremberg Charter in entirely excluding superior orders as a full defence. It reads: "The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility,

but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

The United Nations authorizations for the ad hoc *International Criminal Tribunal far Rwanda* (ICTR) and the *Special Court for Sierra Leone* each omit superior orders as a defence but permit the use of superior orders to mitigate punishment.[80] After some initial ambiguity, the *Special Panels to hear Serious Crimes in East Timor*[81] and the *Statute of the Iraqi Special Tribunal,* signed by the administrator of the Coalition Provision Authority also follow the lead of the Nuremberg Charter.[82] Yet while each uses the same approach, denying a defence based on superior orders but permitting mitigation if justice so requires, there are complications. Superior orders did supply a defence at the time the mass violence in East Timor was committed, so the tribunal's elimination of the defence raises the danger of punishment under a retroactive law.[83] In addition, an illegal order may still give rise to a defence without any assessment of whether it was manifestly illegal.[84]

Accordingly,"the jurisprudence of the courts set up after 1945 to punish war criminals was...strongly leaning towards the absolute liability principle.'[85] Nevertheless, even at the time of the adoption of the ICTY Statute, US Permanent Representative, Madeleine Albright, curiously declared the 'manifestly illegal' principle to be the guiding standard: "It is, of course, a defence that the accused was acting pursuant to orders where he or she did not know the orders were unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful."[86] Seemingly then, Scaliotti is correct in asserting that the "answer to the question regarding the rule applicable to superior orders under international law before the Rome Statute is... far from clear."[87]

Furthermore, it is certainly questionable whether strict adherence to the Nuremberg standard is appropriate given the nature of modern international criminal tribunals. The following observation by Rowe is particularly relevant:

> "It is no real answer to argue that the Nuremberg principles will supply the answer to the scope of defences under international law. The defendants at the International Military Tribunals at Nuremberg and Tokyo were the senior directors of war crimes committed by others. *The* Hague Tribunal, by way of contrast, is, for the most part, having to deal with the 'small fish' who, in 'armies' with disciplinary

> **systems that would hardly be recognized by senior officers of established state armies and with inadequate training *were often as much victims of their own side as were their enemies." 88***

This conception of the 'small fish' war criminal as 'victim' is an interesting one. Surely a military disciplinary system in which a superior can, for example, threaten to kill a subordinate and/or his or her family for failure to obey an order is one that would hardly be recognized by senior officers of established state armies. If the accused can be perceived as victimized in this way by the military hierarchy to which he or she belongs then perhaps the more accommodating manifestly illegal' principle is the more appropriate standard. However, the question remains, as in the above example/what happens when the order to kill innocent human beings is accompanied by a threat to life or limb? The psychologically coercive effects are now fundamentally different in that the accused no longer merely feels a conflict between competing duties under national and international law - instead the conflict is between the competing interests of self-preservation and protecting the lives of others. The issue no longer becomes one of superior orders, but becomes one of duress.

The International Criminal Court and the 'Manifest Illegality' Principle

The drafters of the Rome Statute establishing the International Criminal Court departed from the stand of the other international tribunals by permitting the defence where the order, given by a superior to a subordinate, was not manifestly unlawful and where the soldier did not know the order was unlawful. A soldier charged with war crimes - though not genocide or crimes against humanity - can defend himself or herself from criminal liability by satisfying three conditions: that he or she was legally obligated to follow the orders to commit the war crimes, that he or she did not know the orders were illegal, and that the orders were not on their face manifestly illegal. Some countries that are parties to the ICC have already amended their .domestic law to be in accord with the ICC approach of superior orders. It can be expected to generate a rule of customary international law in future.

Due to divergence in State practice and differences in the approaches of the ICC and other international tribunals, the conclusion that can be made for the time being is that no customary

international law on the defence of superior orders has been established and that no single international norm governing the defence of superior orders currently exists.

V. AN ANALYSIS OF ARTICLE 33 OF THE STATUTE OF THE ICC

In 1994, the International Law Commission adopted a Draft Statute for an International Criminal Court and submitted it to the General Assembly.[89] On 11 December, 1995 the General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court to prepare and develop its own draft statute, building upon the International Law Commission's text.[90] Finally, the General Assembly convened a diplomatic conference in Rome, Italy, from 15 June to 17 July, 1998, for the adoption of a convention, in the form of a Statute, to establish a permanent international criminal court. The participants at the Rome Conference included 160 states, 33 international organisations and a group of 236 non-governmental organisations (NGOs).

The Rome Statute of the International Criminal Court was adopted by the Conference on 17 July, 1998, by a vote of 120 states in favour, 7 against and 21 abstentions. While France, the United Kingdom and Russia supported the Statute, the United States declared publicly that it opposed it. China, Israel, Iraq, Libya, Quarter and Yemen joined the United States to form the 7 states that voted against the Statute. The Rome Statute entered into force on 1 July 2002. As of 18 July 2008, there are 139 signatories and 108 States Parties to the Rome Statute.[91]

The Rome Statute creates the International Criminal Court (ICC).[92] The jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes; and

(d) The crime of aggression.[93]

(A) Drafting History of Article 33

During the Rome Conference which drafted the Statute of the ICC, two main opposing schools of thought emerged. One school of

thought was advocated by the group of like-minded countries, particularly Germany, and argued for an 'absolute liability' approach to the superior orders. They argued that 'superior orders' must never be a defence against criminal responsibility for international crimes. It is very clear that this approach strictly followed the guidelines of the Nuremberg Charter and the Statutes of the ICTY and ICTR.

On the other hand, there are States, in particular the United States, which advocated for the 'manifest illegality approach', arguing that a soldier obeying orders of his superiors would not be criminally responsible unless he knew the order to be unlawful or if the order had been manifestly unlawful. The negotiations were quite difficult and finally the Conference drafted the present Article 33 as a compromised formula. Article 33 of the Statute of the International Criminal Court provides:

Article 33
Superior orders and Prescription of 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 a military or civilian, shall not relieve that person of criminal responsibility unless:
   (a) The person was under a legal obligation to obey orders of the government or the superior in question;
   (b) The person did not know that the order was unlawful; and
   (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

When we make a careful analysis of Article 33, the very first thing we can take note is that the Statute of the ICC acknowledges 'superior orders' as a defence *per se,* rather than a sub-category of the defence of mistake. Nevertheless, Article 33 clearly states the principle that superior orders shall not relieve a person of his or her criminal responsibility unless certain specific requirements are satisfied. Therefore, we can say that Article 33 upholds the general principle of the irrelevance of superior orders. Thus any reference to the defence of superior orders under Article 33 would constitute an exception and the defence will, therefore, have to be interpreted narrowlv in accordance with rules of interpretation.

The Meaning of Superior Order

According to Article 33(1), the superior order must come from either a government or a superior. Therefore, the order might have emanated from a government, for example, in the form of legislation or a regulation that would amount to an international crime under the Statute. That is why the heading of Article 33 reads: 'Superior orders and prescription of law". Alternatively, the order might have come from a superior who stands higher in the hierarch of the chain of command.

(B) The Three Requirements for a Lawful Defence of Superior Orders

The general rule under Article 33 is that there is no defence of superior orders. Therefore, as an exceptional situation, it is for the defendant to prove the existence of the three requirements. These requirements are cumulative in the sense that all the three must be satisfied in order for the defence to be successful.

(i) The Offender was under a 'Legal Obligation' to Obey the Order

The first requirement is that the person claiming the defence was *under a legal obligation to obey the said order.* The Statute thereby refers back to the domestic legal system within which both the superior or the government as the case may be, and the offender were acting. The Court will have to appraise the binding effect of such orders according to that domestic legal system.

(ii) The Offender did not know that the order was Unlawful

An offender may only rely on the defence of superior orders if he or she did not know that the order was unlawful. Whether unlawful or not depends on whether it is a punishable crime under the Statute (whether it is a recognized international crime) or not. Therefore, whether the act was a punishable offence under the domestic legal system of the offender is not relevant.

This requirement is a purely subjective test as the main concern here is with the accused's actual knowledge. It is a lower threshold because it is quite easy for the accused to claim his lack of such knowledge. Like any other fact, knowledge on the part of the accused can be proved by circumstantial evidence, that is, facts from which it may be inferred that the accused

had such knowledge. But this lower threshold is raised by the third requirement that the order must not be 'manifestly unlawful'.

(iii) The order was not 'Manifestly Unlawful'

This is the objective requirement, introduced to limit the scope of the purely subjective second requirement. An order must be considered to be manifestly unlawful if the illegality was 'obvious to a person of ordinary understanding'.[94] The question to be asked here is whether an ordinary person in the situation of the accused would have seen that the order was unlawful. When determining the unlawfulness of the order, the domestic legal system is irrelevance. The decisive factor is whether the order was manifestly unlawful under international law. Therefore, the test is whether even a layman (not necessary to be a legal expert) with only a basic knowledge of international humanitarian law should have considered the action to be unlawful.

(C) The Defence Not Available to Genocide and Grimes Against Humanity

According to Article 33(2), orders to commit genocide or crimes against humanity are considered to be manifestly unlawful and therefore, the defence of superior orders is not applicable to these cases. In other words, the defence is only applicable to orders to commit 'war crimes'. In fact, this provision was inserted in Article 33 in order to appease those States that advocated absolute liability approach and opposed the inclusion of the defence in the Rome Statute[95] and its main purpose was to limit as far as possible the scope of the application of the defence.

However, many scholars are critical of Article 33(2). It is stated in the Commentary to the Rome Statute of the ICC:

> This distinction drawn between war crimes, on one hand, and crimes against humanity and genocide on the other, is a novelty of the Rome Statute. It is deplorable in the sense that it sets up two different standards with regard to, on the one hand, acts of genocide and crimes against humanity, and on the other, war crimes. This distinction is not based in customary international law, nor does it exist in any domestic law.[96]

Furthermore, Article 33(2) appears to give a wrong signal that the commission of war crimes creates lesser injury to the humanity

than acts of genocide or crimes against humanity, which is not the case. Because of the distinction made in Article 33(2) people might think that victims of war crimes are granted a lesser degree of protection than victims of genocide or crimes against humanity.

(D) The Nexus between Superior orders and Command Responsibility

Apart from Article 33, the Rome Statute contains other provisions that are relevant to the superior orders debate. The most relevant among them is Article 28 which deals with *"command responsibility.*

Article 28
Responsibility of Commanders and other Superiors

In addition *to* other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
    (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
    (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

This Article allows for the individual liability of those issuing illegal orders. Accordingly, the liability is shared between the superior and the soldier[97] so that the latter is not made a scapegoat.

(E) Defence of Superior orders under the Rome Statute: Shortcomings and Merits

The Rome Statute establishing the International Criminal Court is the first ever international convention which codifies the principle of superior orders and the first attempt of the

international community to formulate the principle in the form of treaty law. Although there are other international instruments dealing with superior orders, such as the Nuremberg Charter and the Statutes of the ICTY and the ICTR, they do not create treaty law which is based on the consent of States, but instead they were either established by the victorious powers or the Security Council of the United Nations, as the case may be.

One criticism made by Professor Cassese and others is that they would prefer a clear confirmation of the absolute liability principle as contained in the Nuremberg Charter and later affirmed by the Statutes of the ICTY and the ICTR, that is, that superior order is no defence, but may be considered in mitigation of punishment if justice so requires. In this way, according to them, the Rome Statute could have paved the way towards a clear customary international standard.[98] It is submitted that since the Rome Statute was the result of thorough negotiations among the participating States it is quite foreseeable that a delicate balance had to be struck between the need to punish those committing heinous crimes, on the one hand, and the need to protect persons who unknowingly commit war crimes, on the other.

Another criticism is that Article 33 has departed from pre-existing rules of customary international law because it does not abide by the absolute liability principle.[99] However, it has been shown above that there is no uniform and consistent state practice and thus it is very much doubtful that there has already been established customary international law on the defence of superior orders. One of the merits of the successful codification of the defence of superior orders in the Rome Statute is that we can at least say that an agreement could finally be reached and that this will surely influence the development of customary international law in future on this subject.

Several countries committed to the ICC have already amended their domestic law to match the ICC standard on superior orders.[100] If many come to do so, this could change the status of the defence in customary international law, i.e. the approach of the ICC could well be accepted by the international community. In the meantime, without having endorsed the ICC, the United States has indicated room for the defence under limited circumstances. Thus, the United States *Manual for Courts-Martial* (MCM) currently permits the defence as follows: "It is a defense to any offense that the

accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[101] This provision not only permits superior orders as a defence but does so when a person of ordinary sense and understanding would not realize that the order is unlawful. By pegging the standard to the person of ordinary sense and understanding, this version extends the defence beyond an objective test of illegality to a standard considering ordinary persons' knowledge of the law. Moreover, the manual indicates that doubts about the legality of an order are to be resolved in favour of its legality.[102]

The Canadian version permits the defence except if the order was manifestly unlawful to a reasonable soldier under the circumstances.[103] It adopts a definition of manifest illegality as that which is "obviously and flagrantly wrong/'[104] Variations over time, across nations, and among tribunals render doubtful the assertion that the Nuremberg Tribunal rejected the superior orders defence as a matter of international law.

Despite some of the criticism directed against Article 33, it is the view of the present writer that the Article is very carefully phrased and it reflects a clear proposition of the law in this respect. It correctly adopts the manifest illegality approach which can be found in much of the case law, both before and after the Nuremberg trials. Another advantage is that it is extremely limited in its scope as it contains a high threshold that many defendants will find very difficult to satisfy.

VI. CONCLUSION

Article 33 of the Rome Statute correctly adopts the compromised formula by means of acknowledging the *'manifest illegality principle'*. It is the humble opinion of the present writer that this approach is more flexible and hence more amenable to justice. Moreover, this is the first time that the international community has actually reached an agreement with respect to the defence of obedience to superior orders. This is in itself a significant advance in view of the fact that there is no treaty law dealing with the topic. The writer believes that the inclusion of Article 33 in the Rome statute will result in long-term benefits to the international community. It is hoped that it will also contribute to the standardization of national laws and martial laws in respect of

the defence of superior orders in various countries of the world. Finally it will contribute to the development of customary international law in future.

Notes

1. **The following defences are available under the Rome Statute Establishing the International Criminal Court: (1) Mistake of fact or law (Art. 32, the Rome Statute); (2) Superior orders (Art. 33); (3) Mental disorder (Art. 31(l)(a); (4) Intoxication (Art. 31(1)(b); (5) Self-defence (Art. 31(l)(c); (6) Duress (Art. 31(l)(d).**
2. **P. Gaeta, "The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law" (1999) 10 EJIL172 at 173.**
3. **L. Oppenheim, *International Law: a Treatise,* 2nd ed. (London: Longmans, Green, 1912) at 264.**
4. **J. Insco, "Defence of Superior Orders before Military Commissions" (2003) 13 *Duke J Comp. & Int'l Law,* 389, at 393.**
5. **R. Jonassen, "The Defence of Superior Orders in New Zealand Law: A Soldier's Dilemma?" (2002) *AULR* 643, at 654.**
6. **Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law,* (Leyden: A.W. Sijthoff, 1965), 5.**
7. ***Ibid. at 69.***
8. **Col. Patrick Finnegan, *"Operational Law: Plan and Execute", MIL. L. REV.* (Mar.-Apr. 1996) 29-30.**
9. **Dinstein, above note 6, at 9.**
10. **See, for example, Ian Bownlie, "Superior Orders - Time for a New Realism?", (1989) *Crim L R* 396, at 403.**
11. **(1900) 17 SC 161 (Cape of Good Hope).**
12. ***Ibid,* at 567-8 [emphasis added].**
13. ***Annual Digest* 1923-1924, Case No. 235, Full Report, 1921 (CMD. 1450).**
14. ***Ibid. at 45.***
15. **Dinstein, at 8.**
16. ***Ibid. 34.***
17. **US *v Hermann Goring et. al,* XXII Trials of the Major War Criminals Before the International Military Tribunals, 411, 465 (1948); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, princ. IV, [1950] 2 Y.B. Int'l L. Comm'n 374.**
18. **Jordan Paust Leila Sadat, M. Cherif Bassiouni (eds.), *International Criminal Law: Cases and Materials,* (Carolina Academic Press, 2000) 120.**
19. **(1900) 17 SC 561 (Cape of Good Hope).**

20. Judgment in Case of Lieutenants Dithmar and Boldt, Hospital Ship "Llandovery Castle", (1922) 16 *AJIL* 708.
21. *Ibid.,at722.*
22. *Border Guards Prosecution Case* (Fed. Sup. Ct., Fed. Repub. Germany, Nov. 3,1992), 100 ILR 366 (1997).
23. *Ibid.*
24. *Ibid,* at 366.
25. *Ibid,* at 380-383.
26. *Ibid.* 391.
27. Ibid. 366.
28. US v Kinder, 14 CMR 742(1954).
29. See L C Green, "Fifteenth Valdemar A Solf Lecture in International Law" (2003) 175 *Mil L Rev* 309, at 336.
30. *Ibid.*
31. *US v Calley,* U.S. Court of Military Appeals (1973) 22 USCMA 534,48 CMR19.
32. M. Lippman, "War Crimes: The My Lai Massacre and the Vietnam War", (1993) 1 *San Diego Justice Journal* 295, at 309.
33. *Israel v. Eichmann* (Dist. Ct, Dec. 12,1961), *36* I.L.R. 18 (1961); 36 I.L.R. 277 (Sup. Ct, May 29,1962).
34. Ibid.at 254.
35. Ibid. at 258,270.
36. *Ibid,* at 313-14.
37. *Chief Military Prosecutor v. Malinki* (Military Court of Appeal, 1959), II *Palestine Y.B. Int'l L.* 69,*77* (1985).
38. *Ibid. at 78.*
39. *Ibid.* 105-06.
40. *Ibid.* 103.
41. *Ibid. 106.*
42. *Ibid.* 107.
43. Ibid. 107-08.
44. *Ibid. 108.*
45. Among the factors a court should take into account in deciding whether an order is manifestly illegal are: the difference in rank between the issuer and recipient of the order; whether the receiver had grounds for believing that the issuer had access to facts unknown to the receiver; whether the receiver had time to clarify to himself whether the order was lawful; was the order issued in times of normality or emergency; did the receiver have a reasonable basis for believing that he would suffer death or great bodily harm in the event that he refused to execute

the order. In addition, a defendant is to be provided with the benefit of the doubt as to any honest and reasonable mistake as to the facts which led him to execute the order. *Ibid,* at 109-10.

46. *Ibid,* at 111. The defendant must demonstrate that he acted in accordance with an order issued by an authorized authority and the prosecution then bears the burden of proof in establishing manifest illegality. Ibid. at 112.
47. *Ibid.*
48. *Regina v. Finta [*1994] 1 S.C.R. 701
49. *Ibid,* at 725.
50. *Ibid. at 726.*
51. *Ibid,* at 828-29.
52. *Ibid,* at 829.
53. Ibid.at 829,834.
54. Ibid. at 824.
55. *Ibid.*
56. Lasa Oppenheim, II *International Law, A Treatise: War and Neutrality* (2nd ed. 1912) 310.
57. George A. Finch, "Superior Orders and War Crimes", (192115 *AJIL* 440, 441.
58. *Ibid.*
59. (1900) 17 SC 561 (Cape of Good Hope).
60. Judgment In Case of Commander Karl Neumann Hospital Ship "Dover Castle" (1921), 16 *AJIL* 704 (1922).
61. Judgment in Case Of Lieutenants Dithmar And Boldt, (1921) 16 *AJIL* 708,709-10(1922).
62. *Ibid,* at 721-722. '
63. William A. Schabas, *Genocide in International Law—The Crime of Crimes* (Cambridge: Cambridge University Press, 2000) at 325.
64. Dinstein, above note 6, at 18.
65. See H McCoubery, "From Nuremberg to Rome: Restoring the Defence of Superior Orders" (2001) 50 *Int'l & Comp L Q* 386, at 391.
66. Art. 8, Charter of the IMT, 8 August 1945,82 U.N.T.S. 280, art. 8,59 U.S. Stat. 1544.
67. See *United States v. Karl Brandt (Medical Case)* (1947), 1 Trials of War Criminals at 290-91,325.
68. U. K., H. C, "Judgment of the International Military Tribunal for the Trial of German Major War Criminals (With the Dissenting Opinion of the Soviet Member)", Cmd 6964 in *Sessional Papers,* vol. 25 (1946-47) 511 at 556.
69. See Charles Garraway, "Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied" (1999) 81 Int'l Rev. Red Cross

785. Article 6 of the *Charter of the International Military Tribunal far the* ***Far East,*** **19 January 1946, T.I.A.S. No. 1589, echoes article 8 of** ***Charter of*** *the IMT.*

70. See Suzannah Linton & Caitlin Reiger, "The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders" (2001) 4 Y.B. Int'l Human. L. 167 at 169-78.

71. See Matthew Lippman, "The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later" (1998) 15 Ariz. J. Int'l & Comp. L. 415 at 459.

72. See Howard S. Levie, "The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders" (1991) 30 ***The Military Law*** *and Law of War Review* 183 at 199.

73. See ***ibid,*** **at 199-203; Garraway, above note 69 at 785-94.**

74. See International Committee of the Red Cross, ***Report on the Work of the*** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, Geneva, July 1972,* Vol. 1, at 188.

75. In his August 2002 memorandum explaining why the ***Convention Against Torture*** **would not prevent the use of coercive practices in interrogation, then-US Assistant Attorney General Jay Bybee indicated that superior orders could be a defence in an international prosecution for violations of the** ***Convention Against Torture.*** **See Memorandum re: Standards of Conduct for Interrogation from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice to Alberto R. Gonzales, Counsel to the President (1 August 2002) at 45, online: FindLaw** *<http://fll.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf*

76. Levie, above note 73, at 204.

77. See *Report of the Secretary-General pursuant to paragraph 2 of Security Council* ***Resolution 808 (1993),*** **UN SCOR, 48th Sess., Supp. April, May and June 1993, UN Doc. S/25704,117 at para. 57; Theodore Meron,** ***War Crimes Comes of Age: Essays*** **(New York: Oxford University Press, 1998) at 224;** *Report of the International Law Commission on the Work of its Thirty-Ninth* ***Session,*** **UN GAOR, 42d Sess., Supp. No. 10, UN Doc. A/42/10 (1987) at** 16-20. Cherif Bassiouni, *Crimes Against Humanity in International Criminal* ***Law,*** **2nded. (The Hague: Kluwer Law International, 1999) at 483 (stating that obedience to superior orders is not a defence under customary international law to an international crime when the order is manifestly illegal, but "[i]f the subordinate is coerced or compelled to carry out the order, the norms for the defense of coercion (compulsion) should apply" as mitigation).**

78. The resolution by the United Nations General Assembly at its first session in 1946 affirmed "the principles of international law recognized by the Charter of the N rnberg Tribunal and the judgment of the Tribunal" *(Affirmation of the Principles of International Law Recognized by the Charter of*

the N rnberg Tribunal, GA Res. 95(1), UN GAOR, 1st Sess., UN Doc. A/ RES/95(1) (1946) 188). For an example of analysis using this resolution to presume continuity in international law, absent the explicit contrary authority in the authorization of new tribunals, see Christopher Staker, "Defence of Superior Orders Revisited" (2005) 79 Austl. L.J. 431 at 431-32.

79. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (1993),* Annex to *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), supra* note 72,134.

80. For Rwanda, see Article 6(4), *Statute of the International Tribunal for Rwanda,* Annex to SC Res. 955, UN SCOR, 49th Sess., UN Doc. S/RES/ 955 (1994) 15. For Sierra Leone, see *Statute of the Special Court for Sierra Leone,* Enclosure to UN SC, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone,* UN Doc. S/2000/915 (October 2000), art. 6(4).

81. *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses,* see TAET Reg. 2000/15, UN Doc. UNTAET/REG/ 2000/15, s. 21.

82. *The Statute of the Iraqi Special Tribunal,* GC/Law/10 December 2003/1, Al Waqai Al-Iraqiya Official Gazette of Iraq 2003, Vol. 44, No. 3980 at 127, art. 15(e).

83. See Suzannah Linton & Caitlin Reiger, "The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders" (2001) 4 Y.B. Int'l Human. L. at 34.

84. See *ibid,* at 44 (considering application of the defence in the East Timor situation). The authors also suggest that the cultural context may make obedience to orders especially compelling there *(ibid,* at 45).

85. A. Zimmerman, "Superior Orders" in A. Cassese, P. Gaeta & J.R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) at 964.

86 UN SCOR, 48th Year, 3217th Mtg., UN DOC. S/PV.3217(1993) at 15.

87 Massimo Scaliotti, "Defences before the ICC" (2001) 1 Int'l Crim. L. Rev. 1l1 at l41.

88 P. Rowe, "Duress as a Defence to War Crimes after *Erdemovic:* A Laboratory for Permanent Court?" (1998) 1 Y. B. Int'l Env. L. 210 at 226.

89 (1994) 33 I*LM.* 253.

90 General Assembly Resolution 50/46 of 11 December, 1995.

91. *http://www.un.org/law/icc/statute/status.htm*

92. Articles 1, the Rome Statute, 1998.

93. Article 5(1), the Rome Statute, 1998.

94. See, A. Cassese, P. Gaeta and J, Jones, (eds.) *The Rome Statute of the International Criminal Court: A Commentary,* Vol. I, (Oxford University Press, 2002), 970.

95. See for example, Charles Garraway, "Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied", *International Review of the Red Cross*, (1999) No. 836,785, at 790.

96. A. Cassese, P. Gaeta and J. Jones, (eds.) *The Rome Statute of the International Criminal Court: A Commentary,* Vol. I, (Oxford University Press, 2002), 971.

97. See Anthony D'Amato, "Superior Orders vs. Command Responsibility", (1986) 80 *American Journal of International Law,* 604, at 605, arguing for the "Split-Responsibility Solution".

98. A. Cassese, P. Gaeta and J. Jones, (eds.) *The Rome Statute of the International Criminal Court: A Commentary,* Vol. I, (Oxford University Press, 2002), 972.

99. Paola Gaeta, "The defence of superior orders: The Statute of the International Criminal Court *versus* customary international law", *European Journal of International Law,* Vol. 10,1999, pp. 172 ff.

100. Christopher Staker, "Defence of Superior Orders Revisited" (2005) 79 Austl. L.J. 431, at 442-46 (describing efforts by Australia, New Zealand, and the United Kingdom to bring their domestic laws in line with the ICC treatment of superior orders).

101. Art. 90, *Manual for Courts-Martial* (MCM) (2008 Edition), U.S., Department of Defense, *http://www.jag.navy.mil/documents/mcm2008*.

102. See for the practice of states as to the default rule of the presumption of legality of superior orders, Nico Keijzer, *Military Obedience* (Neth.: Sijthoff & Noordhoff, 1978) at 97,133 (comparing court martial rules in the U.S., U.K., France, the Netherlands, and Israel).

103. "An act is performed in compliance with an order which is manifestly unlawful to a reasonable soldier given the circumstances prevailing at the time does not constitute a defence and cannot be pleaded in mitigation of punishment" (Canada, Department of National Defence, *Law of Armed Conflict at the Operational and Tactical Levels* (Ottawa: Department of National Defence, 2003) [the *JAG Manual]* at para. 1615.2. This rule implies that, absent manifest illegality, following orders can supply a defence in Canada.

104. *Ibid.,* citing *R. v. Finta,* [1994] 1 S.C.R. 701 at 834,112 D.L.R. (4th) 513, Cory J. The *JAG Manual* further cites Cory J. to the effect that in order for an order to be considered manifestly unlawful, "[i]t must be one that offends the conscience of every reasonable, right thinking person. It must be an order which is obviously and flagrantly wrong" *(ibid.).*