OBEDIENCE OF ORDERS AND THE LAW OF WAR: JUDICIAL APPLICATION IN AMERICAN FORUMS

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INTRODUCTION

"I was only following orders!" This phrase has been used so often, in so many circumstances, that today it is its own parody. The legal, moral, and personal implications of those words are rooted in man's wartime conduct, as well as being his appeal for understanding and absolution. It is a plea mouthed by both the relatively innocent junior soldier and the duplicitous battlefield murderer. Does the phrase merit serious legal consideration? Is it a legitimate defense to war crimes today? Was it ever a legitimate defense to war crimes?

The topic has been frequently dissected, but it is not merely a question of historical or academic interest. The issue of personal responsibility for wartime acts still exists and remains largely unresolved: just six years ago in Germany, former German Democratic Republic border guards who killed German civilians fleeing to the West raised obedience to superior orders as a defense for their crimes;[1] three years ago in Rome, former German Secret Service Captain Eric Priebke invoked the defense,[2] as did French National Assembly Deputy Maurice Papon in Paris.[3] Today in The Hague, Serb and Croat defendants raise the defense.[4] This year, in Germany,

1. *See* Entscheidungen des Bundesgerichtshofes in Stafsachen [BGHSt] [Supreme Court] 39, 1-36 (F.R.G.) (involving the conviction of defendants for manslaughter and their sentencing to twenty months' suspended probation).

2. *See* John Hooper, *Nazi War Crimes Trial Opens in Chaos*, THE GUARDIAN, May 9, 1996, at 3 (describing the opening of Erich Priebke's military trial in Rome on the charge that he committed multiple homicides in Italy during World War II). The Italian court eventually sentenced the 84-year-old Priebke to life in prison.

3. *Cf.* Transcript of Indictment of Sept. 18 1996, Cour d'appel de Bordeaux, Chambre d'Accusation Arrêt du 18 Septembre 1996, no. 806 (pronouncing the indictment of Maurice Papon for crimes against humanity); *L'arrêt de la Chambre d'Accusation* (visited Sept. 20, 1996) <http://sudovest.com/papon/procedure/page25.htm> (setting forth text of Maurice Papon's indictment); Maurice Peyrot, *Maurice Papon sera jugé pour crimes contre l'humanité*, LE MONDE, Sept. 19, 1996 (detailing the history of the case and describing Papon's participation in the arrest and deportation of over one thousand Jews as Secretary General of the Prefecture of Gironde, France).

4. *See* Prosecutor v. Erdemovic, 37 I.L.M. 1182 (Int'l Crim. Trib. for the Former Yugoslavia, 1998) (sentencing judgment); *see also* Prosecutor v. Erdemovic, 111 I.L.M. 298 (Int'l Crim. Trib. for the Former Yugoslavia, App. Chamber, 1997); Prosecutor v. Edemovic, 108 I.L.R. 180 (Int'l Crim. Trib. for the Former Yugoslavia, Trial Chamber I, 1996).

a former Gestapo agent, Alfons Götzfried, is on trial for assisting in the murder of 17,000 people, mostly Jews, at the Nazi death camp in Maidanek, Poland during World War II. His defense? "I was only following orders."[5]

To a certain extent, obedience to orders must be viewed as a legitimate legal defense. Although the defense would not likely sit well as an excuse for illegitimate acts of violence, the functioning of a military force necessitates the expectation that soldiers will follow orders, and that sometimes orders will be improper. Thus the plea for exoneration by military defendants, tainted as it is by historical association with Nazi defendants,[6] has long been the most significant and difficult problem incidental to the punishment of battlefield depredations.[7] As the United Nations War Crimes Commission noted a half-century ago, "[t]he question of individual responsibility and punishment in cases in which offenses were committed upon the orders of a . . . superior authority by a subordinate pledged by law to obey superior orders, is one of great difficulty."[8] Both before and since World War II, the problem has found different legal solutions in different nations and until relatively recently there has been no fixed ruling or principle in United States military law.[9]

Is the individual soldier immune from punishment because he carried out his duties pursuant to the orders of a superior? It was not until World War II that the question of personal responsibility appeared resolved, bringing about significant change to this ancient defense.[10] Indeed, World War II, Nuremberg, and the Subsequent Trials materi-

5. *See* Terence Neilan, *Germany: Ex-Gestapo Agent on Trial*, N.Y. TIMES, Apr. 28, 1999, at A10 (reporting the initiation of the German trial of former Gestapo agent Alfons Götzfried for war crimes).

6. *See* The United Nations War Crimes Commission, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR, 287 (1948) [hereinafter HISTORY OF THE U.N. WAR CRIMES COMMISSION] (noting that most defendants before the International Military Tribunal at Nuremberg pled not guilty on grounds of superior orders).

7. *See id.* at 274 (stating the difficulty of resolving the question of accountability of those acting on orders of a superior).

8. *See id.*

9. *See id.*

10. *See id.* at 287 (stating that the International Military Tribunal soundly rejected the defense of superior orders, though allowing it to mitigate punishment).

ally altered the legal position of the soldier who pleaded obedience to superior orders in defense of his war crimes.[11] Supreme Court Justice Robert Jackson noted at the opening of the Nuremberg International Military Tribunal, "[s]ociety as modernly organized cannot tolerate so broad an arch of official irresponsibility."[12] That view, however, was not always taken by the United States.

This Essay addresses the unresolved issues surrounding the superior orders defense. It traces the history of the defense through United States' courts as well as international courts, including the Leipzig Trials after World War I and the Nuremberg trials after World War II. The Essay discusses the preferences between the liability assigned to officers and enlisted personnel. Finally, it concludes that the tension between the laws of war and the defense of following superior's orders is not likely to be resolved in the near future, as it reflects the underlying tension of the hierarchical military structure.

I. HISTORICAL ANTECEDENTS

As it pertains to individuals, the law of war,[13] perhaps more than any other branch of law, is liable to failure. Its goal is difficult—to introduce moderation and restraint into an activity uniquely unsusceptible to those qualities. At the best of times, the law of war is "never more than imperfectly observed, and at worse times is very poorly observed indeed."[14] If the efficacy of the law of war was once questionable, however, there is little doubt that today armed conflict and soldiers' responsibility is governed, even if imperfectly, by a

11. *See* HISTORY OF THE U.N. WAR CRIMES COMMISSION, *supra* note 6, at 287 (noting that at Nuremberg and in subsequent war crimes trials conducted by American and British officials, all courts applied the principle that superior orders did not exonerate subordinates from criminal liability).

12. *Id.* at 274.

13. See GEOFFREY BEST, HUMANITY IN WARFARE (1981) 8-18 (distinguishing the main branches of the law of war as *jus ad bellum* as the law governing going to war and *jus in bello* as the law governing what warring parties do once engaged in conflict*). See generally id.* for a discussion about the law of war and its development from the Romans through modern times.

14. *Id.* at 11 (1981).

broad interlocking grid of customary international law, treaties, and domestic law.

The laws and customs of war date at least to the Greek Amphycionic League, which forbade the destruction of places of worship in wartime.[15] In the Middle Ages, the Synod of Charroux mandated excommunication of those who attacked women, peasants, and the clergy in times of war.[16] The concept of a just war emerged during the Renaissance, differentiating between combatants and civilians, and defining the concept of proportionality.[17] Today, international agreements like Geneva and Hague Conventions establish standards of conduct for warring parties.[18] So, in modern times, contrary to the assertion that they are "almost imperceptible and hardly worth mentioning,"[19] the laws of war remain the best resolution to the opposing tensions of the necessities of war and the requirements of civilization.

As ancient as the laws of war are, soldiers charged with violating them have consistently raised obedience to orders as their defense. One of the first recorded uses of the defense was in 1474, when Peter von Hagenbach, Governor of Breisach, unsuccessfully raised it as a defense to charges of murder, arson, and rape.[20] Similarly unsuccessful 130 years later was Captain Axtell, the guard commander at the

15. *See* Lois Tuttle & Ayesha Qayyum, International War Crimes Tribunal for the Former Yugoslavia, *reprinted in* War Crimes Tribunals, n.p. (Conference Materials, Regional Meeting of American Society of International Law, at American University's Washington College of Law, Mar. 31-Apr. 1, 1998).

16. *See id.*

17. *See id.*

18. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 344 (Routledge 7th ed., 1997) (listing treaties codifying the laws of war through 1980, including the Geneva Conventions of 1864 and 1906, the three Hague Conventions of 1899 concerning the laws of land and maritime warfare, and the thirteen Hague Conventions of 1907, dealing with many remaining military issues).

19. *Id.* at 343. Many consider Clausewitz to be the greatest military writer of the Nineteenth Century. Clausewtiz believed that military necessity was limited to destroying an enemy's military power, thereby rendering civilian protections unnecessary. *See id.*

20. Georg Schwarzenberger, INTERNATIONAL LAW, VOL. II THE LAW OF ARMED CONFLICT 462-66 (1968).

execution of Charles I.[21] In the guard commander's case, the English court held:

> [The captain] justified all that he did was as a soldier, by the command of his superior officer, whom he must obey or die. It was . . . no excuse, for his superior was a traitor . . . and where the command is traitorous, there the obedience to that command is also traitorous.[22]

Both von Hagenbach and Axtell were convicted and put to death, showing that, even five hundred years ago, societies sought to fix personal responsibility for wrongful acts, allowing for judgment against and punishment of the individual. Then, as now, a victor's crimes in battle might have been overlooked, yet even the most noble societies faced their own black deeds, as well as those of the enemy. Too often, those deeds arose not from passion raised in battle, but from the calculated direction of superiors to subordinates.

In the Seventeenth Century, Hugo Grotius wrote "[i]f the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out."[23] Conversely, the British Military Code of 1715, from which the United States drafted its first military laws, provided that refusal to obey a military order was a capital offense, regardless of whether the command was lawful.[24] Indeed, cases from that period provide insight into the development of the defense of obedience to orders in the United States.

In early American history, municipal and state courts first halt-

21. A Report of Divers Cases in Pleas to the Crown, 84 Eng. Rep. 1055, 1060 (K.B. 1708) (commenting on the trial of Axtell, an officer who commanded the guards at the trial of Charles I).

22. *Id.*

23. HUGO GROTIUS, 2 DE JURE BELLI AC PARIS LIBRI TRES [The Law of War and Peace] 138 (Francis W. Kelsey trans., 1925). Many identify Hugo Grotius as the founder of international law; he was a proponent of the Naturalist School of Legal Thought, which argues that one can derive basic principles of law from universal principles of justice founded on reason. *See* MALANCZUK, *supra* note 18, at 15.

24. *See* Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 71 n.1 (1944) (quoting the British Military Code of 1715 and noting that the capital penalty existed without reference to the lawfulness of the command).

ingly defined the defense of superior orders in non-military civil and criminal cases, applying it in cases related to employers' instructions to employees, and police supervisors' orders to patrolmen. These courts rejected the defense and held a subordinate responsible for acting on illegal orders without regard for whether the order appeared to the subordinate to be legal.[25] In an 1813 civil case involving an American privateer, the court enunciated a civilian standard that has stood the test of time: obedience to a superior's order is not a legitimate defense if the subordinate knew or should have known that the order was illegal.[26]

A. JUDICIALLY DECLARED: A FIRST MILITARY STANDARD

The first recorded case of an American military officer pleading the superior order defense to an offense grounded in international law was that of Navy Captain George Little.[27] In 1799, Little seized the Danish ship *Flying Fish*[28] during the United States' war with France. Captain Little conducted the seizure pursuant to, but without conforming to, the federal law on seizures, although he was complying with President John Adams' written instructions as to how United States naval commanders should carry out that law.[29] The owners of the Danish ship sued for damages, lost their case at trial, but prevailed on appeal.[30] In the subsequent Supreme Court opinion,

25. *See generally* United States v. Bright, 24 F. Cas. 1232, 1234 (C.C.D. Pa. 1809) (No. 14,647) (concerning a state militia commander who acted under orders of a state governor to prevent a United States Marshall from executing a federal decree).

26. *See, e.g.*, United States v. Jones, 26 F. Cas. 653, 654 (C.C.D. Pa. 1813) (No. 15,494) (concerning a first lieutenant of a United States privateer accused of committing acts of piracy on order of his superior).

27. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (involving the illegal seizure of a foreign vessel under orders of President John Adams).

28. *See id.* at 176.

29. *See id.* at 177-78 (observing that an act of Congress permitted the seizure and forfeiture of ships bound to any French port, but noting that the President's instructions erroneously authorized the seizure of vessels bound both to and from French ports).

30. *See id.* at 172, 175.

Chief Justice John Marshall wrote that naval commanders, in obeying presidential instructions at variance with the language of the underlying law, acted at their peril and were liable for damages. Because the law did not strictly warrant the instructions, the commander was answerable for his actions.[31] In other words, if the instruction was illegal, the subordinate may not obey it, and any subordinate who would obey was responsible for not recognizing its illegality.[32]

This heavy burden of legal interpretation for the unsophisticated military officer of the period was even greater for the unschooled seaman or soldier. There were no recorded cases of enlisted military persons being charged with committing illegal acts pursuant to a superior's order from this time, however, an opinion addressing that situation would have to wait another sixty-three years.[33]

In 1813, Captain Little's unsuccessful defense was raised in another federal case involving a superior's command and it was again rejected.[34] This time it was John Jones, the first lieutenant of a privateer who pleaded his captain's order in defense to charges of his assault and theft on board a captured ship. In instructing the jury about this defense, the judge said:

> No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify the act. . .the participation of the inferior officer, in an act he knows, or ought

31. *See id.* at 178.

32. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (stating that the presidential instructions "cannot . . . legalize an act which without these instructions would have been a plain trespass"); *see also* United States v. Bevans, 24 F. Cas. 1138, 1140 (C.C.D. Mass. 1816) (No. 14,549) (opining that if a sentry on orders illegally killed a man, the orders could not justify or excuse the murder). *But see* Neu v. McCarthy, 33 N.E.2d 570, 573 (Mass. 1941) (adopting rule that obedience to a military order justifies a criminal act unless the order "was so palpably unlawful that a reasonable man in the position of the person obliging it would perceive its unlawful quality").

33. *See* McCall v. McDowell, 15 F. Cas. 1235, 1247 (C.C.D. Cal. 1867) (No. 8,673) (holding that obedience to the order of a superior military officer is a complete defense for an illegal act; whereas the superior officer is liable).

34. *See* United States v. Jones, 26 F. Cas. 653, 657-58 (C.C.D. Pa 1813) (No. 15,494) (dismissing the validity of the superior orders defense as repugnant to reason). The jury returned a verdict of not guilty, but Jones' strongest defense was one of mistaken identity.

> to know to be illegal, will not be excused by the order of his superior.[35]

Thus the *Little* standard remained intact, made clearer by the language in *Jones*: an officer, military or civil, is liable for those orders that he knows, *or should know*, to be illegal.

Complicating the idea that a soldier was liable for illegal acts carried out at the direction of a superior officer is that fact that soldiers were also liable if they did not carry out orders. In an 1849 case, Private Samuel Dinsman, a Marine embarked upon the *USS Vincennes*, was charged with disobeying the orders of the ship's captain and consequently received twenty-four lashes and confinement in punishment.[36] In approving that punishment, the Supreme Court emphasized the authority of military officers and the folly of a subordinate like Dinsman questioning the orders issued by those vested with authority:

> [An officer's] position . . . in many respects, becomes *quasi judicial* . . . . Especially it is proper, not only that a public officer, situated like the defendant, be invested with a wide discretion, but be upheld in it . . . . [I]t is not enough to show he committed an error in judgment, but it must have been a malicious and willful error.[37]

Early on, the Supreme Court's view of officer-enlisted relationships, based in part upon British cases,[38] allowed little room for questioning the superior's orders and, in terms of judicial review, promoted an adherence to a doctrinal *respondeat superior* approach to the obedience of orders, regardless of whether the orders were legal.

In 1851, thirty-eight years after *Little*, the Supreme Court decided a similar issue with the same result, asserting that military officers are liable for illegal acts, regardless of whether the acts are committed pursuant to superiors' orders. Chief Justice Roger Taney added,

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35. *Id.* at 657-58.

36. *See* Wilkes v. Dinsman, 48 U.S. (7 How.) 88, 91-92 (1849) (detailing that the Marine's four-year term expired while on expedition, whereupon he refused to perform further duties, was detained, and repeatedly flogged).

37. *Id.* at 129-30.

38. *See id.* at 129-31 (listing British cases on which the *Wilkes* Court relies).

"[t]he [superior's] order may palliate, but it cannot justify."[39] This *dictum* suggested that a superior's order might mitigate an offense and lead to a lesser punishment, but it would not excuse the subordinate's behavior.

Until the *Little* decision, the focus had been on either the officer's legal responsibility for issuing an improper order or on the subordinate's penalty for disobeying the officer's proper order. The courts had not yet addressed the liability of enlisted personnel. In 1867, however, a federal district court addressed an enlisted man's liability not for disobeying, but for executing illegal superior orders. In *McCall v. McDowell*,[40] the court declared that "[e]xcept in a plain case . . . where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander."[41] Thus, after 1867, in at least one federal district, enlisted soldiers and sailors were essentially off the legal hook. Connecting Captain Little's 1804 Supreme Court opinion with McCall's 1867 district court opinion establishes a first, if little noted, implicit standard for military personnel: the acts of subordinates were protected by the orders of their superiors, unless such orders were clearly illegal. The superior remained liable for any illegal act or order given.

Throughout the Nineteenth Century, Great Britain took much the same tack as the United States. During the Napoleonic Wars, for example, a young British ensign followed an order of his superior and killed a French prisoner. The Scottish court rejected the ensign's plea of superior orders in terms recognizable to an American officer of the day: "If an officer were to command a soldier to go out to the street and to kill you or me, he would not be bound to obey. It must be a legal order . . . every officer has a discretion to disobey orders

39. Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1851) (holding that a colonel who expropriated a merchant's property for military use during the Mexican-American War was liable for trespass and could not invoke his superior's orders as a justification); *see also* Dow v. Johnson, 100 U.S. 158, 169 (1879) (referring to the *Mitchell* Decision with approval).

40. 15 F. Cas. 1235 (C.C.D. Cal. 1867).

41. *Id.* at 1240.

against the known laws of the land."[42]

B. THE CIVIL WAR: AMERICA'S INITIAL LAW OF WAR MANUAL

In the mid-nineteenth century, the law of war continued to develop from a body of custom and tradition into a more substantial written system of rules, eventually giving way to international compacts and treaties. The Lieber Code was instrumental in that transformation.[43]

During the Civil War (1861-65), Francis Lieber, a German-born Columbia Law School professor who had fought in the Prussian Army against Napoleon, and who had three sons soldiering in the Civil War,[44] wrote what came to be known as the Lieber Code. Promulgated in 1863 as General Orders Number 100, the Code's 157 articles contained detailed discussion of the treatment of prisoners and noncombatants, as well as direction on the pursuit of warfare's objectives. Often regarded as the first general codification of the laws of war, the Lieber Code "served as the quarry from which all the subsequent codes were cut."[45] For American troops, Lieber's formulation would remain in force until the World War I.

However, the Lieber Code did not address the question of whether superior orders could justify a violation of any of its rules.[46] Apparently, Lieber, a lawyer, presumed that soldiers would obey their superiors and that the opinions announced by domestic courts would control the issue.[47] Despite the Code's silence on the point, the Civil

42. Alan M. Wilner, *Superior Orders As A Defense to Violations of International Criminal Law*, 26 MD. L. REV. 127, 130 (1966) (citing II BUCHANAN, REPORTS OF REMARKABLE TRIALS 3, 58 (1813) on *Ensign Maxwell*, an early English case).

43. *See* James R. Miles, *Francis Lieber and the Law of War*, 29 Revue de Droit Miltaire et de Droit de la Guerre [Review of Military Law and the Law of War] 253, 255 (1990) (stating that the Lieber Code represented the first codification of the modern law of war and formed the basis for early European codes).

44. *See id.* at 253. Two sons, one of whom later became Judge Advocate General of the Army, fought for the Union; another son fought and died for the Confederacy. *See id.*

45. BEST, *supra* note 13, at 171.

46. *See* Wilner, *supra* note 42, at 131 (observing that the Lieber Code did not address the subject of obedience to orders).

47. *See id.* (remarking that Lieber undoubtedly assumed that earlier domestic court rules would apply).

War raised another opportunity for a court to rule on the issue; this time a military court.

A military commission tried Major Henry Wirz, the Swiss doctor and commandant of the Andersonville, Georgia prisoner of war camp where an estimated 12,000 Union soldiers died.[48] The Union charged Wirz with conspiracy to maltreat federal prisoners and thirteen counts of murder.[49] Wirz pleaded that he had only obeyed his superiors' orders.[50] Like von Hagenbach nearly four hundred years before, Wirz's plea was denied. The commission found Wirz personally responsible for battlefield excesses and sentenced him to be hanged.[51] Wirz thereby became the only soldier of either side in the Civil War to be executed for a war crime.

C. THE TWENTIETH CENTURY: AN EVOLVING STANDARD

The Civil War ended and a new century turned, but obedience to orders continued as a valid defense not only for enlisted men,[52] but also for civilians tried in civil courts.[53] In South Africa, an English military case, *Regina v. Smith*,[54] reached the same conclusion as American courts. "[I]f a soldier *honestly believes* he is doing his duty

48. *See* 8 AMERICAN STATE TRIALS, 666 ff. (1918), *reprinted in* The Law of War at 783 (Leon Friedman ed., 1972).

49. *See id.* at 798 (delineating the charges against Wirz and the military court's findings on each of the thirteen counts).

50. *See id.* at 792.

51. *See id.* at 798 (providing President Andrew Johnson's direction that Wirz be executed on Friday, November 10, 1865).

52. *See, e.g.*, *In re* Fair, 100 F. 149, 154 (D. Neb. 1900) (stating the rule that a subordinate is protected in obeying a superior officer's order so long as the order does not express or show clear illegality).

53. *See* Hately v. State, 15 Ga. 346, 348 (1854) (holding both an employer and his clerk guilty of giving alcohol to a slave, and rejecting the clerk's defense of obedience to orders). The court continued by stating that "every person, agent as well as principle, is responsible for his or her criminal conduct and cannot plead the . . . commands of another . . . except where he or she acts under coercion." *Id.*; *see also* Thomas v. State, 33 So. 130, 132 (Ala. 1902) (stating that a person participating in a robbery under the command of a superior is not excused or justified if there was no coercion or fear of death or serious bodily harm).

54. 17 Special Courts Reports of Cape of Good Hope, 56 (S. Af. 1900), *reprinted in* NICO KEIJZER, MILITARY OBEDIENCE 173 (1978) (discussing famous cases related to orders to commit illegal acts).

in obeying the commands of his superior, and if the orders are not so manifestly illegal that he *must or ought to have known* they were unlawful, the soldier would be protected by the orders of his superior."[55] The Boer War provided several cases involving the defense, the most notorious of which involved Lieutenant Harry H. "Breaker" Morant, who failed in asserting a defense of superior orders and was sentenced to execution.[56]

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

Case law began to define what "clear illegality" meant. Two civilian appellate opinions referred to illegal orders as those whose illegality was "apparent and palpable to the commonest understanding,"[57] and "so plain as not to admit of a reasonable doubt."[58] Nevertheless, confusion as to the meaning of "clear illegality" persisted into the Twentieth, and arguably, into the Twenty-First Century.

The years before World War I saw an increase in the codification of the laws of war. The Hague Conferences of 1899 and 1907[59] articulated the basic rules of land warfare, which the international community still follows today. Any similar ventures since those conventions have not been politically possible. Conventions adopted since World War I have, to an extent, essentially refined and speci-

55. *Id.* at 174 (emphasis in original).

56. *See generally* KIT DENTON, CLOSED FILE (1983) (recounting the truth behind the fictionalized story of "Breaker" Morant, which is far different from the movie).

57. In re Fair, 100 F. at 155 (C.C.D. Neb. 1900) (holding that the order directing the accused to kill an escaping military prisoner was not palpably illegal, thus the state lacked criminal jurisdiction).

58. Commonwealth ex rel. Wadsworth v. Shortall, 55 A. 952, 956 (Pa. 1903) (quoting HARE, CONSTITUTIONAL LAW).

59. *See* DONALD A. WELLS, THE LAWS OF LAND WARFARE: A GUIDE TO THE U.S. ARMY MANUALS 8 (1992) (quoting Dietrich Schindler, a professor of law at the University of Zurich).

fied the principles in those Hague agreements.[60]

In 1906, Lassa Oppenheim, a prominent British international law professor and publicist, postulated that obedience to superior orders constituted a complete and absolute defense to criminal prosecution. "If members of the armed forces commit violations *by order* of their Government, they are not war criminals and cannot be punished by the enemy . . . . In case members of forces commit violations ordered by their commanders, the members cannot be punished, for the commanders are alone responsible . . . ."[61]

Anchoring his formulation on an interpretation of then-traditional concepts of international law, he intertwined obedience to orders with *respondeat superior* and its related Act of State Doctrine. In doing so, Oppenheim was instrumental in bringing about a sea change to the soldiers' obedience defense. There was no personal responsibility, Oppenheim held, when superiors ordered criminal acts. Oppenheim later wrote Great Britain's 1912 handbook on the rules of land warfare, completely revising its first 1903 manual. The new handbook incorporated Oppenheim's *dicta* that, for subordinates, obedience to orders constituted a complete defense to violations of the law of war.

Oppenheim's influence was not felt only in England. Looking to Great Britain's example, as the United States historically had done in matters of military law, and to a lesser degree to France's new manual on the topic, America revised Lieber's General Orders 100 and in 1914 published its first manual relating to the law of war.[62] Reflecting recent Hague and Geneva Conventions as well as Oppenheim's formulation, the *Rules of Land Warfare* described law of war violations, such as the use of poisoned weapons, declaration of no quarter, the maltreatment of bodies and prisoners, bombardment of hospitals,

60. *See id.* (describing the progression of the Army manuals and the sources used to develop the 1934 version of *The Rules of Land Warfare*).

61. 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, 264-65 (1st ed. 1906) (emphasis in original).

62. *See* WELLS, *supra* note 59, at 5 (describing the first edition of *The Rules of Land Warfare* in 1914). Developments in international law necessitated the new manual. New weaponry and conflict strategies were included, as well as references to the international congresses and declarations that the United States recognized at the time.

and mistreatment of civilians.[63] In treating defenses to such acts, the *Rules of Land Warfare* read: "[I]ndividuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts . . . may be punished by the belligerent into whose hands they may fall."[64]

With this paragraph, the United States' published policy joined Britain's revised manual in making a subordinate's obedience to orders a complete legal defense, setting aside American military and civilian case law of the previous 110 years. While the United States manual stated that officers ordering illegal acts "may be punished," the following phrase, "by the belligerent into whose hands they may fall," suggests that, should the officer never be captured, or should he be of the ultimately victorious army, any punishment at all would be problematic. While military manuals, though official, are not punitive and therefore cannot be the basis of court-martial charges, they nevertheless *are* declarative of governmental policy.

Curiously, Imperial Germany, where obedience was popularly thought to be absolute, employed a different and less forgiving rule. Imperial courts punished subordinates if they executed an order knowing that it "related to an act which obviously aimed at a crime."[65] Such a ruling is comparable to the holding of *McCall v. McDowell*, and the pre-1914 United States military standard.

For American soldiers, Article 64 of the Articles of War, 1912,[66] was also pertinent to the issue of obedience of orders. The United States Army explained Article 64, the willful disobedience of a superior officer, in its first law manual, the *Manual for Courts-Martial, Courts of Inquiry and Other Procedure Under Military Law* ("*Manual for Courts-Martial*").[67] The *Manual for Courts-Martial* discus-

63. *See generally id.* (outlining the development of United States Army Manuals and comparing sections of manuals from different years).

64. *See id.* at 118 (quoting paragraph 366 of the 1914 version *of The Rules of Land Warfare*).

65. United States v. Ohlendorf [1947] U.S. Military Tribunal, Nuremberg, TWC, IV, at 471.

66. *See* Act of Mar. 2, 1913 (37 Stat. 723).

67. *See* A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY AND OTHER PROCEDURE UNDER MILITARY LAW 208 (1918) [hereinafter MANUAL FOR

sion of Article 64 noted that willful disobedience of "any lawful command of his superior officer" was punishable.[68] Further, "[a]n accused can not be convicted of a violation of this article if the order was in fact unlawful; but, unless the order is plainly illegal, the disobedience of it is punishable . . . ."[69] In examining the usual military offense of disobedience, the *Manual for Courts-Martial* did not take into account Paragraph 366 of the *Rules of Land Warfare*, which examined the unusual instance of battlefield war crimes.[70]

However, there was no actual conflict between the two manuals. If a soldier obeyed a superior's order to shoot the prisoners, the issue of disobedience did not arise; the *Rules of Land Warfare* protected the soldier from punishment for his illegal act, as superior orders were the soldier's complete defense.[71] If the soldier refused to obey the order to shoot the prisoners, the *Manual for Courts-Martial* protected him, as the order's illegality exempted him from prosecution for disobedience.

American soldiers fought World War I under the guidelines delineated in these two manuals, while United States civilian law continued a steady and contrary path regarding obedience to orders.

D. WORLD WAR I: THE UNITED STATES STANDARD NOT IN EVIDENCE

During World War I, the Allies considered punishing any German who had violated the law of war, from the Kaiser to the lowest conscript. At the war's conclusion, the Preliminary Peace Conference created the Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties to study the issue of ac-

COURTS-MARTIAL] (addressing Article 64 and the United States' military standards for disrespect toward a superior officer).

68. *Id.* at 208.

69. *Id.* at 210.

70. *See* United States Army, Rules of Land Warfare 129 (1914) (examining such offenses as the killing of wounded soldiers and the mistreatment of prisoners of war *inter alia*).

71. *See id.* (stating that individual members of the armed forces will not be punished for these offenses if they are committed under the order or sanction of their government or commanders).

countability for the war.[72] In March 1919, the Conference reported that "military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offense."[73] The Conference declared that the courts would determine whether a plea of superior orders was sufficient to acquit the person charged.[74] While this statement by the Commission concerned primarily senior governmental and military authorities, it was equally applicable to more junior officers. Consequently, the Allies drafted Article 228 of the Treaty of Versailles, which decreed their intention to "[b]ring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."[75] Thus, contrary to the American, British, and French manuals of the day, Article 228 evinced the collective intention of the Allies to apply individual responsibility for law of war violations, without regard for the defense of superior orders. The Allies rejected the then-current United States military standard. As one international law scholar of the period wrote:

> [Article 228] appears to be the first treaty of peace in which an attempt has been made by the victorious belligerent to enforce against the defeated adversary the application of the principle of individual responsibility for criminal acts during war by members of his armed forces against . . . the other party.[76]

On the issue of personal criminal responsibility, however, the Commission found that the Americans, whose military had retreated from that concept with its *Rule of Land Warfare Manual*, were sur-

72. *See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L. 95, 117 (1920) (describing the creation and composition of the Commission). The Commission was composed of fifteen members, two each from the United States, the British Empire, France, Italy, and Japan, and the other five members elected from the powers with special interests.

73. *See id.* (inquiring into the breaches of the laws and customs of war committed by the forces of the German Empire).

74. *See id.* at 117.

75. See Treaty of Versailles, June 28, 1929, art. 228, Major Peace Treaties of Modern History Vol. II, 1288 (1967).

76. James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70, 70-71 (1920).

prisingly resistant. The United States' representatives to the Commission believed that there was no international law making war crimes an individually punishable offense and feared the establishment of precedent that might be applicable to national leaders in the future. Accordingly, the United States representatives objected to charging, without distinction of rank, enemy authorities who ordered or who failed to prevent violations of the laws of war.[77] If morally and legally questionable by today's lights, that position was consistent with then-current military thinking as reflected in American manuals. The United States and the United Kingdom opposed the creation of a new tribunal to try war criminals and the promulgation of new laws or penalties.[78]

The majority of the Commission rejected the American objections and disassociated itself from the position of the United States and United Kingdom. Nevertheless, "the Commission did not consider it within its province . . . to lay down detailed principles for the guidance of national courts in the matter."[79] The British and Americans remained unmoved. At the end of the day, the issue remained unresolved and the work of the Commission led not to an international tribunal for war criminals, but rather the Leipzig Trials, the only war crimes proceedings to be held after the World War I.

The Commission identified 896 alleged battlefield war criminals.[80] Germany protested the trial of its nationals by foreign courts. Due to the instability of the German Government, the Allies compromised and agreed to allow Germany to prosecute a selected number of individuals before the Criminal Senate of the Imperial Court of Justice of Germany, which presided in Leipzig.[81] The number of accused

77. *See* UNITED NATIONS, HISTORICAL SURVEY OF THE QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION 56-58 (1960) (stating that, on the issue of uniform military liability for violations of laws of war, "the American representatives were unalterably opposed").

78. *See id.* at 59.

79. *See* Wilner, *supra* note 42, at 134 (detailing the statistics of the Leipzig trials).

80. *See* WAR CRIMES: REPORT OF THE WAR CRIMES INQUIRY 46 (1989) (referencing Germany's agreeing to surrender those who had committed war crimes for trial by various military tribunals).

81. *See id.* at 46.

shrank to forty-five, and the Allies allowed Germany to prosecute its own citizens in what became known as the Leipzig Trials. The Imperial Court eventually tried only twelve of the forty-five. According to one source, during the trials that went forward, "the doctrine of superior orders and the plea of military necessity were elevated to paramount legal principles."[82] Although the maximum punishment for war crimes was then, as it is today, death, the Court acquitted six of the twelve, and issued sentences to confinement of less than one year to three of the remaining six. The Court imposed its longest sentence, four-years, to an individual who later escaped to Sweden after only a few months. Commentators regarded the Leipzig Trials, as a whole, to be a farce.[83]

There were, however, Leipzig proceedings that provide a window to the Imperial Court's rationale behind its concept of obedience to orders. In a harbinger of Grand Admiral Karl Donitz's World War II Nuremberg trial, the Allies charged Grand Admiral Turpitz, Secretary of State of the German Navy from August 1914 to March 1916, with having originated and issued orders for unrestricted submarine warfare. The Court, however, ultimately found that Turpitz was not responsible for the unrestricted submarine warfare and he was acquitted. Instead, the Imperial Court found responsibility with the Supreme Command of Naval Operations, presumably the ex-Kaiser himself. The Allies did not specifically charge the former Kaiser with violations of the law of war. Regardless of the charge, the Netherlands, where the Kaiser fled following his abdication, refused to surrender him to the Allies for trial.[84]

There were two other notable Leipzig cases that involved the defense of superior orders. Lieutenant Karl Neumann, commander of a German submarine, admitted that he had torpedoed and sunk the British hospital ship, *Dover Castle*, but pleaded that he did so only in obedience to orders issued by the Admiralty.[85] Indeed, the German

82. *See* Wilner, supra note 42, at 134 (recounting the Leipzig trials and declaring them to be worthless).

83. *See id.*

84. *See* L.C. Green, *Is There an International Criminal Law?*, 21 ALBERTA L. REV. 251, 254 (1983).

85. *See Judgment in Case of Commander Karl Neumann, Hospital Ship "Dover Castle*," 16 AM. J. INT'L L. 704, 708 (1921) (acquitting the defendant in the

Government had asserted that the enemy was using hospital ships for military purposes, in violation of customary international law, and declared on March 19, 1917 that German submarines would attack hospital ships not complying with several German conditions. The Imperial Court held that Neumann believed the order to be a lawful reprisal, as the order specified, and therefore was not personally responsible for the sinking of the *Dover Castle*.[86] In support of its holding, the Court applied the German obedience to orders standard delineated in Section 47(2) of the German Military Penal Code,[87] which stated that a subordinate acting in conformity with superior orders is liable to punishment only when he knows his orders constitute a felony or misdemeanor. Applying the German standard, the Imperial Court acquitted Neumann.[88]

A similar case, however, saw a different result and actually set a standard for obedience to orders. The Allies charged Lieutenants Ludwig Dithmar and Johann Boldt, of the submarine U-86, for the sinking of a Canadian hospital ship, the *Llandovery Castle*.[89] At trial, the evidence revealed that, just after the sinking, Captain Helmuth Patzig sought to conceal the sinking of the hospital ship and ordered the two accused subordinates to help kill the survivors.[90] Patzig and another officer machine-gunned the survivors in lifeboats and in the water, assisted by Dithmar and Boldt who spotted targets and main-

Dover Castle case and holding that the defendant had sunk the *Dover Castle* following orders from his highest superiors, which he considered binding, and therefore could not be punished for his conduct).

86. *See id.* at 708.

87. *See* MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 440 (1959) (quoting Section 47 of the German Military Penal Code, which stated that subordinates can be punished for going beyond the scope of the orders given him, or for acting on orders he knows to be against civil or military law).

88. *See id.* at 706-07 (accepting Neumann's assertion that he was following the orders of the German Admiralty, which had recently issued memoranda advising that hospital ships were no longer protected from attack).

89. *See Judgment in Case of Lieutenants Dithmar and Boldt, Hospital Ship "Llandovery Castle*," 16 AM. J. INT'L L. 708, 723 (1921) (holding that the subordinates were guilty, but their habit of obedience to military authority mitigated their offenses).

90. *See id.* at 718-19 (holding only Patzig, Dithmar, Boldt, and the chief boatswain's mate Meissner responsible for the firing on the lifeboats). According to the court, the rest of the crew was below deck, readying for submersion. *Id.* at 714.

tained a lookout.[91] The officers sunk at least two lifeboats.[92] The Imperial Court was unable to determine a precise number of casualties from the gunfire because many of the survivors drowned or were victims of shark attacks.[93]

The Court dismissed the charge against Patzig and ruled that since he had taken refuge in the then-independent state of Danzig, he was beyond extradition. Like Neumann in the *Dover Castle* case, Dithmar and Boldt pleaded "not guilty" on the basis of superior orders from the German naval high command. Also like Neumann, the Court found that Dithmar and Boldt were not guilty of sinking the hospital ship by reason of obedience to superior orders. The Imperial Court found them guilty as accessories to homicide, however, due to their help with machine-gunning of the survivors.[94] In explaining its ruling, the Court stated:

> According to the Military Penal Code, if the execution of an order . . . involves such a violation of law as is punishable, the superior officer issuing such an order is alone responsible. However, the subordinate obeying such an order is liable to punishment if it was known to him that the order . . . involved the infringement of civil or military law. This applies in the case of the accused.[95]

Even for the Leipzig judges, shooting survivors in the water was manifestly contrary to customary international law. Applying a test of actual knowledge, the judges found that Dithmar and Boldt had knowledge or should have had knowledge that their actions were against the law of war.[96]

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91. *See id.* at 719 (outlining the facts as the Imperial Court understood them).

92. *See id.* (interpreting the fact that witnesses confirmed that several lifeboats left the *Llandovery Castle* after it was torpedoed but only one was recovered indicates that Captain Patzig and the defendants attempted to eliminate all witnesses).

93. *See Judgment in Case of Lieutenants Dithmar and Boldt, Hospital Ship "Llandovery Castle*," 16 AM. J. INT'L L. 708, 709 (1921) (outlining the facts of the boats involved in the case and the statements of witnesses to estimate the number of persons killed in both the torpedoing of the hospital ship and the gunfire afterwards).

94. *See id.* at 711 (pronouncing judgment against the defendants for having taken part in homicide and sentencing each to four years' imprisonment).

95. *Id.* at 721.

96. *See id.* at 722 (stating that their very position as naval officers indicates

At Leipzig, in the Twentieth Century's first significant effort to assess criminal responsibility for battlefield war crimes, the former enemy's court, reviled for the insincerity and feebleness of its prosecutions, generally failed to assess personal responsibility for war crimes. In the Dithmar and Boldt cases, however, the Imperial Court applied the more strict German military code's standard, not the revised standard of the American and British victors. It was ironic in that the German standard was similar to the one from which the American victors had retreated in both their peace negotiations and their law of war manuals. The German standard was that subordinates were liable for carrying out orders they knew to be illegal, or should have known to be illegal. Likewise, officers issuing orders that they knew, or should have known, to be illegal, were personally liable. Whatever irony there might have been in the convictions of Dithmar and Boldt dissipated when, several months after trial, both escaped, apparently with the connivance of their jailers.[97]

Throughout the inter-war period, the American soldier's defense of obedience to orders remained unchanged, largely because of a lack of incentive to change the defense, and the military and civilian courts failed to address it. In 1920, the leading military legal scholar of the era, Army Colonel William Winthrop, wrote "[t]hat the act charged as an offense was done in obedience to the order—verbal or written—of a military superior, is, in general, a good defense at military law."[98] A few lines later, however, he added:

> The order, to constitute a defense, must be a *legal* one . . . . It is the 'lawful command of his superior officer' which by the 21st Article of War, 'any officer or soldier' may be punished even with death for disobeying . . . . Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it . . . [except] orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.[99]

their knowledge that they were not permitted to kill defenseless people).

97. *See* Sheldon Glueck, *By What Tribunal Shall War Offenders Be Tried?*, 56 HARV. L. REV. 1059 (1943).

98. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 296 (1920) (providing a comprehensive treatise on military law).

99. *Id.* at 296-97 (emphasis in original).

This caveat to the standard announced in the *Rules of Land Warfare* was Winthrop's addition. While the *Manual on Courts-Martial* did not include a similar provision, Winthrop based the addition of the caveat on common sense and historical practice, even though it was not the official United States position.[100] There was no assessment of the authority of Winthrop's addition at court-martial, as the nation was at peace and without occasion for a war crimes trial.

Today, it is clear that military law requires soldiers to presume the lawfulness of their orders.[101] Case law suggests that, even if a soldier questions the legality of an order, but remains unsure, a court will not hold him liable for obeying an unlawful order.[102] As the Nuremberg Tribunal noted, it is not "incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality."[103]

With little critical discussion between the wars concerning obedience to orders, the debate centered on the offense of *dis*obedience, rather than obedience. The *Rules of Land Warfare* made superior orders a complete defense to battlefield war crimes. The common military offense of disobedience, which an accused justified by proving the illegality of the order, had little bearing on the war crime defense of obedience of orders. Winthrop's assertion, that if an order appeared regular and lawful on its face the subordinate had no right to go behind it to question the superior's authority to issue the order, only tended to strengthen the defense raised by the *Rules of Land Warfare*.

100. *See, e.g.*, *id.* at 296-97.

101. *See* Unger v. Ziemniak, 27 M.J. 349, 359 (C.M.A. 1989) (holding that superior order was lawful, and thus, charges would go forward against subordinates for disobedience of order). Once the defense raises the issue of lawfulness by some evidence, the prosecution has the burden to prove lawfulness beyond a reasonable doubt. *See* United States v. Tiggs, 40 C.M.R. 352, 354 (A.B.R. 1968) (affirming conviction of defendant due to correct application of the beyond a reasonable doubt burden on prosecution).

102. *See* United States v. Kinder, 14 C.M.R. 742, 750 (A.F.B.R. 1954) (affirming conviction of defendant for murder because "the order was so obviously beyond the scope of authority of the superior officer and so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding").

103. *In re* von Leeb*, in* XI T.W.C. BEFORE THE NUREMBERG MIL. TRIBS.*,* 510-11 (1950).

E. THE AMERICAN STANDARD: A GENESIS?

Before and during this period, the customary international laws of war were considered to apply primarily to nations rather than individuals. The Act of State Doctrine, in the context of domestic courts, held that no state could exercise jurisdiction over another state. The courts based this position upon principles of the sovereignty and equality of states. Associated with this doctrine, the courts regarded sovereignty as attaching to particular individuals within a state, not just as an abstract manifestation of the existence and power of the state itself. The sovereign was a definable person to whom allegiance was due and, as an integral part of his or her mystique, the court could not subject the sovereign to the judicial processes of his country. Similarly, the courts considered it proper that a foreign court could not subject a sovereign to its jurisdiction.[104] Vestiges of this doctrine survive, of course, in today's exemption from suit for certain governmental entities and persons officially acting for those entities–the *Feres* Doctrine.[105] In 1918, however, the Allies' post-war attempts to hold the Kaiser personally and criminally responsible as an "author" of the war represented a significant assault on the Act of State Doctrine. In the Twentieth Century, the doctrine was dying, but in the 1920s and '30s it was not yet moribund.

It was an aspect of the Act of State Doctrine that allowed the United States and the United Kingdom to view military officers as personifications of their states. If the state–exempt from criminal process–ordered a common soldier to act, the soldier had no choice but to obey. Having no choice, the soldier must be free of liability for that act. Nevertheless, Western states were beginning to recognize that military officers were not credible embodiments of the state. The West had questioned the orders of kaisers, kings, and commanders, which thereby placed the doctrine in doubt. Professor Ian Brownlie

104. *See* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (holding that a public vessel of war of a foreign sovereign at peace with the United States is exempt from the jurisdiction of the United States). *Schooner Exchange* is the classic case illustrating the relationship between territorial jurisdiction and sovereign immunity.

105. *See* Feres v. United States, 340 U.S. 135, 159 (1950) (holding that the United States is not liable under the Federal Tort Claims Act for injuries to members of the armed forces resulting from the negligence of others in the armed forces).

reports that "[i]n the extensive literature on the question of international crimes and international jurisdiction which has appeared since 1920 a considerable number of writers have envisaged criminal responsibility of states alone . . . ."[106] As to individual criminal responsibility, he continues, "it is nevertheless suggested that the concept has no legal value, cannot be justified in principle, and is contradicted by . . . international law."[107] By the time of World War II, the West had effectively rejected the Act of State Doctrine.[108]

The numerous bilateral and multinational treaties of the inter-war period were silent on the subject of superior orders, with the exception of the 1922 Washington Treaty relating, *inter alia*, to submarine warfare.[109] With World War I's recent unhappy prosecutions of submarine commanders in mind, Article II of the Washington Treaty declared that "[a]ny person . . . who shall violate any of these rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment . . . ."[110] The future World War II combatants, United States, United Kingdom, Italy, and Japan ratified the treaty; France rejected it.

As World War II approached, the United States and United Kingdom continued to view superior orders as a complete defense to a subordinate's war crimes. In the 1929 edition of her land warfare manual, the United Kingdom baldly stated:

106. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 150 (1963).

107. *Id.* at 152.

108. *See, e.g.*, Hans Kelsen, *Collective and Individual Responsibility in International Law With Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 538 (1943) (explaining that the demand for punishment for war criminals means making the individuals responsible by punishing them for acts committed by themselves or for acts committed at their command or with their authorization); OPPENHEIM, *supra* note 61, at 23-70; HERSCH LAUTERPACHT, DISPUTES, WAR AND NEUTRALITY 453-56 (6th ed. 1944) (discussing the controversy surrounding limiting individual liability for war crimes).

109. *See* Treaty Relative to the Protection of the Lives of Neutrals and Noncombatants at Sea in Time of War and to Prevent the Use of Noxious Gases and Chemicals, Feb. 6, 1922, U.S.-U.K.-Fr.-Italy-Japan, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, VOL. II (1910-23) 3116.

110. *Id.* at 3118.

> It is important, however, to note that members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government or by their commander are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands . . . .[111]

The manual did not detail how injured states that employ a more strict standard, such as Germany, might view its asserted prohibition on punishing British subjects they held as prisoners.

In 1934, the United States published a new edition of the *Rules of Land Warfare* ("*Rules of Land Warfare II*").[112] Paragraph 352 of the *Rules of Land Warfare II*, which addressed superior orders, did not vary from the original *Rules of Land Warfare*. The failure of the *Rules of Land Warfare II's* index to even include a "superior orders" entry illustrates the degree of concern that the new edition paid the issue. A soldier's law of war offenses remained fully exempt from prosecution if the soldier committed the crime pursuant to the order of a superior. There was no qualification that the order must have been reasonable, legal, or one within the authority of the superior.

F. WORLD WAR II: AN OLD NEW STANDARD

In 1940, with World War II already raging in Europe, the United States followed its 1934 manual with yet another version. This version added a military nomenclature, FM 27-10 to the original title *Rules of Land Warfare*. The new edition's Paragraph 347 on superior orders merely replicated the 1914 and 1934 standards.

By now the more optimistic officials among the Allies were already considering the possibility of eventually punishing Axis leaders for their roles in the war; not only their senior leadership who initiated the war, but also those who might have committed battlefield war crimes. As early as 1942, the Allies announced that they

111. J.E. EDMONDS & LASSA OPPENHEIM, LAND WARFARE: AN EXPOSITION OF THE LAWS AND USAGES OF WAR ON LAND FOR THE GUIDANCE OF OFFICERS OF HIS MAJESTY'S ARMY 95 (1929) (delineating military laws and procedures in effect and applicable to the United Kingdom).

112. *See* WELLS, *supra* note 59, at 8 (describing the 1934 edition of the Rules of Land Warfare and the international political climate necessitating the changes from the 1914 edition).

would prosecute German and Japanese soldiers for obeying improper orders and to deny them the opportunity to plead the superior orders defense.[113] Such a stance, however, clearly required a reevaluation of United States policy as reflected in its Field Manual.[114] While the Allies did not want to repeat the results of the Leipzig Trials, the United States could not continue to sponsor the defense it intended to deny the vanquished enemy.

In 1906, Oppenheim's *International Law* was instrumental in establishing the prevailing Anglo-American military standard of liability for obedience to illegal superior orders.[115] Through the years, succeeding editions of his work, which the International Criminal Tribunal for the Former Yugoslavia refers to as the *opus classicum* on international law,[116] continued to exert their considerable influence among international legal authorities. The Sixth Edition was published in 1940, edited by Professor Hersch Lauterpacht in place of the then-deceased Oppenheim.[117] In it, Lauterpacht made a significant amendment. Regarding the responsibility of soldiers for battlefield war crimes pursuant to superior orders, Lauterpacht suggested a reversion to the pre-1906 military standard, while at the same time distancing himself from the standard that his predecessor's work had been instrumental in establishing:

> The fact that a rule of warfare has been violated in pursuance of an order . . . of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. A different view has occasionally been adopted by writers, but it is difficult to regard it as expressing a sound legal principle.[118]

Did the fact that Lauterpacht's native Great Britain was engaged in

113. *See id.* at 24 (describing the need for changes to the 1944 edition of the *Rules of Land Warfare*).

114. *See id.*

115. *See* OPPENHEIM, *supra* note 61, at 264-65.

116. Prosecutor v. Erdemovic, 111 I.L.M. 298 (Int'l Crim. Trib. for the Former Yugoslavia, App. Chamber, 1997).

117. *See* LASSA OPPENHEIM, INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY 453-54 (Hersch Lauterpacht ed., 1940).

118. *Id.*

mortal struggle with an enemy soon to face the criminal bar have an influence on this new stance, making this a sort of anticipatory victor's justice? Or, was it merely recognition of the validity of criticism that commentators had long leveled against the prior position? It probably was the latter.[119] Lauterpacht noted the incongruity of differing civil and military standards,[120] found that subordinate immunity was simply "at variance with the corresponding principles of English criminal and constitutional law," and argued, therefore, that it was not a sound principle of law.[121] Lauterpacht's position merely reflected the changing and maturing international law, as well as the withering of the Act of State Doctrine, with the concomitant ripening of personal responsibility for wrongful acts in the world arena.

Other factors were also coalescing to create a newly-unified approach to the punishment of battlefield war crimes. The London International Assembly, created in 1941 under the aegis of the League of Nations, began studying post-war problems and designing a framework for establishing the United Nations.[122] The issue of retribution for World War II war crimes was high on the Assembly's agenda. Later, nine states of the Assembly issued the St. James Declaration of 1942, a precursor of the London Agreement that estab-

119. *But see* MARK P. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR 58 (1999) (observing that "[t]he decline of respondeat superior in . . . military penal codes of most nations has been less a result of logic than of painful experience"). Osiel continues to argue that "[i]t was the historical experience of Nazi war crimes, conducted under superior orders, that led national and international legislators to reassess" the United States position. *Id.*

120. *See generally* Neu v. McCarthy, 33 N.E.2d 570, 573 (Mass. 1941) (holding that a person who enters military service is not thereby relieved from his obligation to observe the laws of the jurisdiction in which he finds himself); State v. Roy, 64 S.E.2d 840 (N.C. 1951) (holding that alleged command of defendant's sergeant to commit an assault on a female would not relieve the defendant from criminal responsibility due to the order's obvious illegality). "It is an interesting gloss on the complexity of the problem that in Great Britain and in the United States the plea of superior orders is, on the whole, without decisive effect in internal criminal or constitutional law, although it is apparently treated as a full justification in relation to war crimes . . . ." Lauterpacht, *supra* note 24, at 72-73.

121. *See* Lauterpacht, *supra* note 24, at 69 n.2 (noting Lauterpacht's disagreement with both the British and American manuals that allow Act of State doctrine as a shield to war crime charges).

122. *See* HISTORY OF THE U.N. WAR CRIMES COMMISSION, *supra* note 6, at 266.

lished the Nuremberg International Military Tribunal.[123]

The London International Assembly in turn created the International Commission for Penal Reconstruction and Development, in part to study rules and procedures to govern eventual war crimes prosecutions.[124] Professor Lauterpacht submitted a persuasive memorandum to the Commission that corresponded to his revised *International Law* position and urged that the defense of obedience to superior orders only be available to an accused who could make out a case of compulsion.[125] The manifest illegality of an order would preclude the defense entirely.[126] "The rules of warfare," Lauterpacht wrote, "like any other rules of international law, are binding not upon impersonal entities, but upon human beings . . . ."[127] Personal criminal responsibility for battlefield war crimes remained the goal. Agreeing, the Commission also urged a definitive and formal end to the Act of State Doctrine, which might otherwise protect Axis leaders as political agents of their states by granting them immunity from prosecution.[128]

In January 1944, the newly formed United Nations War Crimes Commission took up the issue of obedience to orders. Unlike its stance after World War I, the United States now was squarely behind a recommendation that the defense be rejected: "[t]he plea of superior orders shall not constitute a defense . . . if the order was so manifestly contrary to the laws of war that a person of ordinary sense and understanding would know or should know . . . that an order was illegal."[129] In an ironic role reversal, however, the Commission could

123. *See id*. (pointing out that the head of state doctrine would be no shield to prosecution).

124. *See id.* (noting lessons learned regarding war crimes prosecution from World War I).

125. *See id.*

126. *See* Kelsen, *supra* note 108, at 557-58 ("According to the law of some States, the plea of superior command can be rejected only if the command was manifestly and indisputably contrary to law"). Kelsen notes that it is a very rare case indeed where the command is "universally known to everybody, including the accused, to be without any doubt whatever against the law." *Id.*

127. HISTORY OF THE U.N. WAR CRIMES COMMISSION, *supra* note 6, at 266-67.

128. *See id.* at 266.

129. *Id.* at 278.

not reach agreement on this issue due to the varied practice and laws of its member states. Declaring it futile to attempt formulation of an absolute rule, the Commission ultimately recommended that the validity of the plea of superior orders be left to national courts, "according to their own views of the merits and limits of the plea."[130] Despite this failure to reach Allied agreement, the stage was set for basic change in the America's superior orders doctrine, which was not long in coming.

In April 1944, in a striking development, the United Kingdom revised its manual, adopting almost word-for-word Lauterpacht's language in his Sixth Edition of *International Law*. That modification represented, of course, a complete *volte-face*. Seven months later, on November 15, 1944, the United States similarly reversed and revised its Field Manual. The United States change affirmed the ideal that courts would now consider not only individuals, but also organizations and high government officials, culpable for law of war offenses:

> Individuals and organizations who violate the accepted laws and customs of war may be punished there for. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.[131]

As before 1914, obedience to a superior's orders was no longer an automatic and complete defense. This paragraph was the sole change in the new 1944 manual.

France, to be consistent with her allies, made a similar change to her law of war manual, as did Canada. The Soviet approach remained, as it had always been, identical to the older Anglo-American position.[132]

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130. *Id.*

131. UNITED STATES ARMY, FM 27-10, FIELD MANUAL: RULES OF LAND WARFARE para. 345(1) (1944) (reflecting change from 1940 version following executive decision on November 15, 1944).

132. *See* MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 491 (1959) (explaining that under Soviet Russian military law, a soldier carrying out the unlawful order of an officer incurs no responsibility for the crime; the officer

Throughout World War II, Nazi Germany professed an opposition to the defense of superior orders, adhering to the standard only rediscovered by the United States and Britain in 1944. Early that year, after German mobs murdered captured Allied pilots, Nazi Propaganda Minister Joseph Goebbels explicitly attempted to justify the murders by condemning the plea of superior orders as inadmissible in contemporary international law.[133] In the German newspaper *Deutsche Allgemeine Zeitung*, Goebbels wrote that "[n]o international law of warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment by pleading as his defense that he followed the commands of his superiors."[134] In the official Nazi newspaper, *Volkisher Beobachter*, Goebbels wrote that "[t]he [Allied] pilots cannot validly claim that as soldiers they obeyed orders . . . if these orders are in striking opposition to all human ethics, to all international customs in the conduct of war."[135]

Throughout the war, the *Wehrmacht-Untersuchungsstelle für Verletzungen des Völkerrechts* (Bureau for the Investigation of War Crimes) was an active unit of the Nazi Army. Ironically, knowing all that we do about Nazi practices in Russia and other conquered territories, the Bureau regularly gathered evidence for the court-martial of Nazi soldiers charged with war crimes and, reportedly, death sentences often resulted.[136]

Nazi battlefield excesses are often recalled, and rightly so. It bears repeating, however, that war crimes are not limited to the other side. World War II, like all wars before and after, was violent, brutal, and often unmindful of legal restrictions. Two examples of United States war crimes are illustrative of this point.

On June, 27, 1943, General George S. Patton spoke to the officers

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does incur responsibility).

133. *See* HISTORY OF THE U.N. WAR CRIMES COMMISSION, *supra* note 6, at 288 (explaining that Goebbels, as a top-ranking Nazi leader, was personally responsible for many war crimes).

134. *Id.* (citing Goebbels' statement).

135. *See* GREENSPAN, *supra* note 132, at 442 (quoting Goebbels' justification for the slaying of Allied pilots by mobs of Germans).

136. *See* ALFRED M. DE ZAYAS, THE WEHRMACHT WAR CRIMES BUREAU, 1939-1945, 10 (1989) (providing numerous examples of Nazi convictions and punishments for war crimes committed during World War II).

and enlisted men of his 45th Infantry Division just prior to their invasion of Sicily. In his remarks he said, "[a]ttack rapidly, ruthlessly, viciously and without rest, and kill even civilians who have the stupidity to fight us."[137] According to defense lawyers, he also exhorted, "if the enemy resisted until we got to within 200 yards, he had forfeited his rights to live."[138] In heavy fighting only a few days later, a captain of the 45th Infantry Division lined up forty-three captured Germans and directed their execution by machine gun.

During the same invasion, a sergeant murdered thirty-six German prisoners he was escorting to the rear. At their courts-martial, convened by Patton, both soldiers raised as their defense the "orders" issued by Patton in his pre-invasion speech.[139] Subsequent inquiries into Patton's remarks exonerated the general.[140] Although the military court convicted both the captain and the sergeant, their trials illustrate that it was not only Nazis who appreciated the defense of superior orders, or who were willing to employ it to their advantage as a legal defense—or smoke screen.

An even more troubling event involved United States Navy Commander Dudley W. Morton, commander of the submarine *USS Wahoo* (SS-238). During a January 1943 patrol, Morton's submarine surfaced after having sunk a troop-carrying freighter. The sea was filled with Japanese survivors—probably more than a thousand. Morton seemed determined, regardless of the number of survivors, to ensure that he killed all of them.[141] He ordered the submarine's sailors to fire the deck guns and machine guns on enemy lifeboats and survivors in the water, which his sailors did, for more than an hour. The *Wahoo*'s second-in-command, Richard O'Kane, later a rear ad-

137. Aubrey M. Daniel, III, *The Defense of Superior Orders*, 7 U. RICH. L. REV. 477, 498-99 (1973) (discussing the standard to which military leaders are held in decision making and issuing orders).

138. LADISLAS FARAGO, PATTON: ORDEAL AND TRIUMPH 415 (1963) (quoting excerpts from Patton's prepared remarks to his men before the invasion of Sicily).

139. *See* L.C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW 131 (1976) (detailing the defense strategy of those men court-martialed for premeditated murder).

140. *See* FARAGO, *supra* note 138, at 415-16.

141. *See* CLAY BLAIR, JR., SILENT VICTORY 384 (1975) (detailing the account of Dudley Morton and his order to machinegun swimming Japanese sailors and soldiers after his submarine had sunk their troop transport).

miral and Medal of Honor holder, reported that "*Wahoo*'s fire . . . was methodical, the small guns sweeping from abeam forward like fire hoses cleaning a street . . . . Some Japanese troops were undoubtedly hit during this action, but no individual was deliberately shot in the boats or in the sea."[142] By the time the *Wahoo* sailors had finished firing, the boats were nothing more than flotsam.[143]

Upon return to Pearl Harbor, the United States Navy lauded the *Wahoo* with a Presidential Unit Citation and presented Morton with a Navy Cross. In his patrol report, Morton freely described the killing of the hundreds of survivors of the sunken transport. Although this constituted murder to many fellow submariners, the United States never raised any question of Morton's order.[144] Morton's order to fire on survivors appears identical to that of the World War I sub commander, Helmuth Patzig, whom the Leipzig Court sought as a war criminal. The Leipzig Court had convicted Patzig's subordinates, Dithmar and Boldt, of acts similar to Morton's, yet Morton not only escaped punishment but was honored for his acts.

Excuses that "the defeat of the Axis required the use of force in a fashion that more squeamish times—when the fundamental *survival* of the West was less directly threatened—have been found repugnant"[145] and may state a popular political truth. Such excuses, however, fail to take into account the law of war that all nations are obliged to observe.

By war's end, neither Nazi Germany nor Imperial Japan was in a position to charge enemies with battlefield war crimes, although the United States was. In October, 1945, the United States began its first World War II war crimes trial, that of General Tomoyuki Yamashita,

142. RICHARD H. O'KANE, WAHOO 154 (1987) (describing the scene of destruction involving the Japanese survival boats).

143. *See id.*

144. *See* BLAIR, *supra* note 141, at 386 (revealing the lack of response by the High Command to Morton's slaughter of Japanese survivors); *see also* SAMUEL ELLIOT MORRISON, 5 HISTORY OF THE UNITED STATES NAVAL OPERATIONS IN WORLD WAR II 256 (1949) (telling how, during the naval battle of Guadalcanal, seamen on the tug *Boblink* machine-gunned Japanese survivors in the water).

145. Williamson Murray, *The Meaning of World War II*, 8 JOINT FORCES QUARTERLY 50, 54 (1995) (emphasis in original) (explaining the justification for atrocities when at war).

commander of the defeated Japanese forces in Manila. The issue of superior orders did not arise directly in the course of Yamashita's trial before a military commission of five Army general officers. Later, however, Supreme Court Justice Frank Murphy, in a passionate and oft-quoted dissent from the Court's opinion involving Yamashita's conviction, noted that individual criminal responsibility lies not only in those who commit battlefield war crimes, but those who order them as well.[146] Justice Murphy's affirmation of the 1944 *Rules of Land Warfare* standard, and the responsibility of commanders who order war crimes, differed little from Chief Justice Marshall's 1804 opinion regarding United States Navy Captain George Little.[147] The Yamashita case would resonate beyond the Far East International Military Tribunal,[148] and even into the Vietnam War and the cases of Lieutenant Calley and Captain Medina[149] of My Lai infamy.

G. THE NUREMBERG IMT: THE "NEW" STANDARD APPLIED

The Nuremberg International Military Tribunal's ("IMT") procedural rules were a product of the St. James Declaration of 1942, the

146. *See In re* Yamashita, 327 U.S. 1, 38 (1945) (defining the Court's interpretation of international rules of war for purposes of the defendant's petition for habeas corpus). An interesting case recently before the Court of Appeals for the Armed Forces is *United States v. Rockwood,* 48 M.J. 501 (A.C.C.A. 1998), which invokes *Yamashita*. One of the arguments of Captain Rockwood, who the United States charged with disobedience of orders, is that international law affirmatively required him, like Yamashita before him, "to act to prevent the loss of life." Rockwood's conviction was affirmed.

147. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (refusing to exonerate Little for his crime on his claim that he was following the orders of President Adams).

148. *See* B.V.A. RÖLING, *Introduction*, *in* THE TOKYO WAR CRIMES TRIAL 15, 17 (C. Hosoya et al. eds., 1986) (detailing the death sentence of Hirota Koki under the reasoning that he shared responsibility for the rape of Nanking).

149. *See* Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Strategy*, 97 MIL. L. REV. 1 (1982) (explaining that, although the court found Captain Medina not responsible for the murders committed by his men, the court had misapplied the standard to determine his responsibility). The standard for conviction of a superior officer for acts committed by a subordinate was whether the superior officer knew or should have known that his failure to control his subordinates would result in criminal acts. *See id.* The prosecutor in Medina's case acknowledged that the court had applied the wrong standard when the court directed that it must base a conviction on a commander's *actual knowledge* of his subordinates' crimes. *See id.* (emphasis added).

Moscow Declaration of 1943, and, more directly, the London Agreement of August 1945. Relying upon the reports and recommendations of the United Nations War Crimes Commission, the London Agreement set the ground rules for the trial in the Tribunal's Charter, which, among other things, specified war crimes as acts within the jurisdiction of the Tribunal.[150]

Article 8 of the IMT's Charter embodied the change initiated by Professor Lauterpacht four and-a-half years before, and incorporated in the *Rules of Land Warfare* less than nine months earlier. Article 8 read: "[t]he 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 . . . ."[151] The IMT intended to hold the Nazis criminally responsible for war crimes they committed, and for war crimes they ordered. Obedience to superior orders would be no shield. "The fundamental principle involved: the criminal responsibility of individuals . . .."[152] As the IMT famously noted in reference to war crimes, "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[153]

In anticipation of the trial of the Nazis, the Allies had reverted their law regarding the superior orders defense to the pre-1914 standard, which had applied all along in German courts-martial and American civil courts. The Anglo-American legal detour had lasted thirty years, but the IMT seemingly brought the soldiers' legal defense full circle: a law of war violation pursuant to a superior's manifestly illegal order remained a war crime. That construct was the law applied at Nuremberg and, as Professor Geoffrey Best points out:

150. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949).

151. International Military Tribunal, Trial of the Major War Criminals Before the IMT, Vol. I, 10, 12 (1947) (being the official text of the IMT in English, this volume contains the documents and initial motions considered by the IMT).

152. U.N., *The Charter and Judgment of the Nuremberg Tribunal: History and Analysis* (NY: UNGA, 1949) 39.

153. TRIALS OF GERMAN MAJOR WAR CRIMINALS 41 (1946), *quoted in* BROWNLIE, *supra* note 106, at 154 (arguing that collective sanctions against a country to combat war crimes is an ineffective method of charging behavior).

> No element of Nuremberg legislation was more single-mindedly adhered to than this one, the emphatic assertion of individual responsibility . . . . Command responsibility is bracketed with superior orders for obvious enough reasons. If servicemen are to be brought to trial for carrying out unlawful and atrocious orders, do not logic and equity demand that their superiors must be brought to trial for issuing the same?[154]

Still, it is not entirely correct to assert that, "[t]he IMT Charter . . . *eliminated* the defense of superior orders."[155] As single-mindedly as the IMT Charter may have applied the element as to senior officers and officials, the IMT nevertheless did inject an ameliorating factor not suggested by a strict interpretation of the Charter: "The True Test." The IMT explained that the True Test was the inquiry not of whether there was "the existence of the [manifestly illegal] order, but whether moral choice was in fact possible."[156]

International law has not adhered even to Nuremberg's diluted formulation. The superior orders defense is alive and still used when the questioned conduct is not clearly and obviously criminal.[157] As Hilaire McCoubrey points out, even after Nuremberg, superior orders is a valid defense anytime the order concerned was not obviously unlawful to the subordinate.[158] Later, even the framers of the 1949

154. GEOFFREY BEST, WAR AND LAW SINCE 1945, 190 (1994) (offering logical reasoning for criminal prosecution of officers when they have ordered that unlawful acts be committed).

155. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 6 (1997) (explaining that the International Military Tribunal Charter created individual accountability and removed various defenses from the judicial sphere).

156. UNITED NATIONS WAR CRIMES COMMISSION, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 411(1947-49) (noting that the True Test was the articulation of a doctrine existing "in varying degrees in the criminal law of most nations").

157. *See* OSIEL, *supra* note 119, at 97 (offering justification for countries maintaining the superior orders defense). In many countries, people have preconceived loyalties to tribes, clans, and faiths. To allow criminal punishment for following commands of a superior only further weakens the frail system they already have. *See id.*

158. *See* HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS 221 (1990) (concluding that today, despite rulings otherwise, the defense of superior orders potentially remains anytime an order given is not clearly illegal).

Geneva Conventions declined to directly incorporate the prohibition of Nuremberg's Article 8.

H. NUREMBERG'S "SUBSEQUENT PROCEEDINGS"

Following the IMT, the United States initiated a series of war crimes trials held in its sector of Berlin, as did the French, British and Russians in their sectors. Referred to as "the Subsequent Proceedings" because they followed the IMT in purpose and method, the Allies based the trials upon a 1945 Joint Chiefs of Staff directive[159] and incorporated procedure that generally paralleled the IMT's procedures and rules. The Subsequent Proceedings' implementing directive was Control Council Law Number 10, a reference to the Allied Council that oversaw the governing of Berlin. Eventually totaling twelve trials, the Subsequent Proceedings tried an aggregate of 191 high-ranking military and civilian Nazis.

In language essentially identical to IMT Charter Article 8, the Subsequent Proceedings' Article II.4(b) read: "[t]he fact that any person acted pursuant to the order of . . . a superior does not free him from responsibility for a crime, but may be considered in mitigation." Brigadier General Telford Taylor, the Chief Prosecutor opined:

> The major legal significance of the [Control Council] Law No. 10 judgement lies, in my opinion, in those portions of the judgements dealing with the area of personal responsibility for international law crimes. The tribunal had to determine whether the plea of 'duress' or 'superior orders' was genuine . . . and, if the plea was found to be bona fide, to what extent it should be given weight in defense or mitigation.[160]

The "moral test," which effectively modified the IMT's Article 8 by ameliorating its blanket rejection of superior orders as a defense, also affected the Subsequent Proceedings Article II.4.(b), and led to a required showing of duress as a necessary part of a successful defense of superior orders.[161] Therefore, despite Article 8 and Article

159. *See* TAYLOR, *supra* note 150, at 2-10 (describing directive and its origins). The directive establishes a definition of war crimes that includes offenses that violate common justice or moral turpitude. *See id.* at 2; *see also id.* at 247-48 (providing draft of the directive regarding war crimes).

160. *Id.* at 109-10 (emphasis in original).

161. *See* Erdemovic, *supra* note 116, at 25-27 ("As obedience to superior orders

II.4.(b), the tribunal continued to apply a limited responsibility doctrine.[162] The consideration of the "moral choice" test is apparent in the Subsequent Proceedings' *Flick*[163] and *Farben*[164] judgments while, in the *High Command* cases, the tribunal noted that the law must allow a solider to assume that orders conform to international law.[165]

Still, some Nazis never did understand. In the course of the IMT's General Staff prosecution, when asked about the legality of orders, Schutzstaffel General Otto Ohlendorf declared that subordinates had sworn obedience to their superiors and therefore could not even conceive of questioning the legality of orders, thus he could not understand these orders being challenged by the tribunal.[166] As General Taylor commented such a stance was taking the defense of superior orders to the extreme.[167] The tribunal subsequently convicted Ohlendorf and he was hanged.

Although finding the presence of moral choice in many cases, the tribunal strictly applied Article 8 of the Charter in many cases, in-

may be considered merely as a factual element in determining whether duress is made out on the facts, the absence of a superior order does not mean that duress as a defense must fail . . . .").

162. *See* NICO KEIJZER, THE MILITARY DUTY TO OBEY 212 (1977) (explaining that the limited responsibility seems to be a more fair approach to prosecution, considering that the tribunal was composed of judges from victorious nations and only enemy nations were on trial).

163. *See* VI T.W.C. BEFORE THE NUREMBERG MIL. TRIBS. 1197-98 (1952) (commenting on the *Flick* case). The tribunal noted that, because "[q]uotas for production were set for industry by the Reich . . . [t]he defendants were justified in their fear that the Reich authorities would take drastic action" and join the work program that participated in criminal activity. *Id.*

164. *See* VIII T.W.C. BEFORE THE NUREMBERG MIL. TRIBS. 1175 (1952) (commenting on *Farben* case). The tribunal stated that it was "not prepared to say that these defendants did not speak the truth when they asserted that in conforming to the slave-labor program they had no other choice than to comply . . . ." *Id.* In light of the tribunal's finding that the defendants executed a moral choice, the longest sentence issued was eight years with credit for time served. *See id.* at 1206-09.

165. *See* XI T.W.C. BEFORE THE NUREMBERG MIL. TRIBS. 511 (1950).

166. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIAL 248 (1992) (quoting Ohlendorf's testimony that the atrocious acts committed by the Nazi Schutzstaffel were done only in obedience to orders issued from commanders).

167. *See id.* Taylor stated "Befehl ist befehl," which translates to: "orders are orders."

cluding the *Pelius Case*,[168] the *Scuttled U-Boats Case*,[169] and the *Almelo*,[170] *Dostler*,[171]and *Belsen*[172] cases. In each trial, the tribunal held that superior orders did not exonerate subordinates from personal responsibility for their war crimes.

On the other hand, some tribunals in effect held that, if a subordinate did not know and could not be expected to know that the order he carried out was illegal, *mens rea* was lacking and the subordinate was not guilty. This reflection of today's United States military standard is seen, for example in the *Hostage*[173] and *Einsatsgruppen*[174] cases. The *Hostage Case* Tribunal wrote:

> If the act done pursuant to a superior's order be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of the crime exists and the inferior will be protected.[175]

168. The Peleus Trial (Trial of Eck, et al.) (1945), Brit. Mil. Ct., Hamburg, Germany, WCT Series, vol. I.

169. *In re* Grumpelt, *reprinted in* ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, 309 (H. Lauterpacht ed., 1951) (charging a German Navy officer with the scuttling of two submarines).

170. *In re* Sandarac, et al., *reprinted in* ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 297 (H. Lauterpacht, ed., 1951) (charging four German non-commissioned officers with killing a British prisoner of war).

171. *In re* Dostler, *reprinted in* ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, 280 (H. Lauterpacht ed., 1951)(charging a German Army Commander with the execution of fifteen United States prisoners of war).

172. The Belsen Trial (Trial of Kramer et al.) (1945), Brit. Mil. Ct., Germany, WCT Series, vol. II.

173. *See* XI T.W.C. BEFORE THE NUREMBERG MILITARY TRIBUNALS 1236 (1950) [hereinafter Hostage Case] (commenting on the Hostage Case).

174. See IV T.W.C. BEFORE THE NUREMBERG MILITARY TRIBUNALS 470 (1949) [hereinafter Einsatsgruppen Case] (commenting on the Einsatsgruppen case and explaining limitations of superior orders defense).

175. Hostage Case, *supra* note 180, at 1236; *see also* Einsatsgruppen Case, *supra* note 181, at 470-71 (applying similar interpretation of superior orders defense).

II. MANIFEST ILLEGALITY: CONTINUING INTERPRETIVE DIFFICULTY

Understandably, legal systems, including the Uniform Code of Military Justice, rarely define "manifest illegality" with any precision.[176] Whether a subordinate's act, or a superior's order, is manifestly illegal is an objective question. Would a reasonable person recognize the wrongfulness of the act or order? "In short, where wrongfulness [of an order] is clear, you must disobey, but you must resolve all genuine doubts about wrongfulness in favor of obedience."[177] In an ambivalent situation, the reviewing court must resolve any uncertainty as to whether the conduct or order was manifestly illegal in favor of the defendant, for "the whole point of the rule is that no 'reasoning why' is necessary to discern the wrongfulness of an order immediately displaying its criminality on its face."[178]

This is not the same as a soldier disobeying an order based upon the asserted illegality of his nation's *jus ad bellum* resort to the use of force.[179] Moreover, a service person's conscience, religious beliefs, moral judgement, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.[180] Manifest illegality is the standard.

How does a court recognize an order to commit a manifestly illegal act? An 1867 New York case characterized such an order as "so

176. *See* OSIEL, *supra* note 119, at 77. The German Military Penal Code is one of the few that attempts a definition. It offers that "illegality is manifest when it is contrary 'to what every man's conscience would tell him anyhow.'" *Id.* (quoting HANNAH AREN'T, EICHMANN IN JERUSALEM 293 (1962)).

177. *Id.* at 84 (noting that this broad reading of the manifest illegality rule did not survive the modern era).

178. *Id.* at 115 (stating that illegality of the order must be obvious in a way that is pre-reflective).

179. *See* United States v. Huet-Vaughn, 43 M.J. 105, 114-15 (C.A.A.F. 1995) (holding that, in the context of Operation Desert Storm, this argument was a nonjusticiable political question). The *Huet-Vaughn* Court held that the duty to disobey an unlawful order applies only to "a positive act that constitutes a crime [that is] so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness." *Id.* at 107.

180. *See* IV MANUAL FOR COURTS-MARTIAL § 14c(2)(a)(iii) (1995); *see also* United States v. Kabat, 979 F.2d 580 (8th Cir. 1986) (rejecting moral, religious, and political beliefs as a defense for criminal acts).

palpably atrocious as well as illegal that one ought instinctively feel that it ought not to be obeyed . . . ."[181] Two examples are Lieutenant Calley's order to kill unarmed women and children during the Vietnam War,[182] and a Korean War case involving an order to rape and steal.[183] The Court of Military Appeals has found manifestly illegal an Army Specialist Four's order to a private to continue driving a truck on which the brakes were not working properly.[184] One commentator explained the ramifications of the rule:

> The manifest illegality rule thus imposes a broad duty to obey superior orders that is qualified by an equally bright-line duty to disobey orders to commit atrocities. The general rule's extreme leniency is redressed, in part, by the exception's extreme stringency . . . . The objective is to eliminate any possibility of doubt about what one should do in any given situation.[185]

The rule, of course, covers only the easier cases. Where the order presents a doubtful case, the subordinate should obey the order, since its illegality is not manifest.

A. MERE EVIDENCE OR COMPLETE DEFENSE? MISTAKE OF LAW OR MISTAKE OF FACT?

What of the legal practitioner's viewpoint? At trial, the assertion that a soldier acted in obedience to superior orders is either no more than an admissible fact showing that he mistakenly believed his con-

181. McCall v. McDowell, 15 F. Cas. 1235, 1241 (C.C.D. Cal. 1867) (No. 8,673) (stating that this is a practical and just rule).

182. *See* Eckhardt, *supra* note 149.

183. United States v. Kinder, 14 C.M.R. 742, 775 (A.C.M. 1953).

184. *See* United States v. Cherry, 22 M.J. 284, 286 (C.M.A. 1986). There are several cases that have found orders to be overbroad, vague, and incapable of being obeyed. *Compare* United States v. Milldebrandt, 25 C.M.R. 139, 141 (C.M.A. 1958) (holding that the order was so all-inclusive as to be unenforceable), *and* United States v. Wysong, 26 C.M.R. 29, 31 (C.M.A. 1958) (noting that the orders' vagueness and indefiniteness were defects), *and* United States v. Green, 22 M.J. 711, 719 (A.C.M.R. 1986) (finding the order unenforceable due to its arbitrariness and unreasonableness), *with* United States v. Dykes, 6 M.J. 744, 748 (N.C.M.R. 1978) (holding that the order was not an unreasonable deprivation of a right).

185. OSIEL, *supra* note 119, at 287 (stating that this military law approach significantly contributes to the "central human experience of soldiering").

duct lawful, or a defense in its own right. As we have seen, the United States took the position that obedience to orders is a *complete* legal defense only for a brief historical period. Today, obedience to orders remains a complete defense in some Third World countries, where governments favor unqualified obedience to authority.

In modern United States practice, however, obedience to orders remains a defense in and of itself, but only if the accused can show that she reasonably believed the orders she acted upon were lawful.[186] The soldier who raises the defense may assert that she carried out an illegal order while mistaken as to a fact relevant to the order. For example, pursuant to her squadron commander's order, a pilot may fire her munitions at a hospital, knowing that international law protects hospitals, but mistakenly believing her commander's assurance that the enemy employs this hospital as an anti-aircraft gun position. The pilot may successfully assert a defense of mistake of fact. Her squadron commander, of course, will have to contend with his own charges.

Similarly, a soldier may assert that he carried out an illegal order while mistaken as to the law involved. An artilleryman may fire on a museum upon receiving orders to do so, knowing the target to be a museum, but believing it to be a lawful target. Thus, the artilleryman may successfully assert mistake of law as his defense.

Finally, it is possible, if unlikely, to raise the defense of obedience to superior orders by asserting a mixed mistake of law and fact. Pursuant to orders, a soldier may fire on a school occupied by children, believing the children are lawful targets because they have recently fired on him or his comrades. If in actuality the solider or his comrades have not received fire from the school, he may assert the defense of mistake of fact; the children, having never engaged in offensive activity, would remain unlawful targets, and the solider may assert the defense of mistake of law.

186. *See* UNITED STATES ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 182 (1956) [hereinafter FIELD MANUAL 27-10] (noting that in cases where the court deems the order to not constitute a defense to a war crime allegation, the court may consider that the individual was acting pursuant to orders in mitigation of punishment).

B. OBEDIENCE TO ORDERS: ELSEWHERE AND LATER

The Tokyo International Military Tribunal Charter's Article 6(b), as well as Paragraph 16 of American Regulations Governing the Trial of War Criminals in the Pacific Area, were similar to the Nuremberg IMT's Article 8. As happened at Nuremberg, the Tokyo tribunal rejected pleas of superior orders.[187] The tribunals for prosecution of war crimes in the Pacific and the Mediterranean also employed similar procedural articles.[188]

Soviet law rejected superior orders, both as a defense and as mitigation of war crimes. German military law rejects superior orders as a defense, although German civilian criminal law allows it.[189] Denmark and Norway excuse the soldier who disobeys lawful orders that he reasonably believes to be illegal.[190]

Negotiations during the formulation of the 1977 Protocols to the 1949 Geneva Conventions illustrated that the Communist Bloc and many Third World states, wishing to maximize compliance with official directives, offered their soldiers full immunity when they obey unlawful orders, even if they cannot demonstrate that they mistakenly believed that the orders were lawful.[191] Despite lengthy negotiations to draft a provision limiting the defense of superior orders, the effort was unsuccessful due to objections by African and Asian states.[192]

187. *In re* Masuda, et al., *reprinted in* ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, 286 (H. Lauterpacht ed., 1951) (charging a Rear-Admiral and subordinate officers in the Japanese Navy with killing three American airmen).

188. *See* HISTORY OF THE U.N. WAR CRIMES COMMISSION, *supra* note 6, at 283 (describing the provisions in the American regulations for the trial of war crimes issued by the United States Army headquarters for the Mediterranean Theatre of Operations and the similarity of the American regulations governing the trial of war criminals in the Pacific area).

189. *See* WAR CRIMES: REPORT OF THE WAR CRIMES INQUIRY, *supra* note 80, at 66-67.

190. *See* KEIJZER, *supra* note 162, at 106.

191. *See generally* HOWARD S. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 10-44 (Supp. 1985) (recounting the negotiations surrounding several of the more contentious Protocol I Articles).

192. *See* Colonel Howard S. Levie, *The Rise and Fall of an Internationally*

The trials before the Tribunal for the former Yugoslavia ("ICT") have seen the ancient defense of superior orders raised, demonstrating its enduring vitality, although the ICT's articles specifically reject it.[193] The ICT made clear, however, that, although not strictly a defense, obedience to orders can be relevant and an admissible fact.[194] In the ICT's first case, it sentenced a Croat infantryman, Drazen Erdemovic, to ten years confinement. *The Washington Post* reported "the tribunal rejected the hauntingly familiar excuse of Nazi war criminals—that Erdemovic was following orders . . . ."[195] The ICT has made several similar convictions: (1) prison commander Zdravco Mucic, for ordering subordinates to commit murders;[196] (2) Major General Radislav Krstic, who directed the 1995 attack on Srebrenica, for genocide via personal involvement, as well as for his command responsibility;[197] and (3) paramilitary commander Anto Fu-

Codified Denial of the Defense of Superior Orders, 30 MIL. L. & L. OF WAR REV. 183, 200-04 (1991) (detailing the concerns of third world countries [and Australia, New Zealand, and Switzerland] that the proposed provision did not adequately balance humanitarian law with military discipline and it limited its coverage to grave breaches).

193. *See* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, May 25, 1993, arts. 7(3), 7(4) [hereinafter ICT Statute]. Articles 7(3) and 7(4) of the ICT Statute actually expand the concept of *respondeat superior*. *See id.* art. 7(3) (stating that acts committed by a subordinate do not relieve his superior of criminal responsibility). The use of the word "superior," rather than the more frequently found term "commander," allows for the prosecution of civilians as well as military leaders. *See id.* Article 7(4) repeats the now familiar formula: "[t]he fact that an accused person acted pursuant to an order . . . of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment . . . ." *Id.* art. 7(4).

194. *See* Prosecutor v. Erdemovic, 37 I.L.M. 1182 (Int'l Crim. Trib. for the Former Yugoslavia, 1998) (sentencing judgment) ("While the complete defense based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application are particularly strict").

195. Charles Trueheart, *Balkan War Crimes Court Imposes First Sentence; Hague Give Croat Foot Soldier 10 Years*, WASH. POST, Nov. 30, 1996, at A13.

196. Charles Trueheart, *2 Bosnian Muslims, Croat Convicted of Atrocities Against Serbs*, WASH. POST, Nov. 17, 1998, at A34. The conviction of Mucic is significant because it is the first judgement since the post-World War II tribunals in Nuremberg and Tokyo to reject "the arguments of mid-level officers who claimed they were just following orders." *Id.*

197. Steven Erlanger, *Bosnian Serb General Is Arrested; Genocide Charges tied to Srebrenica Attack*, SAN DIEGO UNION-TRIB., Dec. 3, 1998, at A1 (explaining

rundzija, for failing to stop his subordinates from committing a rape.[198] Additionally, in the Rwandan tribunal's first case, Jean-Paul Akayesu, a civilian mayor, pleaded guilty to ordering the deaths of more than 2,000 Tutsis by police, soldiers, and Hutu militiamen.[199]

In future cases, defendants will no doubt continue to assert the defense of superior orders. Although not yet established, the Statute of the International Criminal Court, in matters of command responsibility and obedience to orders, echoes the Yugoslavia Tribunal standards.[200]

CONCLUSION

Since World War II, in American application, there has been no significant change in the soldier's defense. The law regarding obedience of superior orders as a defense to law of war violations remains as it was applied at Nuremberg and in the Subsequent Proceedings. The current United States Law of War Field Manual reads:

> The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful . . . . That the individual was acting pursuant to orders may be considered in mitigation of punishment.[201]

It is unlikely that there will be any significant change to the cur-

that the ICT accused Krstic of directing the attack on Srebrenica in 1995 where "some 7,000 Bosnian Muslim men were marched off, presumably to their deaths").

198. *See Bosnian War Crimes Panel Finds Commander Guilty in Rape Case*, N.Y. TIMES, Dec. 11, 1998, at A3 (noting that the ICT found Furundzija guilty of two counts of war crimes for failing to stop a subordinate's rape of a Bosnian Muslim).

199. *See* James C. McKinley, Jr., *U.N. Tribunal, in First Such Trial Verdict, Convicts Rwandan Ex-Mayor of Genocide,* N.Y. TIMES, Sept. 3, 1998, at A1 (stating that there was evidence that Akayesu ordered the deaths of several Tutsi intellectuals in his community and eight from another town).

200. *See* Rome Statute of the International Criminal Court, July 17, 1998, arts. 25.2., 25.3(b), 28 (setting forth individual criminal responsibility and the responsibility of commanders and other superiors).

201. *See* FIELD MANUAL 20-17, *supra* note 186, at 182.

rent standard, or military case law. A potential conflict exists between American views of manifest illegality and the views of other states. Because of this conflict, if a non-American United Nations' commander were to direct the United States contingent to carry out orders that the Americans view as contrary to customary international law, the resolution remains to be seen.[202]

What can be said with some assurance is that military defendants will raise the defense of superior orders, ancient as it is, in the future. Moreover, subordinates will obey illegal orders, given the overwhelming influence of the military hierarchical structure—particularly in the lower ranks and in combat.[203]

The defense has seldom prevailed in the past, while its application, more important than ever, has not grown clearer in today's world. Finally, those who devote their energies to military justice and to international law will continue to wrestle with definitions, intent, and the accused's understanding. As one United States Army commander said after a recent training exercise, "I know that if I ever go to war again, the first person I'm taking is my lawyer,"[204] indicating that commanders require the counsel of their judge advocates more than ever.

202. *See, e.g.*, Julius Strauss, *U.N. Draws Up Plans for Safe Havens for Serbs*, SUNDAY TELEGRAPH, Aug. 29, 1999, at 23 (commenting that the fall of Srebrenica has been attributed, in part, to differing objectives of the states whose soldiers were supposed to provide a safe haven).

203. *See* OSIEL, *supra* note 119, at 241 n.21 (noting that, as a practical matter, it is likely that subordinates will obey most illegal orders).

204. Colonel Patrick Finnegan, *Operational Law: Plan and Execute*, 76 MIL. L. & L. OF WAR REV. 29, 32 (1996).