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The Defense of Superior Orders

Article 33 of the ICC statute – a departure from customary international law?

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Contents

Summary

The defence of superior orders is the answer to what is called the soldier's dilemma. This is so called since on the one hand, a soldier is bound by national legislation, military practice, and often psychological pressure to unquestioningly follow the orders of his superior. On the other hand, when this order is illegal, he is bound by international law to refuse to follow the order. There are three schools of thought on how to solve this dilemma.

For a long time, lower level soldiers were always excused for crimes committed pursuant to orders (i.e. respondeat superior). In the late 19th century and early 20th century this changed to an approach where soldiers could be excused, but only if they did not know, or should not have known, that the order was illegal (i.e. conditional liability). With the creation of the Nuremberg tribunal after the second world war, this theory was abandoned in favour of an approach where following orders never could amount to a complete defence for a breach of International Criminal Law (ICL) (i.e. absolute liability). The absolute liability approach was thereafter used in the *ad hoc* tribunals created to hold war-criminals responsible for the crimes in Yugoslavia and Rwanda (the ICTY and the ICTR). Then the International Criminal Court (ICC) was established, and in its treaty the defence of superior orders was once again partially recognised in accordance with the theory of conditional liability. According to Article 33 of its statute, the defence of superior orders can be considered as a full defence, but only in cases where the defendant did not know the order was illegal, and the order was not manifestly illegal. Furthermore, the crimes of genocide and crimes against humanity are presumed to be manifestly illegal (leaving the other two "core crimes", war crimes and the crime of aggression, as the only crimes covered by the provision).

This has been criticised as a departure from customary international law, and redundant in that no crime as expressed in the ICC statute ever could be

anything but manifestly illegal. It has also been criticised for making a distinction between the different core crimes without basis in law. The aim of this thesis to assess this critique and reach my own conclusions as to whether a departure was made from customary international law with the drafting of Article 33 of the ICC statute, whether the defence should exist in ICL, and if so, how it should be formulated.

The theory of respondeat superior is rooted in national law and in the idea of military discipline. It is argued that since soldiers are trained to carry out orders without question, they should be excused if one of these orders amounts to a crime, and only the one issuing the order may be held accountable. As has been convincingly argued by both legal scholars and judges in the tribunals however, this is not tenable. A soldier is not a machine but a thinking human being. Furthermore, *reductio ad absurdum*, this approach would lead to only Hitler being accountable for the crimes of the holocaust. Therefore, it was rightly abandoned, and has to my knowledge no supporters within the legal debate today.

The theory of absolute liability was adopted by the Nuremberg Tribunal, which brought some of the highest-level officials from the Nazi regime to justice. Thereafter it was used in the subsequent proceedings and the ICTY and the ICTR. The rationale behind this theory is that it is irrelevant whether someone was ordered to commit a crime or not. He is equally blameworthy if he commits a crime of his own volition as if he commits it pursuant to an order. If a soldier is threatened at gun-point, or do not know the order is illegal, he could instead rely on defences of duress or mistake.

The theory of conditional liability acknowledges that in some cases, especially on the field of battle, it is not always readily apparent to a soldier whether the order received was legal or not. Therefore, it states that a soldier is excused from crimes committed under order, but not if these orders were obviously illegal (sometimes phrased as whether the soldier should have known that the order was illegal), or if he knew that the order was illegal.

This approach has been used in the Leipzig trials, and in national military tribunals. In the ICC, this approach is accepted for war crimes and for the crime of aggression, but for the crimes of genocide and crimes against humanity the strict liability approach still reigns. Here, the test is whether the soldier knew the order was illegal, or whether it was manifestly illegal.

As to whether this is a departure from customary international law, my answer is in the negative. This is because the Nuremberg charter was created for a very specific and extreme situation, and therefore cannot be considered an expression of customary international law. Rather, I read the provision as excluding the defence for the purposes of trying these high-level officials, for these heinous crimes.

As to the argument that the defence should be excluded since no crime within the jurisdiction of the ICC ever could be anything but manifestly unlawful, my answer is once again in the negative. Some of the war crimes outlined in the statute require a complicated set of events, and hypothetically it is not impossible to find some example of when an act constituting the objective elements of these crimes would not be manifestly illegal. Furthermore, to exclude a defence based on an assumption that it "will not be used anyway" seems unnecessary and incompatible with the theory of individual criminal responsibility.

For the same reason as above, I do agree with the criticism regarding excluding the crimes of genocide and crimes against humanity from the defence. As to whether the manifest illegality test should be objective or subjective, I believe that it is right to set an objective standard. This is due to the fact that in some cases, especially when it comes to these serious crimes, ignorance should not be an excuse.

Sammanfattning

Inom internationell straffrätt har det länge debatterats huruvida försvaret att en soldat begått ett internationellt brott efter befallning av förman ska innebära ansvarsfrihet för den åtalade. Om en soldat blir beordrad av sin befälhavare att begå ett brott så står han inför ett dilemma. Han kan antingen vägra, och riskera repressalier från nationellt håll, eller begå brottet, och riskera att bli straffad av en internationell tribunal i efterhand. Historiskt har det funnits tre teorier om hur en sådan situation ska lösas. Den äldsta teorin kallas ”respondeat superior”, och den innebär att en soldat alltid är ursäktad om han begår brott under order, och att enbart den som ger ordern kan hållas ansvarig för brottet. I slutet av 1800-talet och början av 1900-talet övergavs den teorin i stor utsträckning, och blev ersatt av en teori som kan kallas ”villkorlig ansvarsfrihet”. Enligt den teorin är soldaten ursäktad om han inte visste, eller inte borde ha vetat, att ordern var olaglig. I annat fall ska även den underordnade stå till svars för brottet. När Nürnbergtribunalen bildades övergavs den teorin till förmån för en teori som kan kallas ”absolut ansvar”. Enligt den teorin spelar det över huvud taget ingen roll om ett brott begås under order eller på eget initiativ, och ett försvar som går ut på att ”jag bara följde order” var uttryckligen exkluderat från Nürnbergstadgan. Rwandatribunalen och tribunalen för det forna Jugoslavien hade samma exkludering i sina stadgor. Sen bildades den internationella brottsmålsdomstolen, vilken i sin artikel 33 till hälften accepterade teorin om villkorlig ansvarsfrihet (för aggressionsbrott och krigsförbrytelser), och till hälften föreskrev teorin om absolut ansvar (för folkmord och brott mot mänskligheten).

Detta har kritiserats som en avvikelse från internationell sedvanerätt, samt överflödig då det har hävdats att inget brott inom domstolens jurisdiktion kan vara annat än uppenbart rättsstridig. Artikeln har också kritiserats för att den utan grund har gjort en distinktion mellan de fyra grundläggande brotten. Målet med det här examensarbetet är att bedöma denna kritik och

dra mina egna slutsatser kring dessa frågor, samt dra mina egna slutsatser kring huruvida ansvarsfrihetsgrunden befallning av förman bör vara en del av den internationella kriminalrätten och i sådana fall hur en sådan ansvarsfrihetsgrund bör vara utformad. Detta kommer jag göra genom en klassiskt rättsdogmatisk metod, samt en kritisk bedömning av argumentationen i domar och doktrin.

”Respondeat superior-teorin” har sin grund i nationell rätt och en teori om militär disciplin. Argumentationen är att soldater är utbildade till att lyda order snabbt och reflexmässigt, samt att de varken är i en position att kunna, eller har kunskap nog att bedöma, lagligheten i en order (särskilt i fält). De bör därför vara ursäktade om det sedan visar sig att ordern de löd innebar ett brott, och enbart förmannen som gav ordern bör kunna straffas. Motargumentet är att en soldat inte är en maskin, utan en människa fullt kapabel att tänka själv, särskilt när vi talar om så allvarliga brott som de fyra grundläggande brotten. Dessutom skulle en acceptans av den här teorin, *reductio ad absurdum*, leda till att enbart Hitler skulle kunna hållas ansvarig för brotten begångna under förintelsen. Enligt min vetskap är det ingen i dagens debatt som förespråkar ett återvändande till den här lösningen.

Teorin om absolut ansvar stadfästes i Nürnbergtribunalen, vilken drog några av de högst uppsatta i nazityskland inför rätta. Därefter har den använts i Tribunalen för det forna Jugoslavien samt i Rwandatribunalen. Enligt den här teorin är det helt irrelevant om ett brott begås under order. En soldat som begår ett brott är lika klandervärd om han begår det under order som om han gör det på eget bevåg. Om soldaten blir hotad att utföra ordern så är det istället bestämmelserna om nöd som blir applicerbara.

Teorin om villkorlig ansvarsfrihet medger att i vissa fall, särskilt i fält, är det inte alltid helt uppenbart för en soldat huruvida en order är laglig eller inte. Därför stadgar den att en soldat är ursäktad om han begår brott under order av en förman, givet att han inte visste att ordern var olaglig, samt att ordern inte var uppenbart olaglig (ibland är det senare kriteriet istället att soldaten

inte borde ha vetat att ordern var olaglig). Detta synsätt har använts i Leipzigtribunalen och i nationella militära tribunaler. I den internationella brottsmålsdomstolen används den för krigsbrott och aggressionsbrott. Här är testet för att bedöma ansvarsfrihet huruvida den åtalade visste att ordern var olaglig, och om ordern var uppenbart olaglig (om någon av dessa situationer är för handen fritas inte den åtalade från rättsligt ansvar).

På frågan om denna bestämmelse innebar ett avsteg från internationell sedvanerätt är mitt svar nekande. Detta då Nürnbergstadgan skapades för en väldigt specifik och extrem situation, och därför inte är lämpad att applicera generellt. Jag sällar mig till de som menar att stadgan enbart syftade till att i just det här fallet, när höga ledare som haft en stor skuld till förintelsen åtalas, så ska en invändning om bindande order lämnas utan avseende.

Gällande frågan om artikel 33 är överflödig och bör exkluderas då ingen order att begå ett brott såsom det definieras i stadgan kan vara annat än uppenbart olaglig är mitt svar också nekande. Jag håller med om att i de allra flesta fall, kanske till och med i alla fall, så kommer denna ansvarsfrihetsgrund nekas då ordern kommer bedömas som uppenbart olaglig. Det är dock inte helt säkert att så är fallet, och vi vet inte vilka situationer som kommer bli hänskjutna till den internationella brottsmålsdomstolen i framtiden. Att utesluta en ansvarsfrihetsgrund på förhand baserat på ett antagande om att det inte kommer vinna framgång rimmar dessutom illa med principen om personligt straffrättsligt ansvar och oskyldighetspresumtionen.

På samma grunder som jag nämnt ovan så håller jag dock med om kritiken att det var fel att på förhand exkludera ansvarsfrihetsgrunden för brotten folkmord och brott mot mänskligheten. Särskilt då det inte finns någon folkrättslig grund för att värdera de fyra grundläggande brotten olika. Gällande huruvida kriteriet om uppenbar olaglighet bör bedömas objektivt eller subjektivt förespråkar jag en objektiv bedömning. Detta då jag anser att även oförlåtlig försumlighet, i vissa fall, bör vara straffbart.

Abbreviations

GC	Geneva Convention
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court.
ICL	International Criminal Law
IHL	International Humanitarian Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia

1 Introduction

1.1 Soldiers dilemma (damned if you do, damned if you don't)

The defence of superior orders is the answer to what is called the soldier's dilemma. This is so called since on the one hand, a soldier is bound by national legislation, military practice, and often psychological pressure to unquestioningly follow the orders of his superior. On the other hand, when this order is illegal, he is bound by international law to refuse to follow the order. In the words of Dicey:

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

There are three main schools of thought on how to solve this dilemma, or rather if or when superior orders can be used as a defence. These schools of thought are the absolute liability approach, the conditional liability approach and the respondeat superior approach. Broadly speaking, firstly, according to the doctrine of absolute liability, it is simply irrelevant whether the defendant did the crime completely of his own volition or under orders. He shall still be held responsible. Secondly, the conditional liability approach holds that he should only be held liable if he knew, or should have known, that the order given was illegal. Thirdly, the theory of respondeat superior suggests that a subordinate is never responsible for simply following the orders of his superior.

[1] Dicey, A.V., *Introduction to the Study of the Law of the Constitution (1st ed., 2013, Oxford Oxford University Press), p. 167. See also,* Dinstein, Yoram, *The Defence of 'obedience to Superior Orders' in International Law* (2012, Oxford Oxford University Press), chapter 1, para 4, and Cassese and Gaeta, *Cassese's International Criminal Law*, 3d edition, (2013, Oxford University Press), p. 230.

How to tackle the issue of whether a soldier who commits a crime under direct orders of his superior should be held responsible for his actions has varied over time.[2] Historically, it was only the superior who would be held responsible in these situations, and the soldier "simply following orders" would be excused. This somewhat changed during the late 20th century and the Leipzig tribunals (held after the first world war), where a conditional liability approach became the norm. This changed further during and after the Nuremberg tribunal. Thereafter it was commonly held that "following orders" never could be a valid excuse or defence, and the absolute liability approach reigned supreme.[3] This was upheld both by, for example, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Then in 1998 came the ICC statute,[4] and the establishment of the International Criminal Court. The ICC statute Article 33 states the following:

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 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] It is important to note however, that this is a both greatly simplified definitions of the terms, and a great simplification of the history of the theories. In reality, the development has been far from linear, and the different theories has grown and shrunk in importance over time and depending on who you ask. It is not as easy as saying that, for example, in 1910 a soldier always would be able to rely on the defence of superior orders to get away with a war-crime, or that in 1960 he would not. This will become clearer later in the text.
[3] It could still be a part of a defence of for instance duress or mistake of fact or law, or be considered as a circumstance for mitigation of punishment. See Mccoubrey, Hilaire, *From Nuremberg to Rome: restoring the defence of superior orders*, in International & Comparative Law Quarterly, Cambridge University Press, p. 386.
[4] Rome Statute of the International Criminal Court. The Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

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

Although narrow in scope and negatively formulated, this seems like an "opening of the door" for the excuse of "just following orders". According to some legal scholars, this is a regrettable departure from customary international law. [5] According to others, it is a good compromise, and not at all a breach of customary international law.[6] Some claim that the paragraph is redundant, in that no order to commit a crime that would fall under the jurisdiction of the ICC possibly could be anything other than manifestly unlawful.[7] On the other side of the spectrum, it has been critiqued for its *a priori* exclusion of crimes against humanity and genocide from the defence.[8]

1.2 Purpose

In this essay, I will attempt to assess this critique and reach my own conclusions as to whether a departure was made from customary international law with the drafting of Article 33 of the ICC statute, whether the defence should exist in International Criminal Law (ICL), and if so, how it should be formulated.

[5] See for example Gaeta, P, *The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law*, 1999, in EJIL; Cassese & Gaeta, *Cassese's International Criminal Law*, p. 231; and Dinstein, Y, *The Defence of 'obedience to Superior Orders'*, postscript preface, part 3, para 4.
[6] See for example, McCoubrey, Hilaire, *From Nuremberg to Rome*, p. 394; and Garraway, Charles, *Superior orders and the International Criminal Court: Justice delivered or justice denied*, in 81 Int'l Rev. Red Cross 785 (1999) p. 792.
[7] See for example Cassese & Gaeta, *Cassese's International Criminal Law*, p.231.
[8] See for example Zahar, Alexander, *Superior Orders*, in Cassese et al, *The Oxford Companion to Criminal Justice*, (2009, Oxford University Press), p. 527; and Krabbe, Maartje, *Excusable Evil – An analysis of Complete Defences in International Criminal Law* (Intersentia, 2014), p. 6.

1.3 Question

My questions therefore are: Was a departure made from customary international law with the creation of Article 33 in the ICC statute? Should international criminal law contain a defence of superior orders in the future, and if so, what should be its criteria, and what crimes should it cover?

1.4 Limitations

In ICL, there are numerous acts which might be seen as international crimes if the term is defined broadly. Any crime of international nature or any crime subjected to any treaty provision might fit in this broader definition. Examples include piracy, human trafficking, drug smuggling and slavery.[9] The focus of this essay, however, is on the so-called *core crimes*, which are under the jurisdiction of international courts and tribunals. These are the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.[10]

1.5 Method

Writing a thesis in international law presents its own challenges. Firstly, it is somewhat of a patchwork of provisions, agreed on by states through compromise. Secondly, the hierarchy of norms and sources are not as clear as in national law. Different rules apply for the same act depending on which court has jurisdiction, and fragmentation of the law is an issue. Thirdly, international law in general is a young discipline, which is constantly expanding and developing, and this is doubly true for the area of ICL. This makes it an interesting area of study, but it also means that extra

[9] Cryer, Robert, et. al., *An introduction to Criminal Law and Procedure* (2010, Cambridge University Press, p.4).
[10] Cryer et. al., *Introduction,* p. 4. See also the ICC Statute and the Statutes for the *ad hoc* Tribunals.

care is needed in terms of critically assessing the sources and that the selected method must allow for an objective evaluation of the problem at hand. In this thesis, as a starting point I am using the doctrinal research method, where I attempt to identify, analyse and synthesize the issue of the defence of superior orders within ICL, with focus on how it has been incorporated into the statutes and jurisprudence of the international tribunals and courts.[11] After this, I will approach the findings and arguments critically in order to attempt an answer to the research questions posed above.

1.6 Materials and previous research

As for my material for this thesis I am going through relevant international treaties (with particular focus on the ICC statute), case law (both from international tribunals and national courts), and secondary sources in the form of legal doctrine.

The topic of defences in ICL has not been discussed to any great extent, and this is true especially when compared to defences in national criminal law. The field of ICL and individual criminal responsibility is still relatively young, and therefore not fully developed. There has been a lack of attention to the topic in doctrine and case law from international criminal tribunals on the topic is sparse. One reason for this can be the tendency of lack of sympathy for the defendants.[12] Another reason could be that prosecutors often target only the "most blameworthy" of perpetrators, and rarely someone who might make a valid claim to a defence.[13] Despite this, perhaps due to its controversy, the defence of superior orders has been argued and

[11] I will also be looking at case law from national jurisdictions, but only in cases concerning international crimes. This will be done with the aim of clarifying the principles, and illustrating different ways to interpret them.
[12] Cryer et. al., *Introduction*, p. 402. On an emotional level it would simply feel wrong to accept a claim of "yes, I committed the crime of genocide, but do not think I should be punished for it as I was intoxicated at the time" (to make an extreme example).
[13] Cryer et. al., *Introduction*, p. 402.

discussed quite frequently in legal doctrine, although not so much in jurisprudence from the international tribunals.[14]

For the purposes of this thesis, Yoram Dinstein's influential book *The Defence of 'Obedience to Superior Orders' in International Law* has been of great help and deserves special mention. It has been hailed as ground-breaking and was certainly before its time when it was published in 1965, and is still seen as "pre-eminent in this field".[15] I would also like to note the book *The Rome Statue of the International Criminal Court - A Commentary,* edited by Kai Ambos and Otto Trifferer, which was of great help when interpreting the ICC statute. Finally, I would like to mention Maartje Krabbes book *Excusable Evil – An analysis of Complete Defences in International Criminal Law,* which provided me with additional insight into the role of defences in ICL.

1.7 Structure

To answer my questions, I will first look briefly at defences in ICL in general (chapter two). Then I will look at the history of the defence of superior orders, and try to define the scope of the different theories (chapter three). Throughout this section I will look at jurisprudence from national courts and the *Ad Hoc* Tribunals to further define the scope of the defence and set a background to be able to decide whether a customary rule exists. Then I will go through Article 33 of the ICC statute (chapter four). Thereafter I will assess and discuss the debate surrounding the article and my questions posed above (chapter five and six). I will finish with a conclusion where I summarise my answers from the previous discussion (chapter seven).

[14] See for example, Cryer et. al., *Introduction*, p. 402, Krabbe, M, *Excusable Evil*, p. 171, and Gaeta, P, *The Defence of Superior Orders*, p. 172.
[15] Cryer, R, *Superior Scholarship on Superior Orders - An Appreciation of Yoram Dinstein'sThe Defence of 'Obedience to Superior Orders' in International Law*, in Journal of international Criminal Justice 9 (2011) p. 964.

2 Defences in International Criminal Law

2.1 Complete defences

A defence, in its simplest term, is any argument put forward by the defendant to become acquitted. For the purposes of this text however, I am referring to the defence of superior orders in the sense of a complete substantive defence (hereafter just complete defence). A complete defence refers to the situation when the defendant admits that he committed an act covered by the objective elements of a crime, but still claims that he should be acquitted for some judicially relevant reason.[16] Further, when referring to *complete* defences, what is meant is that if a successful plea of such a defence is put forward, it would absolve the defendant of criminal liability and not just be a cause for mitigation.[17] This could be summarized as "I did it, but I don't think I should be punished".[18]

The ICC statute is the first international document making an attempt at cataloguing complete defences for international crimes. The statute explicitly recognizes the defences of insanity, intoxication, self-defence, duress, necessity,[19] mistake of fact, mistake of law[20] and superior orders.[21] It is important to note that this list is neither exhaustive for the purposes of ICL in general, nor for the ICC itself, as the treaty states that other defences derived from customary international law, other applicable treaties or

[16] Krabbe, M, *Excusable Evil*, p. 6. See also: Eser, Albin, '*Defences in War Crimes Trials'*, in Yoram Dinstein and Mala Tabory (eds.), *War Crimes in International Law* (The Hague, 1996).
[17] Krabbe, M, *Excusable Evil*, p. 5.
[18] Krabbe, M, *Excusable Evil*, p. 6.
[19] Article 31 of the ICC Statute.
[20] Article 32 of the ICC Statute.
[21] Article 33 of the ICC Statute.

general principles of law may also be pleaded before the court.[22] Since the purpose of this essay is to look deeper into the defence of superior orders, I will not attempt to define or give any background to the other defences except for in situations when they are in direct relation to the defence of superior orders.

2.2 Justifications versus excuses

When discussing complete defences in international criminal law (and criminal law in general, particularly in civil-law jurisdictions) there is a distinction between a justification and an excuse. When an action is justified, it means that the action (that normally would be deemed illegal) in a particular case is deemed at least permissible (e.g., in the case of self-defence). In other words, while the act fulfils the definition of a crime, the act is approved of by the legal community. [23] For instance, beating a soldier to stop him shooting an innocent civilian fulfils the definition of a crime, but the act is not seen as wrongful. A justification negates the crime, and the act of the defendant is deemed to *not be a crime*. According to Cassese, the bar set for an otherwise illegal act to be justified is that the act is the lesser of two evils.[24] An excuse, on the other hand, does not negate that a crime has taken place, it simply means that it would be unjust to hold the perpetrator responsible. Here the objective elements of the crime is fulfilled, but the actor is not blameworthy (for instance, this could be the case if the crime is committed under duress, if it was committed by a child, or if the actor was insane).[25] As Cassese said;

> *Justifications affirm the rightness, or at least permissibility, of the action; excuses preserve the*

[22] Article 31(3) of the ICC statute, read together with Article 21 of the ICC Statute. See also, Cryer et. al., *Introduction*, p. 404-405.
[23] Krabbe, M, *Excusable Evil*, p. 36; Cassese & Gaeta, *Cassese's International Criminal law*, p. 209.
[24] Cassese & Gaeta, *Cassese's International Criminal law*, pp. 209-210.
[25] Krabbe, M, *Excusable Evil*, p. 36.

wrongness of the action, while at the same time recognizing the injustice of punishing the actor."[26]

The distinction between the two are relevant for many reasons. An excuse and a justification are mutually exclusive. For an act to be excused, it first needs to be deemed wrongful (otherwise there would not be anything to excuse). Additionally, an excuse is individual. If a soldier commits a war crime under duress, but his accessory does it of his own free will, only the first mentioned would be excused. If, however, the act is deemed justified, there is no crime and therefore no accessory to the crime.[27] The distinction is also relevant in the case of self-defence. If you resist an excused attacker (who might be under duress or insane), the act is still wrongful and therefore you have a right to defend yourself. However, if the attacker is justified, the attack is not illegal and therefore you have no right to self-defence.[28]

In the international criminal courts and tribunals, the distinction between the two has been more vague, and these different types of complete defences are discussed in general terms as simply "defences", or "grounds for excluding responsibility" as it is stated in the ICC statute.[29]

[26] Cassese & Gaeta, *Cassese's International Criminal law*, p. 209.
[27] Cryer et al, *Introduction*, p. 403; Krabbe, M, *Excusable Evil* p. 37.
[28] Krabbe, M, *Excusable Evil* p. 37.
[29] Krabbe, M, *Excusable Evil*, p. 35. Cryer et. al., *Introduction*, p. 403.

3 The defence of superior orders

3.1 Introduction

When talking about the defence of superior orders, we are referring to an excuse, not a justification. If, for instance, a soldier commits the war crime of killing a civilian under orders from his superior,[30] the war crime does not cease being a crime and become lawful. However, under some (very strict) circumstances, only the superior giving the order may be held accountable, whereas the soldier executing the order should be excused and not held criminally liable.[31]

As I mentioned earlier in this paper, historically, and in the international criminal law doctrine, there has been three major theories regarding how the situation of this Soldier's dilemma should be resolved. These are the theories of respondeat superior, absolute liability, and conditional liability. These did not develop linearly, and how to solve the dilemma has been a topic of discussion at least from the 19th century and forward. I shall now explain these theories more in depth, while providing the historical context on how they developed. I will finish by going through the ICC statute and its version of the conditional liability approach.

3.2 The doctrine of respondeat superior

According to the theory of respondeat superior, only the superior issuing an unlawful order can be held accountable, and for the subordinate a plea of superior orders "automatically and *a priori*"[32] amounts to a full defence for

[30] Perhaps being under the (wrongful) impression that a civilian is an enemy combatant, or believing that the command from the superior was lawful and that he was duty-bound to comply.
[31] Cryer, et. al., *Introduction*, p. 417, and, Krabbe, M, *Excusable Evil*, p. 183.
[32] Dinstein, Y, *The Defence of 'obedience to Superior Orders'*, chapter 2, para 1.

his conduct.[33] This theory is very old and has been advanced by such as Cicero and Thomas Hobbes, and has close ties to the theory of superior responsibility and the act of state doctrine.[34] For more contemporary purposes, the theory is rooted in national legislations and military manuals,[35] and the earliest versions of humanitarian law recognized this principle.[36] The reasoning behind excusing the soldier is that, as I briefly stated earlier, it is at the core of a soldier's training (and when in the field, often necessary for the soldier's survival) to follow the orders of his superior without hesitation. National law often requires soldiers to follow orders without question, prescribing harsh punishment if the soldiers refuse (especially in times of war).[37] On the battlefield or during military operations orders must be followed immediately with no time for thought or discussion, and it is crucial for the organization and control of a military unit that a commander can give orders with the expectation that these be carried out.[38] Oppenheim articulated the theory in the following way:

> *"violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations by order of their Government, they are not war criminals and cannot be punished by the enemy; the latter can, however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may,*

[33] Cryer, et. al., *Introduction*, p. 415; Krabbe, M, *Excusable Evil*, p. 171.
[34] Minow, M L, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence*, in McGill Law Journal, 1 (2007), p. 386.
[35] An example is Article 443 (Chapter XIV) of the *British Manual of Military Law*, as it read between 1914 and 1944, stated that whoever violates the laws of war in obedience to superior orders is not a war criminal and cannot be punished. Article 336 of the American "*Rules of land warfare*" had the same provision during approximately the same time period. See Lippman, Matthew, R, *Humanitarian Law: The Development and Scope of the Superior Orders Defense*, in (20 PENN ST. INT'L L. REV. 153, 2001) pp. 159-160.
[36] Cassese & Gaeta, *Cassese's International Criminal Law*, p. 228. Even back then (in the 19th century) the principle was uncertain, and in many instances courts have upheld the position that both a subordinate and superior should be held accountable when an order obviously is illegal. More on this in the section about conditional liability.
[37] Dinstein, Y, *The Defence of 'obedience to Superior Orders'*, chapter 1, para 1.
[38] Minow, M L, *Living Up to Rules*, pp. 5-6.

therefore, be punished as war criminals on their capture by the enemy" [39]

Oppenheim later justifies this view by stating that since the law requires the individual to follow orders, the law should not require the individual to be punished for it.[40] It is also interesting to note the connection between the doctrines of superior responsibility and acts of state as a basis for his argument. Dinstein however, points out that this point of view clearly seems to ignore the supremacy of international criminal law over national law. To be excused for a war crime, which is a crime based in international law, a defendant should not be able to excuse himself through national legislation.[41]

During the early 20th century this view became more and more controversial, and a more moderate approach of the "ought to know" doctrine emerged,[42] which stated that a soldier only would be able to rely on the defence if it was credible that the order appeared lawful when it was received.[43]

To me, it is clear that the doctrine of respondeat superior is outdated and rightly no longer accepted in international criminal law. To automatically excuse any crime based on that the defendant was "just following orders" would, simply put, be wrong. Although in some instances, with regards to the necessity of military discipline, soldiers must follow orders immediately and without thought, this is not the case for all orders at all times. As Stephens convincingly argued:

"The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would

[39] Oppenheim, L, *International Law*, vol. 2 (1st ed., 1906), pp. 310-311, found at http://www.gutenberg.org/files/41047/41047-h/41047-h.htm
[40] Dinstein, Y, *The Defence of 'obedience to Superior Orders'*, chapter 2, para 5. Referencing Oppenheim, *International Law*, vol. 2 (3rd ed., Roxburgh, 1921), p. 343.
[41] Dinstein, Y, *Defence of 'obedience to Superior Orders'*, part 2, chapter 1, para 1.
[42] There are some national cases dating back as far as the early 19th century supporting this view as well.
[43] McCoubrey, H, *From Nuremberg to Rome*, p. 386. Due to its close relation to the theory of conditional liability, I will expand on this in that section of the paper.

be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior"[44]

Today, to my knowledge, there is no one who is in support of this theory in regards to the international crimes. Instead, the debate for the last century (which blossomed once more after the creation of the ICC), has been regarding which of the theories of absolute liability or conditional liability that should be the solution to the dilemma.

3.3 The doctrine of absolute liability

3.3.1 General remarks

By the mid-20th century, the diametrically opposite view[45] of absolute liability became the norm. In the aftermath of the horrors surrounding the second world war it seemed inconceivable that "just following orders" could be accepted as an excuse. The doctrine of absolute liability holds that although a subordinate is bound to follow the commands of his superior, this ceases to be the case whenever the order given is illegal. In its purest form, it neither creates a defence in itself, nor can it be considered a factual element taken together with some other defence.[46] In other words, for the purposes of this theory it is completely irrelevant whether the crime was committed pursuant to an order or not.

Such a position can be found from American jurisprudence as early as in 1865 in the "Wirtz"-case, in which a confederate prison camp manager (Wirtz) was brought to justice for mistreating prisoners. Wirtz claimed that he acted on superior orders and stated that he only was "*the medium, or*

[44] Stephen, James Fitzjames, A History of the Criminal Law of England (vol. 1, 1883, MacMillan and co.), p. 205. Found at https://archive.org/details/historyofcrimina01stepuoft/page/204
[45] In comparison to the theory of respondeat superior.
[46] Dinstein, Y, *Defence of 'obedience to Superior Orders'*, p. 126.

better, the tool in the hands of his superior". The military commission rejected his plea and stated that:

> *"A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey such an order and disastrous consequences result, both the superior and the subordinate must answer for it."*[47]

This seems to express the core idea of the doctrine of absolute liability, in that it holds it to be impossible to order someone to do an illegal act. In international criminal law, this theory became crystalized with the creation of the Nuremberg charter in the aftermath of the second world war.

3.3.2 The Nuremberg Tribunal

Considering the horrors of the crimes committed by the Nazi regime, and the fact that the German state at the time was an extremely authoritarian state subject to the so called "*fuhrerprinzip*", the introduction of this principle is not surprising. The *fuhrerprinzip* meant that every level of the state was answerable to the one above it in a strictly hierarchical system, with the Fuhrer at the top of the hierarchy.[48] Therefore, accepting the doctrine of respondeat superior would, reductio ad absurdum, lead to only Hitler being punishable for the crimes committed in the Third Reich.[49] It is also worth noting that the London Charter was specifically created for the Nuremberg Tribunal, in which some of the highest ranking leaders of the Nazi regime was put on trial. Article 8 of the London charter[50] thus states the following:

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[47] Cassese & Gaeta, *Cassese's International Law*, p. 228 & Dinstein, Y, *Defence of 'obedience to Superior Orders'*, chapter 3, para 1.
[48] McCoubrey, Hillary, *From Nuremberg to Rome*, p. 389.
[49] Dinstein, *Superior Orders*, chapter 3, para 4.
[50] The provision in the International Military Tribunal For the Far East, or "Tokyo Tribunal" contain a paragraph outlining the same provision. It is interesting to note, however, that the defence was rarely raised before the Tribunal, as no one wanted to blame the emperor.

> ***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.***

In practice, the defence of superior orders was never accepted as grounds for mitigation of punishment by the tribunal due to the "shocking and extensive crimes in question".[51] Despite the clear wording of Article 8, the defence was nevertheless raised several times (both as basis for mitigation for punishment and as a complete defence) during the Nuremberg Tribunal and the Subsequent Proceedings (trials after World War 2 that applied the Nuremberg Charter to its proceedings).[52] Therefore, there are many instances where the tribunal upholds the theory and explains the logic for doing so. The main pronouncement of the tribunal regarding Article 8 can be found in the following argument:

> *"The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, 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."*[53]

Some comments can be made regarding this pronouncement, however. Firstly, Article 8 was not in "conformity with the law of all nations" in 1946. In fact, most national military codes accepted the defence under some

[51] International Military Tribunal (Nuremberg), *Judgment and sentences*, 1 October 1946, p. 283 and 316. See also: Triffterer, Otto & Ambos, Kai (eds.), *The Rome Statute of the International Criminal Court - A Commentary*, 3d ed. 2016, and Krabbe, M, *Excusable Evil*, p. 173.
[52] Krabbe, M, *Excusable Evil*, p. 173.
[53] International Military Tribunal (Nuremberg), *Judgment and Sentences*, 1 October 1946, p. 221. See Also Dinstein, *The Defence of 'obedience to Superior Orders'*, Chapter 1.2.D, para. 1.

circumstances at the time of these proceedings.[54] Secondly, the Tribunal links the provision to the most serious breaches of international law (torture and killing) but does not mention other war crimes (such as destruction of property or pillaging), leaving the door open for the defence in regards to less serious crimes. Thirdly, the tribunal does not define how to determine whether a moral choice was possible or not.[55]

The Tribunal defends the stance of absolute liability by comparing the situation of committing international crimes due to illegal orders by a dictator with that of committing crimes due to orders from a superior in a criminal organization by stating:

> *"Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and business men … They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organised domestic crime."*[56]

To the often proposed argument that the subordinate is no more than a tool in the hands of the ones in power, the *real* criminals, the Court stated in the *Einsatzgruppen Case*, which was part of the Subsequent Proceedings,[57] that:

> *"The obedience of a solider is not the obedience of an automaton. A solider is a reasoning agent. ... The fact that a solider may not, without incurring unfavorable*

[54] Krabbe, M, *Excusable Evil*, p. 173.
[55] Krabbe, M, *Excusable Evil*, pp. 173-174. Furthermore, the "moral choice" criterion seems rather to relate to the defences of mistake, duress, necessity, or defences in general.
[56] International Military Tribunal (Nuremberg), *Judgment and Sentences*, 1 October 1946, p.226. See also Cassese, *Introduction*, p. 230.
[57] The so called Subsequent Proceedings was twelve trials undertaken by the United States in the occupied zone after world war two. These were created by the authority of Control Council Law No. 10, which provided jurisdiction for the core crimes (minus the crime of genocide as it had not yet been articulated at the time), and took place in Nuremberg. In the guiding document of these proceedings, the same approach for absolute liability was adopted. See Cryer, *Introduction*, pp. 119-120.

consequences, refuse to drill, salute, exercise, reconnoiter, and even go into battle, does not mean that he must fulfill every demand put to him. ... The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offense."[58]

Once again the theory of absolute liability is articulated, in stating that the superior only is bound to follow lawful orders.

3.3.3 Absolute liability after Nuremberg

The ICTY followed the Nuremberg example in its statute, and its Article 7(4) states the following:

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

This is almost per verbatim the same wording as in the London Charter. A difference from the Nuremberg Tribunal is that in one case, the plea of superior orders actually came into play as a mitigating factor in sentencing. This happened in the Erdemovic case,[59] which is also worth noting as it is one of the rare instances where a relatively minor level soldier is held accountable before an international tribunal. Erdemovic was a young soldier who voluntarily joined the Bosnian Serb Army (VRS). At first, he carries out normal military tasks. One day, he is ordered on a secret mission to a farm in Pilica, and once there he and his group are ordered to massacre hundreds of Muslims. At first Erdemovic refuses, but is then threatened that if he does not acquiesce, he will join the Muslims and be murdered alongside them. Erdemovic chooses to join in the massacre rather than being

[58] *United States v Ohlendorf* **(1950)** IV *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law* ***No.10,*** *470 ('Einsatzgruppen Case)*. See also Minow, M. L., *Living Up to Rules*, pp. 17-18.
[59] ICTY, *Prosecutor v. Erdemovic*, Trial Chamber 1, 27 November 1996, and ICTY, *Prosecutor v. Erdemovic*, Appeals Chamber, 7 October 1997.

killed himself, and according to his own estimation he killed around 70 people. A year later he is charged with crimes against humanity before the ICTY. Erdemovic pleaded guilty for the crime but claims the defence of duress, and in the sentencing the defence of superior orders was one reason why his plea of duress was considered as a mitigating circumstance when determining the sentence. [60] As to whether the defence of superior orders can be seen as a factual circumstance in connection to another defence (in this case, duress), the court stated the following:

> *"We subscribe to the view that obedience to superior orders does not amount to a defence per se but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out."*[61]

The court is still very clear on the fact that it does not see the defence of superior orders itself as a full defence, but that it can still be considered as a factual circumstance enforcing a plea of duress or mistake of fact. Judge Cassese further underlined this view with the following quote:

> *"Superior orders may be issued without being accompanied by any threats to life or limb. In these circumstances, if the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order. If, following such a refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised, and superior orders lose any legal relevance."*[62]

Here Cassese articulates a manifest illegality criterion, not as standard for culpability, but rather as a criterion for when the subordinate would be

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[60] ICTY, *Prosecutor v. Erdemovic*, Appeals chamber par. 34 (see also trial chamber).
[61] ICTY, *Prosecutor v. Erdemovic*, (Sentencing Appeal) (ICTY, Appeals Chamber, 1997). See also Dinstein, Y, *The Defence of 'obedience to Superior Orders'; postscript preface*, part 2, para. 4.
[62] ICTY, *Prosecutor v. Erdemovic*, Appeals Chamber, 7 October 1997, Separate and Dissenting Opinion of Judge Cassese, para.15.

obligated to refuse an order.[63] He also underlines that in circumstances when the order is accompanied by a threat, the relationship of superior and subordinate becomes irrelevant and only the defence of duress can be applied. In other words, according to this view, if a person commits an international crime under duress, it is not relevant whether the threat came from his superior or someone else. This reflects the core of the absolute liability doctrine.

In the Mrda judgement,[64] the court denied the defendants plea for mitigation of punishment based on the defence of superior orders. Their rationale behind this was that the orders were manifestly unlawful, and therefore not grounds for mitigation of punishment.[65]

In the ICTR, the provision is verbatim the same as in the ICTY, and it was only once considered (and rejected) in mitigation of punishment.[66] It is also interesting to note that the relatively recently instated (in 2002) Special Court for Sierra Leone also adopted the approach of absolute liability in its statute, using the same language as the ICTY and ICTR.[67] The same is true for the Iraqi Special Tribunal instated in 2003.[68]

3.4 The doctrine of conditional liability

In the conditional liability approach, the main rule is that acting pursuant to superior orders is a complete defence, with the exception being when the

[63] He does not, however, say anything about how the situation should be solved in a hypothetical situation where the order given was not manifestly illegal.
[64] ICTY, *Prosecutor v. Mrđa* (Judgment) (ICTY, Trial Chamber, 2004).
[65] ICTY, *Prosecutor v. Mrđa* (Judgment) (ICTY, Trial Chamber, 2004), para. 22.
[66] ICTR, *Prosecutor v. Bagosora et al*., Trial Chamber, 18 December 2008, par. 2274. See also Krabbe, M, *Excusable Evil*, p. 176.
[67] Statute of the Special Court for Sierra Leone, attached to Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2002 (UN doc. S/2002/246), p. 32
[68] National Legislative Bodies / National Authorities, Iraq: Statute of the Special Tribunal for Human Rights, 10 December 2003, Article 15.E states "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires".

subordinate knew or should have known that the order was illegal, or if the order was manifestly illegal.[69] This can be seen as a middle ground between the theories of absolute liability and respondeat superior. The theory has had a somewhat different scope in different jurisdictions and different times, and the test varies between whether the order was obviously unlawful, manifestly unlawful or if the person should have known that the order was unlawful.[70]

An early example of a conditional liability approach, or an "ought-to-know" approach if you will, is from a British case concerning a soldier (Smith) who during the Boer War in South Africa shot and killed a civilian upon orders from his superior officer. Smith was then acquitted after pleading the defence of superior orders. The judge (Solomon, J) stated that if a soldier honestly believes that he is only doing his duty, and the order is not so manifestly illegal that he ought to have known that he acted illegally, then he should be protected by the defence of superior orders.[71]

In the Leipzig trials, this principle was upheld and articulated in two famous cases, the "Llandovery Castle" and the "Dover Castle".[72]

In the Llandovery castle case, the commander of a German submarine had sunk a British hospital ship after being told by his government that the British used these ships for military purposes, and therefore had lost their protected status under the Hague convention. Even though this turned out to be a false accusation by the German government, the court acquitted the defendant on the basis that he had no reason to question the information and orders received by naval command, and stated that he would only have been liable to punishment if *he knew* that he acted on an illegal order.[73]

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[69] Gaeta, P, *The Defence of Superior Orders*, p. 175.
[70] Cassese & Gaeta, *Cassese's International Criminal Law*, pp- 231-232.
[71] McCoubrey, H, *From Nuremberg to Rome*, p. 387.
[72] Dover Castle case, A.J.I.L., vol. 16 (1922), p. 704 and Llandovery Castle case, A.J.I.L., vol. 16 (1922), p. 708. See also Dinstein, pp. 12-19.
[73] Llandovery Castle case, A.J.I.L., vol. 16 (1922), p. 708. See also, McCoubrey, H, *From Nuremberg to Rome*, p. 387.

The Dover Castle case also involved the sinking of a hospital ship. Here however, the commander of the submarine (Patzig) knew that he was attacking a hospital ship and acted without orders of his government. After torpedoing the hospital ship, he ordered his subordinates to shoot the survivors who had managed to escape to lifeboats. The question before the court was whether these subordinates should be excused on the basis of following the orders of their superior. The court answered in the negative, stating:

> *"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 also the accused, to be without any doubt whatever against the law"*[74]

Here the Court articulates a manifest-illegality criterion, by stating that the act of murdering shipwrecked survivors is so clearly a breach of the laws of nations that the defendants cannot rely on the defence of superior orders. The court uses this manifest illegality test, not as an objective measure of whether the subordinates *should* have known that the order was illegal, but as an auxiliary test to assess whether the subordinates *actually knew* that the order was illegal.[75] These cases set the broad parameters for the subjective version of the conditional liability doctrine, or "ought to know" doctrine, which was the accepted theory until 1939.[76]

Another often mentioned and cited case is the "Calley case".[77] Lieutenant Calley was a part of the Mai Lai massacre in Vietnam on the 16th of March in 1968. When tried before a court martial in 1973 he pleaded the defence of superior orders. The appellate court held that:

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[74] Dover Castle case, A.J.I.L., vol. 16 (1922), p. 704.
[75] Dinstein, *Defence of superior orders*, pp. 18 and 30, and McCoubrey, H, *From Nuremberg to Rome*, p. 388.
[76] McCoubrey, H, *From Nuremberg to Rome*, p. 388.
[77] *United States v. Calley*, 22 U.S.M.C.A. 534 (C.M.A. 1973).

> *"[t]he acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful."*[78]

Here, the court upheld a conditional liability approach, and set a comparably low bar for the manifest illegality test by phrasing it as whether "a man of ordinary understanding" would know that the order was unlawful.[79] This lower threshold becomes especially clear when comparing it to the standard set out above. The contents of an order that a man of "ordinary sense and understanding" would deem to be unlawful might differ significantly from an order that is "universally known to everybody" to be illegal.

It is also worth noting, that despite the fact that the doctrine of absolute liability had been introduced by the Nuremberg Treaty at the time for this case, the American Court used the older conditional liability approach when it was "one of their own" who was put on the stand, and not a defeated opponent.

[78] *United States v. Calley*, 22 U.S.M.C.A. 534 (C.M.A. 1973), at 542.
[79] This standard was for American purposes set forward in the Kinder case, "*United States v. Kinder*, 14 C.M.R. 742 (1953). See also Lippman, M, R, *Humanitarian Law: The Development and Scope of the Superior Orders Defense* pp. 215-220.

4 Conditional liability in the ICC statute

4.1 Introduction

With the creation of the ICC, a narrower version of the conditional liability approach is once again introduced, and the defence of superior orders is recognized as a de facto defence under some circumstances. This can be seen as a compromise between the absolute liability approach and the conditional liability approach, in that absolute liability is prescribed for the crimes of genocide and crimes against humanity whereas a conditional liability approach is prescribed for war crimes (and, it seems, the crime of aggression).[80] In Article 33, there is no explicit mention of superior orders as a mitigating circumstance, but according to Article 78(1) and Rule 145(2)(a)(i) of the statute, which states that "circumstances falling short of constituting grounds of exclusion of criminal responsibility" it may be considered in mitigation. To this date, there is no jurisprudence from the Court expanding on this defence. Article 33 of the statute states the following:

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 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;

[80] Hajdin, Nikola, *Commentary on the ICC statute*, Case metrix network. Found at: https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/ and Krabbe, M, *Excusable Evil*, p. 182.

(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.

It is important that this defence is stated in the negative ("*shall **not** relieve that person of criminal responsibility **unless***"), showing that the main rule still is that a defence of superior orders is rejected, except for when the three cumulative conditions are met. The requirement for a defendant to be able to rely on the defence can be broken down into the following eight points:[81]

4.2 The order must be in regards to a crime within the jurisdiction of the ICC

This means that the order must be regarding a crime that falls under Article 5 of the Statute (genocide, crimes against humanity, war crimes and the crime of aggression), and that the crime must have occurred after the 1st of July 2002 (or, for the crime of aggression, after the 1st of January 2017) when the statute entered into force.[82]

4.3 The crime was committed pursuant to an order

The crime must have a causal connection to the order given, or in other words, one cannot defend oneself from one crime by claiming that one was

[81] Triffterer, O, *Commentary on the ICC Statute*, pp. 1190-1196. See also, Krabbe, M, *Excusable Evil*, p. 177.
[82] Triffterer, O, *Commentary on the ICC Statute*, p. 1190.

ordered to do another.[83] For the purposes of this article, it is not relevant whether the subordinate willingly or unwillingly follows the order, but the crime must be "initiated or inspired by the order". [84] Therefore, if the defendant was intending to do the crime regardless of being ordered to do so, he cannot hide behind the defence of superior orders.

There is no formal requirement for what constitutes an order. An order can be given orally, in writing, by omission or be otherwise expressed. It can be explicit or implicit. The order can be given to a specific person covering a specific situation, or in general. For an order to be an order, it presupposes that the superior has a right to demand obedience from the subordinate and some degree of effective control over the defendant.[85]

4.4 The order came from the Government or a superior

An order from the Government can come from any branch or person with the formal right to act on behalf of the Government. These orders can be specific or general. The order can be given by either a *de facto* accepted, or legally established government. The terminology of "Government *or* superior" is not alternate, the order can for instance be given by a superior official within the same branch of Government. The terminology rather aims at clarifying that the order does not have to come from the Government itself but also, for instance, could come from a local military commander.[86]

[83] Krabbe, M, *Excusable Evil*, p. 178.
[84] Triffterer, O, *Commentary on the ICC Statute*, p. 1193.
[85] Triffterer, O, *Commentary on the ICC Statute*, pp. 1190-1191.
[86] Triffterer, O, *Commentary on the ICC Statute*, p. 1191.

4.5 Either military or civilian

This clarifies that the order does not have to come from a direct military superior, but also could be issued by a superior civil servant or a civil branch of the government. It refers to "all branches of Governments and relevant fields in which superiors are acting."[87] An order issued by, for instance, NATO or the Security Council also falls within this definition.[88]

4.6 The accused must have been legally obliged to follow the order

This obligation must have existed at the time of the crime committed. Since an order to commit a crime outlined in paragraph 5 always is unlawful, a subordinate would on the face of it never be legally obliged to carry out such an order. What is referred to by this paragraph therefore is binding orders in general, in the sense that the defendant under normal circumstances would be obliged to carry out orders when coming from this source.[89] This provision also excludes orders from superiors within criminal organizations.[90] The distinction between a criminal organization and, for instance, a rebel commander or a criminal government is not always clear and it is not certain if these fall within the scope of Article 33.[91] The wording however does seem to exclude these groups.[92] Regarding the situation where the defendant *mistakenly* believes that he was obliged to follow the order, opinions are divided. Some claim that mistake could be claimed in accordance with Article 32,[93] whereas others claim that since the

[87] Triffterer, O, *Commentary on the ICC Statute*, p. 1192.
[88] Triffterer, O, *Commentary on the ICC Statute*, p. 1191, Krabbe, M, *Excusable Evil*, p. 178.
[89] Triffterer, O, *Commentary on the ICC Statute*, p. 1194.
[90] Hajdin, Nikola, *Commentary on the ICC statute*, Case metrix network.
[91] Krabbe, M, *Excusable Evil*, p. 179.
[92] Cryer et. al, *Introduction*, p. 417.
[93] Triffterer, O, *Commentary on the ICC Statute*, p. 1194.

provision on mistake of law only excludes cases that negate the *mens rea*, it would not be applicable in this case.[94]

4.7 The accused did not know that the order was illegal

If the defendant was aware that he was executing an illegal order, he can not rely on a defence based on Article 33. This is logical considering that Article 33 is an expansion on the mistake of law doctrine found in Article 32.[95] A defendant can hardly claim to be mistaken if he knows that the act was illegal. The provision is subjective, and it is the prosecutor that must prove that the defendant had positive knowledge that the order was illegal. If the soldier is in doubt about the legality of the order, he did not know that the order was illegal.[96] It is interesting to note that this provision excludes a soldier who is facing the "soldiers' dilemma". If a soldier is debating whether to comply with an unlawful order (thereby risking prosecution for an international war crime) or face a court martial for refusing it, he must be aware of the illegality of the order.[97] The soldier in such a scenario may however be able to rely on the defence of duress or necessity, depending on the circumstances.

4.8 The order was not manifestly unlawful

It is not enough that the defendant is unaware of the unlawfulness of the order, the ignorance must also be excusable. If the defendant is unaware of the illegality of the order, but the order is deemed to be manifestly unlawful, then the defendant was culpably ignorant and should still be held

[94] Cryer et. al, *Introduction*, pp. 417-418.
[95] Cryer et. al, *Introduction*, p. 418.
[96] Triffterer, O, *Commentary on the ICC Statute*, p. 1194, and Krabbe, M, *Excusable Evil*, p. 180.
[97] Cryer et. al, *Introduction*, p. 418.

accountable.[98] Cassese and Gaeta claims that this provision is contradictory in itself, in that no case where a War Crime would be admissible before the court could it ever be anything but manifestly unlawful. Especially considering the preamble mentioning that the court is only interested in the "most serious crimes of concern to the community as a whole", and that Article 8(1) of the statute stipulates that the court especially has jurisdiction over war crimes "in particular when committed as part of a plan or policy or as a part of a large-scale commission of such crimes".[99]

The Court has never stated what would be required for an order to be deemed manifestly illegal as it has yet to be discussed in any jurisprudence from the ICC. Some national courts however have had different definitions of the term, and a popular and often quoted interpretation can be found in Israeli jurisprudence, which states the following:

> *"The distinguishing mark of a "manifestly unlawful" order should be displayed like a black flag over the order given, as a warning reading "Prohibited!" Not formal unlawfulness, hidden or half-hidden, not unlawfulness which is discernible only to the eyes of legal experts is important here, but a conspicuous and flagrant breach of the law, a certain and imperative unlawfulness appearing on the face of the order itself, a clearly criminal character of the order or of the acts ordered, an unlawfulness which pierces the eye and revolts the heart, if the eye is not blind and the heart not obtuse or corrupted—that is the extent of "manifest" unlawfulness required to override the duty of obedience of a soldier, and to charge him with criminal responsibility for his acts."*[100]

This is definitely a high bar, and Trifferer explains it as that the illegality of the order has to be "obvious, self-evident (even to a lay-person) and

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[98] Cryer et. al, *Introduction*, p. 418, and Krabbe, M, *Excusable Evil*, p. 180.
[99] Cassese & Gaeta, *Cassese's International Criminal Law*, p. 231; Cryer et. al. *Introduction*, p. 231. See also, Gaeta, *The Defence of Superior Orders*, p. 190, and Klamberg, Mark, *Article 33: Superior Orders and Prescription of Law*, in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, note 325, available at www.cmn-kh.org/clicc, updated 30 April 2017.
[100] *Kafr Kassem case* (second instance), Judgment, p. 410 (Military Court, Central District 3/57, Military Prosecutor v. Melinki), A similar quote can be seen in the *Eichman case*, A-G of Israel v. Eichmann 36 ILR 277, see also Cryer et. al., *Introduction*, p. 417 and Dinstein, Y, *Defence of superior orders*, chapter 1, part 1, para 12.

uncontestable".[101] Other courts has phrased it as whether the order was "criminal on its face"[102]or "so outrageous as to be manifestly unlawful".[103] Some argue that this provision also should be decided on an individual basis. After all, it has been said, it is not legitimate to expect that what is manifestly unlawful for an admiral with access to a staff of lawyers always would be so for a newly recruited private on the ground.[104] As I stated earlier, the exact scope of the provision remains unclear until we see jurisprudence from the court establishing what criteria should be applicable for a manifest-illegality test at the ICC.[105]

4.9 The order did not involve the crimes of genocide or crimes against humanity

Finally, the crimes of genocide and crimes against humanity are *a priori* excluded from defence, and any order pertaining to the commitment of these crimes is seen as manifestly unlawful *per se*. The legal reasoning behind this is somewhat unclear, and the provision has been criticized since it seems to assume that all cases of genocide or crimes against humanity per definition are more serious than all cases of war crimes or aggression.[106] It is also worth noting that anyone can commit genocide or crimes against humanity, whereas only military and paramilitary personnel can commit war crimes (typically this is also true for the crime of aggression), therefore it stands to reason that the aim of this provision is to provide this latter group with a

[101] Triffterer, O, *Commentary on the ICC Statute*, p. 1195.
[102] Von Leeb (Wilhelm) and others (High Command case), United States, US Military Tribunal sitting at Nuremberg, 28 October 1948 XII LRTWC 1, 74. See also Cryer et. al, *Introduction*, p. 418.
[103] R v. Finta Canada, Ontario Court of Appeal, 29 April 1992. See also Cryer et. al, *Introduction*, p. 418-419.
[104] Cryer et. al, *Introduction*, p. 419.
[105] Krabbe, M, *Excusable Evil*, p. 180.
[106] See for instance Cassese & Gaeta, *Cassese's International Criminal Law*, p. 181; Triffterer, O, *Commentary on the ICC Statute*, p. 1196; and Cryer et. al. *Introduction*, p. 419. Cryer however notes that this seems more legitimate when comparing war crimes with the crime of genocide as opposed to when comparing it to crimes against humanity.

greater degree of protection.[107] This provision was the result of a political compromise during the drafting process, as the American delegation supported the conditional liability approach, whereas the German delegation wanted the strict liability approach in the statute.[108]

4.10 Relationship with Article 32

When reading A33 together with Article 32 of the ICC statute, it becomes clear that the defence of superior orders is a (narrow) extension of the defence of mistake of law. The difference, and extension, lies in that here there is no requirement that there is a negation of *the mens rea* when it comes to superior orders, whereas this is a requirement for the defence of mistake of law.[109]

[107] Triffterer, O, *Commentary on the ICC Statute*, p. 1196. See also Krabbe, M, *Excusable Evil*, p. 181.
[108] Gaeta, P, *The Defence of Superior Orders*, pp. 188-189.
[109] Article 32 para 2 of the ICC Statute states: "A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, **or as provided for in article 33.**"

5 Critique and debate surrounding Article 33 of the ICC statute

5.1 General remarks

The most ardent critique of the provision is coming from scholars who believe that after the creation of the Nuremberg statute the principle of absolute liability has reached the status of customary international law, and that Article 33 departs from this customary rule. In a similar vein, it has also been critiqued as superfluous. These scholars argue that no act covered by the definitions of the crimes in the Statute could ever be anything other than manifestly illegal.

From the other side of the spectrum, the rule has also been critiqued for its *a priori* exclusion of the crimes of genocide and crimes against humanity from the defence. The argument against this exclusion is that firstly, it is not clear that all of the acts covered by these provisions necessarily would be worse, or more obviously illegal, and therefore more blameworthy than all acts covered by the definition of a war crime. Secondly, some argue that to exclude these crimes from the defence (or any crime from any defence) *a priori* is in violation of the principle of individual criminal responsibility.[110]

5.2 Is Article 33 incompatible with customary international law?

To assess whether the drafters of the Statute made a departure from customary international law with the ICC statute, first we have to assess whether a customary rule existed at the time of its drafting. On one hand,

[110] Krabbe, M, *Excusable Evil*, p. 350.

the defence is either ignored or rejected in the statutes of all *ad hoc* Tribunals created since Nuremberg. The defence has never been accepted in case law from these Tribunals, barely even as grounds for mitigation.[111] On the other hand, many national jurisdictions have provisions stating that subordinates are not liable for the commitment of crimes under orders unless the order is obviously or manifestly unlawful, or the subordinate should have known that the order was unlawful. Additionally, many military manuals and national case law also accept the conditional liability approach.[112] This seems to indicate that there is no common state practice regarding the defence, and that there therefore is no customary rule to the effect that superior orders never can be accepted as a defence.[113] Another indication of this is the fact that the states could not agree on the scope of the defence during the drafting process.[114]

Gaeta argues however, that since these national rules cover not only the most serious breaches of the Geneva conventions (which is the definition of war crimes), but all crimes large and small (including theft or insubordination, for example), they have a different scope compared to that of ICL. Therefore, the argument goes, they bear no relevance to what the customary rule is for the defence when it comes to international crimes.[115] In fact, when applying the manifest illegality standard in cases regarding war crimes in front of these national courts, the defence has been rejected as the order has been deemed manifestly illegal or that the defendant should have known that the order was illegal.[116] The conclusion therefore is that there existed, and exists, a customary rule to the effect that superior orders never can amount to a full defence in the context of war crimes.[117] This

[111] See chapter 3.3.1.
[112] Cassese & Gaeta, *Cassese's International Criminal Law*, p. 231.
[113] Cassese & Gaeta, *Cassese's International Criminal Law*, p. 232. See also Gaeta, P, *The Defence of Superior Orders*, p. 182.
[114] See chapter 4.8.
[115] Gaeta, P, *The Defence of Superior Orders*, p. 183.
[116] Gaeta, P, *The Defence of Superior Orders*, pp. 184-185.
[117] Gaeta, P, *The Defence of Superior Orders*, p. 186. See also Cassese & Gaeta, *Cassese's International Criminal Law*, p. 232.

leads to the conclusion that Article 33 "departs from customary international law without any well-grounded motivation".[118]

Against this argument, it is stated that the Nuremberg doctrine of absolute liability never has reflected customary law. The absolute liability doctrine was introduced covering a very special circumstance, namely the Nuremberg Tribunal, in which high command from the Third Reich was indicted for their crimes. These were not soldiers making judgement calls on the field of battle, but people in high positions setting the policies. Therefore, the argument goes, the provision in the Nuremberg charter was not intended to change the scope of international criminal law, but only intended to clarify that in this situation, when prosecuting high ranking officials of the Third Reich, it is clear that all the defendants ought to have known that their orders were illegal, and/or that the crimes in question were manifestly illegal. In fact, in no case would the defendants have been acquitted if the defence was accepted with a manifest illegality test attached to it.[119] It is also worth noting, that when drafting the London Charter the respondeat superior doctrine was not yet completely abandoned and forgotten. When reading the arguments of the judgements from the Nuremberg Tribunal and its Subsequent Proceedings, it often seems the case that they are arguing against that theory, rather than against any manifest illegality standard. Due to this, it is argued that keeping the harsher position of absolute liability in the statutes of the ICTY and ICTR was based on a wrongful impression that absolute liability was now the norm and had reached the status of customary law. [120]

Personally, I am inclined to agree with the second line of argument. In the same sense that it is wrong to compare national legislation (which covers all manner of crimes) to ICL (which covers the most serious crimes) I feel that it is wrong to compare the situation of Nuremberg to that of the ICC statute.

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[118] Gaeta, P, *The Defence of Superior Orders*, p. 190. See also Dinstein, Y, *The Defence of 'obedience to Superior Orders'*, Postscript preface, part 3, para 5.
[119] McCoubrey, Hillary, *From Nuremberg to Rome*, pp. 389-390. See also Cryer, et al, *Introduction* pp. 415-416 and Zahar, A, *Superior Orders*, a.as. p. 527.
[120] Zahar, A, *Superior Orders*, a.as. p. 527.

While the Nuremberg Tribunal, and to some extent the ICTY and ICTR, were created to cover specific situations concerned with the gravest breaches of international law, the ICC has a more general approach. To take a provision created for a specific and extreme situation and then to apply it in general is problematic. Certainly, the ICC also is intended for the most serious crimes, but it is not certain that all future indictments will be regarding policy setters in high positions. The ICC is still young, and it remains to be seen what their exact scope will be in the future. This is especially true considering that at least in one case, a relatively low-level soldier was tried before the ICTY (Erdemovic).[121]

5.3 Are all crimes within the jurisdiction of the court manifestly illegal?

Another argument against Article 33 has been that it is redundant, in that no case put before the ICC would ever be anything other than manifestly unlawful. The basis for this is that the preamble of the statute points out that the court shall have jurisdiction only over the "most serious crimes of concern to the international community".[122] Furthermore, Article 8 of the statute states that "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes" and defines war crimes as "Grave breaches of the Geneva Conventions". How, it is argued, could a crime be a most serious crime of concern to the international community, be a part of a plan or policy or large-scale criminal enterprise, and be a grave breach of the Geneva Conventions, and not be manifestly illegal? [123] On top of this, all war crimes under the jurisdiction of the court are specifically laid out in Article 8 of the convention, making them clear and "unquestioningly and

[121] See chapter 3.2.3.
[122] Preamble to the ICC Statute, para. 9.
[123] See for instance, Cassese & Gaeta, *Cassese's International Criminal Law*, p. 231, and Gaeta, P, *The Defence of Superior Orders,* pp. 190-191.

blatantly criminal".[124] Another point in this favour can be seen in the previous section, where I state that in all probability in no case before the Nuremberg Tribunal, ICTY, or ICTR would the defendants have been acquitted if subjected to the manifest illegality test.

The first answer to this argument is quite straight forward. It may be the case that in all cases, the crimes and orders prescribing them will be deemed manifestly illegal. However, to therefore *a priori* exclude the defence based on that assumption is contrary to the principle of individual criminal liability. Blameworthiness should rather be decided based on the facts, and on a case-by-case basis, even for the most heinous of crimes.[125] Secondly, I hold that it is not absolutely certain that all cases of war crimes as outlined in Article 8 always will be manifestly illegal. I will like to illustrate this with an example, using the war crime of starvation:[126] The ICC statute Article 8, 2, b (xxv) states that the following constitutes a war crime:

> ***"Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;"***

The corresponding rule in the Geneva Convention IV Article 23 states as follows:

> ***"Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases."***

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[124] Gaeta, P, *The Defence of Superior Orders,* p. 190.
[125] Krabbe, M, *Excusable Evil* p. 349.
[126] This example is inspired by the lecture on the topic held by guest lecturer Arne Willy Dahl during the course "International Criminal Law" at the University of Oslo last spring. His notes from a lecture covering the same topic can be found on the following link: https://www.uio.no/studier/emner/jus/jus/JUS5570/v13/undervisningsmateriale/dahl-2-080413.pdf

The example goes as follows: A group of soldiers are manning a check-point outside a city. They do know these relevant provisions, but have been ordered by military command not to let a convoy carrying food and medicine past the check-point. These soldiers also know that the people in the city are starving. Should these soldiers then ignore the orders they were given, and let the convoy past? There could be many reasons why they have been ordered to stop the convoy, of which they have not been appraised. Perhaps an imminent attack is planned using the same path, or a missile attack is planned on a bridge further up the road. Perhaps intelligence has surfaced indicating that the convoy is also carrying weapons to the enemy in the city. Or, perhaps they are ordered by their commander to stop the convoy in order to put pressure on the enemy to get them to surrender. Should the soldiers assume that the last given possibility is the reason for the order, and therefore let the convoy past despite the order? In any case, can the order to stop the convoy be seen as manifestly unlawful? Perhaps this situation could be solved by claiming that even without the provision in Article 33, the soldiers would be acquitted based on a lack of *mens rea*, but the example still illustrates the problem with *a priori* excluding the defence based on the assumption that all orders to carry out war crimes outlined in the statute *by definition* are manifestly unlawful. In any case, it seems to me that it is better to have the provision, even if it might be superfluous, than excluding it because it *might be* (maybe even probably will be) superfluous. As the idiom goes, “better to have it and not need it, than to need it and not have it”.

5.4 Should crimes against humanity and genocide be excluded from the defence?

There has also been some discussion regarding whether, if a conditional liability approach is accepted, it makes sense that it is limited to war crimes

and the crime of aggression. Firstly, it is important to reiterate that this exclusion have no legal basis, but was made due to a political compromise.[127] However, this does not make it wrong to discuss whether this exclusion makes sense or was well motivated.

One argument against the exclusion is that it seems to indicate that all instances of crimes against humanity and genocide per definition are more serious than all instances of war crimes.[128] This is especially the case when considering that the definitions of many war crimes overlaps with that of the crimes against humanity. In the ICTY and ICTR, the same acts by the same defendants have been charged with both crimes against humanity and war crime. Therefore, it is argued, a defendant could plea the defence of superior orders for one of the crimes but not the other, even though they correspond to the same act.[129]

I would argue, however, that this is somewhat of a logical misstep. As it has become clear earlier, a manifest illegality test would in all probability exclude most of the war crimes, and all criminals put in front of the Tribunals in the past. Therefore, it would stand to reason that in the instances when an order to commit an act that is covered by both the provisions of war crimes and crimes against humanity is at hand, the defence would certainly fall on the hurdle of manifest illegality in terms of the war crime as well. In my opinion, the wording does not mean that all orders to commit war crimes are seen as less serious than all orders to commit crimes against humanity or genocide. It merely means what it says, namely that while all orders pertaining to the commitment of crimes against humanity and genocide are manifestly unlawful, *maybe in some rare instances* orders to commit war crimes are not. I cannot infer from the text that it would claim that the most serious examples of war crimes are more serious than the least serious examples of crimes against humanity or

[127] Gaeta, P, *The Defence of Superior Orders*, p. 189.
[128] Many seems to share this view, regardless of whether they approve of the conditional liability approach or not. See for example, Cryer et al, Introduction, p. 419; Triffterer, O, *Commentary*, p. 1196; Cassese & Gaeta, *Cassese's International Criminal Law*, p. 231.
[129] Zahar, A, *Superior Orders*, a.as. p. 527.

genocide. In other words, to me, the provision can at most be claimed to indicate that the "least serious" examples of war crimes are seen as less serious than the "least serious" examples of crimes against humanity and genocide. [130]

The other argument against the exclusion is harder for me to refute. It follows the same logic as that of including the defence for war crimes from the beginning. To *a priori* exclude a defence, any defence, and therefore not try it on its merits in each individual case leaves something to be desired in terms of individual criminal responsibility.[131] Additionally, there is no basis in customary ICL for separating the core crimes.[132] Furthermore, the exclusion is unnecessary in that in all probability all cases of crimes against humanity and almost certainly all cases of genocide would fail the manifest legality test. Therefore, it is my opinion that the second paragraph of Article 33 is unnecessary and should be removed.

[130] Whether this is actually objectively true however, falls outside the scope of this thesis to determine.
[131] Krabbe, M, *Excusable Evil*, p. 349.
[132] Krabbe, M, *Excusable Evil*, p. 349. See also Zahar, A, *Superior Orders*, a.as. p. 527 and Gaeta, P, *The Defence of Superior Orders*, p. 190.

6 Final questions

6.1 Should the defence of superior orders be included in ICL?

Given the arguments above, it is my opinion that the defence of superior orders should be accepted in both the ICC statute, and in ICL in general. This should be the case for all of the core crimes. Additionally, national courts have upheld the position of absolute liability since at least as early as the 19th century when trying soldiers or personnel from the defeated opponent's side, while at the same time upholding some version of the conditional liability approach when dealing with their own soldiers. It is contrary to general international law, and humanitarian law, to treat "others" differently from one's own nationals.[133]

6.2 Ought to have known, or knew?

After my conclusion that the defence of superior orders should be included in ICL, what remains is to assess in what shape. Should the test be subjective or objective, and if the test is objective, where should the bar be set?

Dinstein argues that the true test in regards to the defence of superior orders should not be whether an order can be seen as manifestly illegal. Instead, he proposes that the relevant factor is whether the soldier *actually knew* that the order was illegal or not. In other words, he proposes that the test should be subjective. The manifest illegality test, therefore, should only be used as an auxiliary measure to assess whether the defendant was aware of the illegality of the order. If the soldier did not know that the order was illegal, this would negate the *mens rea* of the crime, and the defendant would be

[133] See, for instance, GC III art. 82.

acquitted on that basis. He argues that an objective approach would be too harsh for some, but too lenient for others.[134]

Counter to this argument, it can be stated that a subjective approach is practically always difficult for evidentiary reasons, regardless of whom will have the burden of proof. Either the prosecutor must prove that the defendant subjectively *knew* the order to be illegal, or the defendant will have to *prove* that he did not know the order to be illegal. Additionally, an objective criterion will carry the advantage of trying culpable ignorance and culpable negligence. In other words, if an order is deemed objectively to be manifestly unlawful to any reasonable person, the defendant should also have been aware of this and deserves to be punished regardless of whether he *actually knew* about the illegality of the order or not.[135] I tend to agree with the second line of argument. One should be able to hold a defendant culpable even if he did not subjectively know about the illegality of the orders, in particular considering that we are talking about crimes of the most serious nature. Therefore, the standard set should be objective.

To assess where the bar for this objective criterion should be set is, however, difficult. It could be set as a "reasonableness standard", or a "manifest illegality standard". The reasonableness standard has its advantages in that, if any reasonable person would deem an order to be illegal, should not also the defendant be liable to punishment even if he claims ignorance? Especially considering the grave nature of the crimes in question? The "manifest illegality standard", on the other hand certainly has support in case-law and doctrine. To interpret it as the "black flag" screaming "prohibited!" might be setting too high of a standard, but on the other hand, as has been argued, this high standard would still be reached in most, if not all, possible cases before the ICC and other *Ad Hoc Tribunals*. Furthermore, as the ICC has yet to define the term further, I can make no preliminary assessment as to whether their prospective interpretation of the

[134] Dinstein, Y, *Defence of superior orders*, pp. 27-28.
[135] Cryer, R, *Superior Scholarship*, p. 964.

manifest illegality standard will be reasonable. In my opinion, where to exactly set the standard for manifest illegality is done best through jurisprudence by applying the standard to specific situations. In conclusion, I do not want to make any strong statements about whether the manifest illegality criterion is too high of a standard or not, given that until the ICC has interpreted it through its case-law, we simply do not know what the exact criteria of the standard will be.

7 Conclusions

In conclusion, it is my opinion that no departure was made from customary international law when the defence of superior orders was recognized in the ICC statute. This due to the fact that the absolute liability standard, as outlined in the Nuremberg Charter, did not constitute customary international law, but covered a specific and extreme situation. I believe that the defence should be admitted in ICL in general, not only in the ICC, but also in national courts and in future *Ad Hoc* Tribunals. In all probability, for practical purposes, it would rarely, possibly never, be used when dealing with the core crimes, especially when dealing with criminals from higher levels of the hierarchy. Nevertheless, the defence should not be *a priori* excluded, but judged its merits for each case, in line with the principle of individual criminal responsibility. For the same reason, I do not think that the crimes of genocide or crimes against humanity should be *a priori* excluded from the defence based on an assumption that they always would be manifestly illegal. Finally, I believe that the manifest legality test should be an objective measure of liability, both for evidentiary reasons, and for the reason that ignorance should sometimes be seen as culpable, especially in regard to these serious crimes.

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Canada:

- *R v. Finta*, Canada, Ontario Court of Appeal, 29 April 1992