

COMMAND RESPONSIBILITY AND
THE DEFENCE OF SUPERIOR ORDERS

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Abstract

The thesis analyses how the two notions of superior responsibility and the defence of superior orders are related under current international criminal law. Superior responsibility and the defence of superior orders have been developed independently since the Nuremberg Trial. However, both doctrines have been categorized into a singular notion called individual responsibility, which seem to have emerged simultaneously after World War II. The two doctrines are sometimes heard in one case, where a commander charged with a crime who actually ordered such behaviour may raise a superior order defence. Sometimes a superior who issued illegal orders has to take responsibility for his own actions but also for his subordinates' actions. The reason for this complication is that both doctrines only focus on one aspect of individual responsibility. Are the two concepts inter-related or inter-dependent? There is no fixed solution to this question. The focus of this thesis is to examine the relation between these different concepts. The aim of the paper is to address the reality and problems of the new concepts of individual responsibility established at Nuremberg and also assess the validity of the principles under current international criminal law. Although the individual approach, dealing with defendants independently, is widely accepted, the balance issue should be examined. To strike a balance between superiors and subordinates, superiors should also have opportunities to be mitigated under certain circumstances. This idea would be necessary to contribute a balanced approach. The possible conditions are presented to strike a balance between superiors and subordinates.

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Abbreviations

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 2 December 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977
Geneva Convention I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 12 August in 1949
Geneva Convention II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
Geneva Convention III	Third Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949
Geneva Convention IV	Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
Hague Convention IV	Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
ICTY Statute	Statute of International Criminal Tribunal for Former Yugoslavia
ILC	International Law Commission
Nuremberg Charter	Charter of the International Military Tribunal at Nuremberg
Nuremberg Trial	International Military Tribunal at Nuremberg
Tokyo Charter	Charter of the International Military Tribunal for the Far East
Tokyo Trial	the International Military Tribunal for the Far East

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Chapter I : Introduction

It was not until the end of World War II that individual responsibility was seriously debated from the perspective of international law. Before the war there were undoubtedly ideas of individual responsibility in each country but they were not of an international character.¹ It must be remembered that the notion of individual responsibility in wartime was already promulgated in military laws before World War II, the provisions of which varied according to states. However, most of the pre-war provisions of domestic laws were promulgated with a view to protecting states' interests and few states were concerned over the interests of humanity, withholding unnecessary arms, and protecting civilians. Paragraph 443 of the 1914 edition of the British Manual of Military Law had a provision that those who followed superior orders did not commit war crimes and those who issued the illegal order were liable, the punishment of which could have been done only by the belligerent.² Under the 1914 edition of the US Rules of Land Warfare, subordinates did not take responsibility when they were under the orders or sanction of their government or commanders, and the commander who issued illegal orders was liable by the hands of belligerent, the idea of which was also upheld in the 1934 edition of the US Rules of Land Warfare. France had the former French Penal Code of 1810 applicable to wartime acts of soldiers. However, the 1810 Code was not helpful in prosecuting soldiers who committed a war crime pursuant to the order of superiors. It can be said that the needs of preventing atrocities were not emphasized before World War II. One might say that the idea of individual responsibility under international law was established before World War II. In terms of international documents, it is true to say that some international treaties were normative. Hague Convention (IV) Respecting the Laws and Customs of War on Land, and Annex of 1907 has norms on the acts of soldiers with a view to

¹ Piracy, slave trade, and drug trafficking have been considered as international crimes.

² Paragraph 443 of the 1914 edition of the British the Manual of Military Law.

desiring 'to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization', which merely imposing responsibility on signatory parties and most of them would not have been recognized as customary international law.

During this period, the idea of *respondeat superior* was acknowledged under the influence of a publication by Professor Oppenheim,³ under which those who followed orders of his superior did not take responsibility. It stated that the issuers of orders were solely liable. When a subordinate disobeyed the order of his superior, the subordinate would have been held liable whether or not it was legitimate to do so. Commanders did not need to take responsibility even if the subordinates committed a crime under the command unless they actually ordered the subordinates to do so. Probably there was the belief that the subordinate was an automaton so it must follow orders absolutely. For this reason, when the subordinate did not follow orders, he would have been liable as this was not caused by the commander's decision. Therefore, it can be said that the subordinates were well protected in the interests of the country, however commanders were rarely punished as punishment was limited to cases of illegal orders issued by commanders. In these cases they were supposed to be tried solely by the hands of the belligerent. In addition, the notion of indirect responsibility of the commander caused by the subordinates was not established yet before the war.

The Leipzig Trial concerning World War I crimes was not conducted at an international court, where only a handful of secondary German offenders were tried before German Supreme Court at Leipzig. The court failed to prosecute German Emperor Kaiser Wilhelm II, since the Netherlands did not extradite him to stand trial for his crime of aggression, claiming that his crimes were 'political' in nature. Thirty-three German combatants were tried before the Court at Leipzig. The criminal punishment at international level during this period was transitional from total exemption to the establishment of individual responsibility under international criminal law.⁴

Though the effort to try high ranking German leaders was unsuccessful at Leipzig,

³ 2 Oppenheim, International Law, 1st ed., (1906), pp 264-265.

⁴ see also p36 et seq.

the first overall international punishment of an individual was tried at Nuremberg and Tokyo.⁵ State responsibility as such was not discarded but was clearly put aside in the trials on account of regret at the failure to prosecute German high ranking officials and commanders concerning the atrocities of World War I. The legacy of Nuremberg and Tokyo was exposed as the Nuremberg Principles by the work of the International Law Commission and subsequently recognized by the General Assembly.⁶ Regardless of the fact that court used the term Nuremberg Principles, subsequent military trials of secondary offenders of the Axis countries followed most of the Principles, under which a subordinate who carried out an illegal order of the superior was liable, and simultaneously the commander who issued the illegal order also took responsibility.

Though the Nuremberg Principles did not insert a provision on indirect responsibility of superiors, the Tokyo Trial and the Yamashita Trial⁷ produced the new idea that superiors ignorant of the atrocities by the subordinates without taking proper steps to prevent them also are liable. The intention of originating the doctrine was not deliberate as this doctrine was not seen in any of these documents; the Nuremberg Charter, the Tokyo Charter, the Nuremberg Principles or even Control Council Law No. 10. The concept of indirect responsibility goes beyond the notion of ordinary responsibility of superiors, and gives the impression that any high ranking officers and commanders may be punished because of its position. As the courts have never recognized strict responsibility or vicarious responsibility, the courts compromised by creating new concepts; the ‘should have known’ standard, the ‘had reason to know’ standard, or the ‘must have known’ standard. Though there are serious doubts that the doctrines were accepted under international law before the Second World War,

⁵ The International Military Tribunal at Nuremberg (the Nuremberg Trial) was established by the Charter of the International Military Tribunal at Nuremberg (the Nuremberg Charter), and the International Military Tribunal at the Far East (hereinafter the Tokyo Trial) was established by the Tokyo Charter of the International Military Tribunal at the Far East (the Tokyo Charter).

⁶ The Nuremberg Principles were made by the International Law Commission and was accepted by the UN General Assembly on 12 December 1950. Kittichaisaree, Kriangsak, *International Criminal Law*, Oxford University Press, p.20.

⁷ AG 000.5 (9-24-45) JA Before the Military Commission Convened by the Commanding General United States Army Forces, Western Pacific: Yamashita, Tomoyuki.

the International Criminal Tribunal for Former Yugoslavia (the ICTY) and the International Criminal Tribunal for Rwanda (the ICTR), and the International Criminal Court (the ICC) seem to follow most of them.

The advent of the new concepts at Nuremberg and Tokyo has brought a complicated situation where subordinates and commanders are both liable. The subordinates who executed illegal orders are criminals, regardless of the fact that he was ordered to do so, the theory of which is called the *absolute liability* doctrine.⁸ The *absolute liability* doctrine completely superseded the well-accepted *respondeat superior* doctrine with a view to fighting against the crimes by the Axis states. For this reason few states support the *respondeat superior* doctrine anymore. According to the new doctrine, superior orders may be considered in mitigation but will not undermine the criminality. However, the commander who actually issued illegal orders is also held liable, although, even if the commander does not issue orders, he might be held liable for his negligence. The principles seen at Nuremberg and Tokyo were probably convenient to prosecute most individuals responsible for the atrocities regardless of its status but they left a number of questions. It is recognized that the superior orders and superior responsibility are fundamentally different. It is indeed true that the former deals with subordinates' possibilities of relieving responsibility when they followed illegal superior orders, and the latter deals with superior officers' responsibility when they actually issued illegal orders or when they did not take necessary steps to prevent subordinates' crimes even when they did not do anything without the knowledge of the commission.

However, both doctrines have been categorized into a singular notion called individual responsibility, which seem to have emerged simultaneously after World War II. The two doctrines are sometimes heard in one case, where a commander charged with a crime who actually ordered such behaviour may raise a superior order defence. Sometimes a

⁸ Sadat, Leila Nadya, *the International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Transnational Publishers, Inc., 2002, p. 218.

superior who issued illegal orders has to take responsibility for his own actions but also for the subordinates' actions. The reason for this complication is that both doctrines only focus on one aspect of individual responsibility. Are the two concepts inter-related or inter-dependent? There is no fixed solution to this question. The focus of this thesis is to examine the relation between these different concepts.

Chapter 2 will give the overview of the notion surrounding the defence of superior orders and an introduction of the three main approaches of the issues. The chapter will also examine the ideas of duress, mistake, and necessity, which are often raised in relation to superior order defences. Chapter 2 will focus on the development of superior order codifications, from the perspective of domestic law and international law. The outlook is to find out why the *respondeat superior* doctrine was discarded and how new doctrines emerged. This chapter deals with superior order issues at the ICTY, the ICTR, and the newly established international criminal court from the perspective of the rules and principles of current international criminal law. The chapter will examine whether the ICC approach is part of customary international law discarding the *absolute liability* doctrine made at Nuremberg.

In Chapter 3, the notion of superior responsibility will be examined, distinguishing the difference between direct responsibility of his own acts and indirect responsibility caused by subordinates' acts. Domestic codes will be used to examine how the doctrine of superior responsibility was comparatively developed. Chapter 3 will analyse the Nuremberg Trial and the Tokyo Trial, focusing on the new notion of indirect responsibility of superiors. It will examine how both of the concepts have been inserted or revised into major statutes of international courts. Chapter 3 also discuss how the notion of indirect responsibility has been developed since Nuremberg. The ICTY and the ICTR seem to reflect the legacy of Nuremberg but give precise criteria of the application the doctrine of indirect responsibility. Chapter 3 will examine whether the ICC Statute concerning direct responsibility and indirect responsibility of superiors are in conformity with the rules and principles established at Nuremberg.

Chapter 4 will analyse how the two notions of superior responsibility and the defence of superior orders are related under current international criminal law. The Chapter will answer what is the defence of superior orders and the possibility of it, and how the superior order plea is influenced by the situation of his commander. The Chapter will also try to answer what exactly superior responsibility is and how the notion is influenced by subordinates' situation.

It is not an easy task to compare two different theories since they have been treated differently under international criminal law. Thus, the use of domestic cases, international cases, and domestic law and international documents as comparative examples will give a clearer picture of the complexity. Some of the rules established at Nuremberg and Tokyo are no longer in use, and the principles of the ICC are slightly different than the counterpart of the ICTY and the ICTR. The rules and principles at the ICTY, the ICTR, and the ICC will be carefully examined. Through Chapter IV, it will be critically examined whether the two notions are interrelated. It is problematic that there are not established legal rules and methods concerning the relation between superior responsibility and superior order pleas, though each notion has been developed sufficiently. The aim of the paper is to address the reality and problems of the new concepts of individual responsibility established at Nuremberg and also assess the validity of the principles under current international criminal law.

Chapter II : The Defence of Superior Orders

1. Introduction to the Defence of Superior Orders

The plea of the defence of superior orders is one of the most controversial issues in international criminal law. International criminal law puts soldiers in a dilemma: whether they should obey or disobey the order of superiors. From the subordinates' point of view, disobeying superior orders is strictly prohibited by domestic military law, as the soldiers have to deal with imminent and dangerous situations on the battlefield. On the contrary, if they obey illegal orders, they might be tried for the war crimes they committed in court, being criticized as 'you should have disobeyed under the circumstances because what the superior said was illegal.' Either way the order of commanders puts the subordinates in serious trouble as they are incapable of judging the legality of superior orders.

2. Theoretical Approaches to Superior Orders

The states' positions of subordinates' responsibility have varied according to the times. Through history of international law it can be said that three major theoretical approaches have been taken to the soldier's claim that he just followed the superior order because it was his duty.

a. Position A: the Doctrine of *Respondeat Superior*

Position A, the doctrine of *respondeat superior* was probably the most well-known approach to superior order pleas until the 1940's because of a publication of Lassa Oppenheim, under which a soldier who carried out orders of the superiors following a superior order could not be

liable.

The doctrine of *respondeat superior* was originated by the first edition of Oppenheim's book on international law, which stated that:

violations of rules regarding warfare are war crimes only when committed without an order of the belligerent government concerned. If members of the armed forces commit violations by order of their government, they are not war criminals and may not be punished by the enemy; the latter may, however, resort to reprisals.¹

Under this doctrine the order of the government or superior officers justifies any acts, so a subordinate who executed the order cannot be punished. The background of this doctrine was that a majority of states had similar provisions in military law during the period, as priority was given not to avoiding atrocities on the battlefield but military unity.

Subsequently, a slight change was added to the second volume of Oppenheim's Treatise on International Law. The second volume of Oppenheim's Treatise also upheld the doctrine of *respondeat superior* but Oppenheim mentioned a possibility of subordinates' punishment but at the same time he put the condition that they can only be 'war criminals' with the hands of 'the enemy'.² In practice, it is easy to assume that his home country would never have punished him for this as long as it was working for the government interests.

The doctrine of *respondeat superior* is apparently based on the policy that the interest of military discipline requires immediate obedience without any hesitation, as the ultimate duty of soldiers is to obey the order. It is not difficult to assume that if he defies the superior order, violating military law of his country, he will be liable for his disobedience accordingly.

Under the doctrine only the superior officer would be held responsible for his subordinate's commission, which means that subordinates are automata as if they were tools. After World War I, this doctrine had a great influence on military law in many states. In

¹ 2 Oppenheim, International Law, 1st ed., (1906), pp 264-265.

² 2 Oppenheim, International Law, 2nd., (1912), p. 310.

Britain, the British Manual of Military Law (1914), No. 443, as drafted by Professor Oppenheim, precisely followed own view:

[m]embers of 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....³

Following the British practice, the US Rules of Land Warfare (1940) promulgated an identical provision.⁴ Oppenheim's doctrine had a great influence on military regulations of the world up to 1940s.⁵ However, after World War II, the doctrine of *respondeat superior* apparently started to lose ground, as the international community began to realize that the doctrine did not prevent soldiers' committing atrocities against civilians and sometimes soldiers. The Allied countries started to realize the need to implicate rules and principles to punish followed soldiers caused atrocities in the 1940s, especially when it became apparent that they were going to win the war.

The doctrine of *respondeat superior* seems to be adequate in that careful consideration is given to soldiers in a dilemma under superior control. However, it became a cause of disasters during World War II, as the doctrine could not break the chain of command on the battlefield even when the order was apparently illegal. Though this doctrine was probably the major approach to superior orders before World War I, it completely had lost ground since the war and none of the scholars continued to support the view.

³ Professor Oppenheim drafted the provision on the British Manual of Military Law on superior orders issued in 1914. Lippman, Matthew R., 'Humanitarian Law: The Development and Scope of the Superior Orders Defence', [2001] 20 Penn State International Law Review, p. 159 (cited in this paper "Lippman Penn")

⁴ UNITED STATES DEPT OF THE ARMY, FIELD MANUAL 27-10 § 347 (1940)

⁵ Bassiuni, M. Cherif, *Crime Against Humanity in International Criminal Law*, 1st ed., Martinus Nijhoff, 1998, p 374. (cited in this paper as "Bassiouni Humanity")

b. Position B: the position of *Absolute Liability*

Position B is called the doctrine of *absolute liability*. If an illegal order is issued by a superior, the subordinate must refuse to execute, and there must be no punishment of his decision. If he chooses to follow, he may do so at his own risk, which means he might be punished by court in the future for violation of international law, and he will not be allowed to use superior order as a defence there. The rationale behind the *absolute liability* doctrine is that a soldier has free will and is not a robot, thus, he has to analyse the situation on the battlefield by himself. This ‘think for themselves’ principle became a subject of discussion not only for the effectiveness of the military unit but also for the unit’s safety itself.⁶

The international community supported the principle in order to deal with and effectively punish subordinates who carried out their superiors’ orders at Nuremberg and Tokyo. The Nuremberg Charter provided the doctrine of *absolute liability*, although it was probably retroactive law.⁷ Subsequently, this doctrine became a part of the Nuremberg principles.⁸

The theory was generally accepted in the 1950s because of the disasters caused by the Axis countries. This doctrine apparently put a soldier in an unstable position where he always had to question the legality of the order. Regardless of the fact that an order was issued or not, the subordinate who committed a war crime become liable for his action under this doctrine, as his primary duty is to keep the fundamental rules of international law. The doctrine seems to be unrealistic in terms of effectiveness of military command. It should be

⁶ Sadat, Leila Nadya, *the International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Transnational Publishers, Inc., 2002, p. 218.

⁷ Bassiouni mentioned the fairness of the trials in his forward to Professor Sadat’s book, stating that ‘[s]ome called it “victor’s vengeance,” even though those who were prosecuted at the Nuremberg and Tokyo trials were war criminals. The question is not whether they were fairly tried, but whether the system as a whole is fair when it excludes violators on the victors’ side.’ Ibid.

⁸ See (1950) ii *Yearbook of the ILC* 374-378; There have been many lingering questions about the *ex post facto* endorsement from the perspective of international law. Kittichaisaree, Kriangsak, *International Criminal Law*, Oxford University Press, 2001, p 20. (cited in this paper “Kittichaisaree”)

noted that the overall reason for acceptance of this approach was the apparent need to try war criminals during World War II, however, it did not take into future combat possibilities. The fact that there was not a world war for half a century did not hinder the development of this view. It took several decades for the international community to realize the problematics of this approach. Careful consideration has to be given to the fact that the theory was devised for the purpose of trying high ranking officials at Nuremberg and Tokyo. With the advent of modern natural law, the quest of legality and lawfulness seems to have superseded the importance of prohibition of *ex post facto* law. The ideas originated from natural law are now considered as *jus cogens*, which means peremptory norms of international law that must not be violated by any state. Under the doctrine even a state cannot make a treaty against the peremptory norms.

c. Position C: Intermediate Positions

The former doctrines have disadvantages; the doctrine of *respondeat superior* was given up by the necessity and importance of trying international criminals during World War II, and the doctrine of *absolute liability* can be deemed unreasonable as it does not meet the demands of military discipline.

Intermediate approaches are of validity in this comparison analysis. Intermediate positions are divided into two doctrines; (1) ‘moral choice test’, which allows soldiers to use superior order as a defence when moral choice was impossible, (2) the position of ‘manifest illegality principle’, which may assert the defence of obedience of superior orders, but not if the subordinate recognized, or should have recognized, the apparent illegality of the order.

The former is a subjective test, in which commission of a crime following a superior order can be a defence when ‘moral choice was in fact possible’⁹. The moral choice test was firstly seen in the International Military Tribunal at Nuremberg as follows.

⁹ 22 Trial of the Major War Criminals Before the International Military Tribunal (1946) at 42.

That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test... is not the existence of the order, but whether moral choice was in fact possible.¹⁰

The moral choice test is based on a subjective criterion, so theoretically it can be applied to any situation. Strictly speaking, a moral choice is always possible as long as he is able to say no. Hence, even where he is threatened, it can be argued that a moral choice is possible. From this perspective, the expression 'whether moral choice was in fact possible' would be considered as vague wording, for there is a possibility that the moral choice test will be used arbitrarily.

A more concise view would be the latter test 'manifest illegality principle', in which commission of a crime following a superior order may be a defence only where the person was under obligation to obey the orders, and the accused did not know that the order was unlawful. The rationale behind this is based on the intelligence of the reasonable person. A subordinate should incur responsibility for his act if he commits a crime pursuant to a manifestly illegal order, nevertheless he should be free from responsibility if he commits an offence in accordance with an order which is not manifestly illegal.¹¹ To apply this test, the order has to be 'obvious to any person of ordinary understanding'.¹² According to this objective principle, obedience to superior order is allowed as a defence only where orders are not so manifestly illegal that subordinates did not know or could not have known them to be unlawful.¹³ The objective would be to eliminate any possibility about what he should do in

¹⁰ Ibid.

¹¹ Dinstein, Yoram, *The Defence of 'Obedience to Superior Orders' in International Law*, Sijthoff, 1965, pp.26-27. (cited in this paper "Dinstein")

¹² Lauterpacht, 'War Crimes', p.73.

¹³ Quoted in Bakker, Jeanne L., 'the Defense of Obedience to Superior Orders: the Mens Rea Requirement', [1989] 17 AM J CRIM Law 66. (cited in this paper "Bakker")

any situation of war.

In *Chief Military Prosecutor v. Malinki and Others* (the *Kaffr Qassem* case) the Military Court of Appeal of Israel upheld the comments of the District Military Court of the Central District as follows:

[t]he identifying mark of ‘manifestly unlawful’ order must wave like a black flag above the order given, as a warning saying ‘forbidden’...an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces the eye and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of ‘manifest’ illegality required in order to annul the soldier’s duty to obey and render him criminally responsible for his actions.¹⁴

The Court adopted the manifest illegality principle, stating that ‘a certain and obvious unlawfulness’ should be prevented, and confirmed the guilty verdict delivered by the District Court.

In the 1990s, neither the Statutes of the ICTY and ICTR nor the Commentary addresses the principle of *manifest illegality*. It can be said that the drafters of the Statutes made the best effort to follow the legacy of Nuremberg and were in favour of the doctrine of *absolute liability*.

Interestingly, the International Criminal Court retreats from *absolute liability* principle and newly upholds the *manifest illegality* principle. Article 33 of the Rome Statute of the International Criminal Court provides that a subordinates committed a crime pursuant to superior orders or government order will not be able to defence unless; (a) the person was

¹⁴ Appeal 279-283/58, 44 *Psakim (judgments of the District Courts of Israel)* 362; quoted in Green, L.C., ‘The Defence of Superior Orders in the Modern Law of Armed Conflict’, [1993] *Alberta Law Review*, pp. 323-333. (cited in this paper “Green Modern”)

under a legal obligation to obey orders of the Government or the superior in question; (b) the person did not know that the order was unlawful; (c) the order was not manifestly unlawful. Article 33(2) eliminates the possibility of defence concerning superior orders of genocide or crimes against humanity. Article 33 of the ICC Statute shows leniency to subordinates to some extent as it uses the *manifest illegality* principle. According to the doctrine commission of a crime following a superior order can be a defence only where the person was under an obligation to obey the orders, and the accused did not know that the order was unlawful.

The intermediate position seems to be appropriate from the view of international criminal law. Leniency is to some extent given to fighting soldiers under superiors' command, but also consideration is given to the risk of their going to commit heinous crimes. The ICC's position sets limits to the leniency putting the condition that an order was not manifestly unlawful, which would be proportional to the idea of *mens rea*. Therefore, in the case that the order is not manifestly unlawful, the subordinate should be able to raise a superior order plea, as it sometimes negates the *mens rea* of subordinates.

Possible criticism of the *manifest illegality* doctrine would be that the definition of manifest illegality is still not known. Article 33 (2) of the ICC Statute gives two examples; genocide and crime against humanity, though it is not exhaustive. Article 33 of the ICC Statute should have made exhaustive exceptions to give concrete understanding to soldiers. According to the provision, international crimes other than genocide and crime against humanity may or may not be manifestly illegal. The definition of the manifest illegality will depend on judges, which might cause an arbitrary use of a superior order defence. It has to be remembered that fighting soldiers on the battlefield can kill or injure enemy soldiers legitimately, which is not illegitimate under international law at all. There are not distinct differences between licence to kill anyone and the right to kill or injure legitimately. The manifest illegality principle has to give a guideline to the subordinates, the role of which seems to be still unaccomplished.

3. Mens Rea Requirement

Crime in international law as well as any domestic crime, is composed of two elements; the performance of an act forbidden by law, and the state of a guilty or culpable condition of mind.¹⁵ The former is called *actus reus* and the latter is called *mens rea*, both of which must be present to secure conviction.¹⁶ The *mens rea* a guilty state of mind is a prerequisite for securing conviction of a criminal since it is the mental element that causes the *actus reus* of each crime.

The definition of guilty mind depends on the nature of crime.¹⁷ Usually, it is defined in the relevant treaty or can be found in general principles of international tribunals. The widely accepted understanding of *mens rea* could probably be inferred from the ICC Statute. According to Article 30 of the ICC Statute, a person can be liable ‘if the material elements are committed with intent and knowledge.’¹⁸ Intent represents that a person ‘means to engage in the conduct’ and ‘to cause that consequence’ or he is aware that the consequence will occur. Knowledge represents ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events’.

‘Knowledge may not be presumed’¹⁹ as it is a fundamental element of criminalization. However, it ‘may be proved through either direct or circumstantial evidence’.²⁰ In order to prove the *mens rea* it is not necessary to obtain a statement that he had prior knowledge. It is generally accepted that international criminal law does not allow a court to charge someone if it did not have guilty mind in the course of criminal behaviour. In this context, guilty mind can include recklessness, and negligence, together with ordinary

¹⁵ See Greenspan, Morris, *The Modern Law of Land Warfare*, University of California Press, p.477.(cited in this paper “Greenspan”)

¹⁶ Bakker, n13 above 56.

¹⁷ Greenspan n15 above 477.

¹⁸ Article 30 of the Rome Statute of International Criminal Court.

¹⁹ *Prosecutor v. Blaskic*, IT-95-14, 3 March 2000, Para 307.

²⁰ *Ibid.*

intention as their mental situation is tantamount to actual knowledge.

When an order is given to soldiers, the issue of *mens rea* would always be debatable as the subordinates assume that the superior's orders are legitimate. It is very likely that a subordinate who executed the order did not know it was illegal regardless of whether ignorance was the subordinate's fault or not.

Especially after World War II, the principles of current international criminal law do not precisely correspond with the concept of *mens rea*. The international community was not so concerned about this issue when they were trying soldiers, commanders and political leaders of the Axis countries. Under the classic doctrine of *respondeat superior* soldiers are automatically acquitted so it is highly likely that soldiers who executed the order do not need to discuss *mens rea* issues. It is possible to say that the theory validates a subordinate's execution even when he knew that the order was illegal. Under the *absolute liability* principle, on the contrary, whether or not he knew the order was illegal does not matter, because he is not considered as 'automaton'. This was the accepted approach after World War II. This doctrine does not allow the subordinate to use the situation for acquittal even if the soldier did not know the order was illegal. The moral choice principle is interlinked with the *mens rea* as defence can be available as long as he did not have the required *mens rea*. Surprisingly, the most accepted *manifest illegality* principle is not perfectly consistent with the *mens rea*, because superior orders cannot be a defence when the order is manifestly illegal.

a. Mistake of fact and Law

'Mistake of fact' and 'mistake of law' are fundamentally different. 'Mistake of fact' is on the existence of a material element or fact, and 'mistake of law' does not deal with a material element or fact. 'Mistake of fact' can be justified if it negates the mental element but 'mistake of law' just deals with legal aspect of a crime, which is irrelevant to material prerequisites for justification or excuse. As the saying goes, ignorance of law is no excuse.

The rationale behind is that ‘the legal assignment to a certain category or the precise apprehension of a legal definition is not ‘the job’ of the perpetrator but of the person who has to apply the law’.²¹ It can be said that law imputes all the knowledge of international criminal law to all persons, so wilful blindness will not be a basis for exculpation.

Persons mistaken about pure facts should be excluded because they did not have the required *mens rea* and apparently would not have done the act if the facts had been known to them. The prohibition of using ignorance of law pleas would not be applied here as law does not fall within fact. But persons who are mistaken about pure legal elements or legal and factual elements should be considered differently according to the case. The principle of ignorance of law does not directly apply to superior order cases, as soldiers under a commander tend to believe the order of the superior is legitimate. International courts have taken different views reflecting social needs.

Under the *respondeat superior* doctrine, the subordinate might easily raise a mistake or ignorant of law defence. Under this doctrine obedience to superior orders is a defence to prosecution. According to the doctrine, ‘[a]llowing obedience to superior orders as an absolute defence does not eliminate criminal responsibility; instead, it shifts the locus upward to the person who issued the illegal orders’.²² The rationale behind this approach is that soldiers cannot judge the legality or illegality of the orders. However, it would be extreme to support the view even when he or she knew that the order was illegal and still followed the orders. In these cases, he or she is not entitled to have a mistake of law defence because he or she apparently had the criminal intent that the order was illegal.

On the contrary, the *absolute liability* doctrine never justifies unlawful acts by superior orders regardless whether soldier commits a crime because of mistake of law or ignorance of law. The proponents of the *absolute liability* doctrine take another extreme position that obedience to superior orders is irrelevant to the determination of criminal

²¹ Commentary on the Rome Statute of the International Criminal Court, Triffterer, Otto (ed.), Nomos Verlagsgesellschaft Baden-Baden, 1999, p. 564 (cited in this paper “Triffterer”)

²² Bakker, n13 above 57.

culpability. According to the doctrine, obedience to superior orders would not be a defence, which means that a defence based on the lack of the required *mens rea* is not accepted as an exception. However, it should be noted that mistake of law can be taken into account in the case of mitigating subordinate's responsibility but cannot diminish responsibility from the subordinate.

The *absolute liability* doctrine has a major flaw that it does not deal with *mens rea*. This doctrine forges that international law gives a license to kill soldiers legitimately on the battlefield. Under this doctrine superior order pleas would automatically be overruled even when a subordinate's *mens rea* is lacking by superior orders. The *absolute liability* doctrine has to be compromised to some extent based on the element of *mens rea* from the perspective of principles of international criminal law.

As an intermediate position, the moral choice test gives soldiers a chance to free them from responsibility. As this is a subjective test, the possibility of application is unlimited and so mistake of law or ignorance of law would be also understood on a subjective level. If they misunderstand something illegal as legal, there is no chance of a moral choice, so it is likely that they would be acquitted. At the same time, the moral choice test can be very harsh. The moral choice is theoretically possible even when a soldier is under death threat as long as the soldier has conscience. If so, all soldiers who had a choice not to obey orders would be charged with that. This is an extreme consequence, thus the idea of the moral choice as such would not be appropriate.

On the contrary, the *manifest illegality* principle seems to give an objective compromise. Superior orders can be a defence 'only where orders are not so manifestly illegal that subordinates did not know or could not have known them to be unlawful'.²³ The criteria is based on 'the intelligence of the reasonable man'.²⁴

According to the *manifestly illegal* principle, a mistake of law defence would sometimes be acceptable. If the superior order is manifestly illegal like genocide, crime

²³ Bakker n13 above 66.

²⁴ Dinstein n 10 above 27.

against humanity, he could not be acquitted however seriously he believed the order was legal as it stands on ‘the intelligence of the reasonable man’. If the order is not manifestly illegal and he believed that was following a legal order, he would be acquitted. Being compromised in favour of soldiers, the *manifest illegality* principle gives relatively an appropriate situation to soldiers though it doesn’t reflect *mens rea* perfectly.

b. Duress and Superior Orders

The defence of duress can be raised together with the plea of superior orders, however different they are fundamentally. The defence of superior order is based on ignorance of the illegality about the illegal order issued. The defence of duress is based on impaired free will at the time of commission to form the required *mens rea*.²⁵ Superior orders are issued by superiors or commanders but duress is not limited to these people. Superior orders can be issued without any threats to life or limb as long as there is a superior-subordinate relationship, which means the soldier has an obligation to follow orders of the superiors.²⁶ Under the principles of current international criminal law, if the superior order is manifestly illegal under international law, or the subordinate has a moral choice not to carry out the order, he would probably be under an obligation to refuse it. If he does not defy the order, he would be prosecuted for the crime he executed.

The plea of duress can be raised by anyone regardless of their position. It is independent of superior orders in nature. Civilians without any superior-subordinate relationship can raise the plea of duress if they are threatened seriously though superior order defence can be raised only by soldiers. In some extreme cases, even a superior officer can raise the plea of duress when subordinates utter threats of violence.²⁷ The plea of duress can also be raised when civilians threaten superior officers.

²⁵ See Knoop, Geert-Jan G.J., ‘Defenses in Contemporary International Criminal Law’, Transnational Publishers, 2001, p.53. (cited in this paper “Knoops”)

²⁶ Cassese, Antonio, *International Criminal Law*, Oxford University Press, 2003, p.246.

²⁷ See Ibid.

In case of mitigation of sentence, either of the terms can be applied. The notion of duress is stronger terminology than a superior order plea, as duress will not leave a choice to a defendant and can eliminate the defendant's criminal intent completely. Therefore, if a duress defence is allowed, a superior order plea is probably not used for mitigation. The *Bralo* case of the ICTY held that '[d]uress and superior orders are separate, but related, concepts and either may count in mitigation of sentence'.²⁸ Indeed, a number of superior order cases include duress pleas, too.²⁹

The rationale of the defence of duress is that the person under duress has no *mens rea* and apparently would not have done it without threatening. The responsibility on this view rests with the person who exercised the compulsion not with the person who had to carry out. It can be said that the person who used compulsion used other persons as a means to commit a crime. Therefore, criticizing the executioner under duress seems odd if the person was unable to reject it.

In *US v. von Leeb et al*, the court showed an objective criterion of a reasonable person and held:

[t]o establish the defence of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.³⁰

In *Ohlendorf* and others (the *Einsatzgruppen* case), the United States Military Tribunal II at Nuremberg held that:

Let it be said at once that there is no law which requires that an innocent man must forfeit

²⁸ *Prosecutor v. Bralo*, IT-95-17-S, 7 December 2005, Para. 53.

²⁹ *Ibid*; *Prosecutor v. Cesic*, IT-95-10/1-S, 11 March 2004, para. 95; *Prosecutor v. Jelusic*, IT-95-10-T, 14 December 1999, para. 15.

³⁰ *United States v. von Leeb*, 10 T.W.C.1, 11 T.W.C. 509 (1948)

his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever. Nor need the peril be that imminent in order to escape punishment. But were any of the defendants coerced into killing Jews under the threat to be killed themselves if they failed in their homicidal mission? The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order.³¹ The tribunal also added a proportionality principle and held that ‘the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order’³².

It is insufficient to raise duress as a defence where the superior would not want the soldier to disobey their order as duress in this case is not serious enough.³³ It is required that there is an honest belief of an immediate threat and physical harm. The US department of Army has the similar view that ‘the defendant must have an honest belief that he is to be subjected to a serious wrong if he does not carry out the act in question. Furthermore, this threatened harm must be more serious than the harm which will result to others from the act to be performed’.³⁴

As to recent cases, in *Erdemovic*, the majority opinion of the Appeals Chamber of the ICTY held that ‘duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings’.³⁵ The Appeals Chamber erroneously eliminated the possibility of duress defence in cases of war crimes and crimes against humanity. The issue was whether he was able to make a moral choice without examining the context of the order. Either way criteria of proportionality,

³¹ In *Ohlendorf and others*, United States Military Tribunal at Nuremberg, April 10, 1948, 15 I.L.R. 656 (1948). Quoted in International Criminal Law Cases and Materials (2nd ed., Bassiouni ed.), Carolina Academic Press, p.106 (cited in this paper “Bassiouni Cases”)

³² Ibid., p.106.

³³ Paust, Jordan J., ‘My Lai and Vietnam: Norms, Myths and Leader Responsibility’, (1972) 57 Military Law Review, p.170

³⁴ U.S. Dep’t of Army, II International Law, (1962) p.247-248. Quoted in Bassiouni Cases n31 above 123.

³⁵ *Prosecutor v. Erdemovic*, No.IT-96-22-Y, (7 Oct. 1997) (Judgment of the Appeals Chamber), available at (<http://www.un.org/icty/erdemovic>).

imminence, and reasonableness would be examined. There is no need to exclude the possibility of war crimes and crimes against humanity as they can be a variety of crimes, from a killing to a massacre. The question remains whether the person was forced to kill by having a gun put to his head unless he commits a war crime or crime against humanity. The decision of the ICTY does not give a solution to this situation.

A more appropriate view would be the ICC approach, Article 31(1)(d) of which takes a different approach and states that:

[t]he conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control.³⁶

In spite of many proposals and drafts³⁷ that tried to distinguish between necessity and duress, Article 31(1)(d) puts them together finally as grounds for excluding criminal responsibility. Duress can be a defence if the action in question meets the criteria that Article 31(1)(d) requires. Only 'imminent death' or 'continuing or imminent serious bodily harm' can be seen as duress together with reasonableness and proportionality. The Statute seems to have compromised on a proportionality criterion, which is based on a subjective situation in the accused's mind. This means that the person does not need to avoid the greater harm by his conduct in reality, but at least he needs to intend to do so in his mind.³⁸

³⁶ Article 31(1)(d) of the ICC Statute.

³⁷ Triffterer n21 above 550.

³⁸ See Triffterer n21 above 552.

c. Necessity and Superior Orders

Firstly the differences between necessity and military necessity have to be clearly differentiated. Military necessity means a legal justification for targeting military objectives to win the battle in wartime, by which sometimes the harm is caused to civilians or civilian property. Article 23 (g) of the Hague Convention (IV) Respecting the Laws and Customs of War on Land does authorise to ‘destroy or seize the enemy’s property’³⁹ if it is demanded by ‘the necessity of war’. Also, the Nuremberg Trial convicted German war criminals for ‘wanton destruction of cities, towns or villages, or devastation not justified by military necessity.’⁴⁰ The use of military necessity⁴¹ should strictly be limited from the following points; 1) the purpose of an attack must be limited to military victory; 2) the attack must not violate the laws of war; 3) it should not cause problems to civilians and civilians objects; 4) any cause of damage will have to be compensated as soon as the war is over.

On the contrary, there is another notion of necessity, which is not limited to war situations. A person can raise a necessity at the time of commission where he was under ‘threats to life and limb emanating from objective circumstances and not from others’. A necessity can be a recognized defence in most civil and common law systems.⁴² In that case, a person should not be liable for his action as he was not able to make a rational decision, which means that he did so ‘to avoid an evil both serious and irreparable’; ‘that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil’.⁴³

In *Flick and Weiss*, the US Military Tribunal deprived Flick and Weiss of the defence of necessity because they took active steps ‘were not taken as a result of compulsion or fear, but admittedly for the purpose of keeping the plant as near capacity production as possible’.⁴⁴

³⁹ Article 23 (g) of the Hague Convention (IV) Respecting the Laws and Customs of War on Land, and Annex, prohibits to ‘destroy or seize the enemy’s property, unless such destruction or seize be imperatively demanded by the necessities of war’.

⁴⁰ *Nuremberg Judgment*, p.174. Quoted in Greenspan n15 above 279.

⁴¹ See *Prosecutor v Naletilic*, IT-98-34-T, 31 March 2003, para. 578.

⁴² See Knoops n25 above 94.

⁴³ *Warton’s Criminal Law*, I, chap.iii (vii), par. 126. Quoted in Greenspan n15 above 496.

⁴⁴ The *Flick Case*, TWC, VI, 1202. Quoted in *Ibid*, p. 497.

In the *High Command* Case, the court stated a criterion of necessity defence as follows:

[t]o establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent peril as to deprive him of freedom to chose the right and refrain from the wrong”.⁴⁵

With regards to the inter-relation between necessity and superior orders, the defence of superior orders is different from necessity in that the necessity defence does not necessarily need an order from a superior. Necessity can be raised where the action taken was to ‘avoid an evil’, there was no alternative, and the remedy taken does not go over the evil. The superior order defence does not apply the said rules.

Duress and necessity are very similar in that the person taken an action without criminal intent in his mind in both situations.⁴⁶ Thus, where he was absolutely forced to carry out the action under duress or in necessity, it can be said that he did it but had no criminal intent. The difference would be that ‘necessity arises out of natural causes’ where ‘a person in a condition of danger’, whereas ‘duress is the pressure brought to bear on a person by another person’.⁴⁷

4. Civilians and superior orders

The concept punishing civilian criminals under the notion of international criminal law has started World War II trials. The provisions of the ICC⁴⁸, ICTR⁴⁹, and ICTY⁵⁰ apparently

⁴⁵ The *High Command* Case, TWC, XI, 509. Quoted in Ibid, pp.497-498.

⁴⁶ See Ibid, p.496.

⁴⁷ Kittichaisaree note 7 above 273.

⁴⁸ Article 27 and 28 of the ICC Statute.

⁴⁹ The ICTY Statute applies to natural persons regardless of their position. See Article 6 and 7 of the ICTY Statute.

include civilians. As regards to superior orders issues, whether just a civilian would be entitled to use superior order as a defence is uncertain. The relevant provision on the ICC provides that you must have a legal obligation to obey orders⁵¹ but it does not say that civilians are entitled to raise a defence of superior orders. If there is no relationship between the accused and the person who issued orders to the accused, the defence of superior order will not be available since no obligation can be found between them. It is probably agreed that there has to be a link between the actor and the superior because the rationale of the superior order defence is that the accused working under a superior is in a position to follow orders under heavy burden. Therefore the accused may not be the right person to judge if the order as such is illegal or not.

In *Erdemovic*, the Trial Chamber did not accept the superior order defence and held that leniency should be shown to a person of 'a low rank of the military or civilian hierarchy'.⁵² As the Chamber did not accept superior orders as a defence for any reasons, there is no doubt that civilian subordinates will not be acquitted unless his situation falls within duress or other excusable defences. However, the Chamber showed that leniency should be given to subordinate of a civilian hierarchy, which means that civilian subordinates relatively get a lesser sentence than military subordinates.

In origin, the justification behind the defence of superior orders is that soldiers in the field are required to follow orders in extreme circumstances, where they cannot easily judge which order is legitimate. It is easy to see that civilians are not required to follow any orders in an armed conflict situation unless there is a special contract. For this reason the author takes the view that the applicability of the defence of superior orders to civilians should be strictly limited. No international statute clearly mentions availability of superior order defences to civilians. Fortunately, there is no need to worry about civilian superior order

⁵⁰ The ICTR Statute is very identical in terms of individual responsibility. Article 5 and 6 of the ICTY Statute.

⁵¹ Article 33(1)(a) states '[t]he person was under a legal obligation to obey orders of the Government or the superior in question'.

⁵² *Prosecutor v Erdemovic*, IT-96-22-T, para.10.

pleas since illegal orders like killing civilians outside of battlefield for ordinary civilians would be clearly illegal. In the case of civilians, priority should be given to examining whether the accused had the required *mens rea* at the time of execution.

5. Historical Background of the defence of superior orders

Superior order pleas have been seen in domestic courts for several hundred years, the position of each state has varied. The first recorded use of a superior order plea was in 1474,⁵³ when Sir Peter von Hagenbach, Governor of Breisach, was charged with atrocities committed against civilians in Breisach, Austria.⁵⁴ The defendant raised the plea of superior orders against murder, arson, and rape. Rejecting his plea, the tribunal convicted him of murder, rape, perjury, and other crimes against the laws of God and man, which would be called war crimes or crime against humanity now. As a result, Hagenbach was stripped of the knighthood and executed accordingly. This case is considered as a precedent for individual responsibility, though the plea of obedience as such was rejected. However, it is not appropriate to recognize this case from the perspective of international law since the court was of domestic character.⁵⁵

Another historical case of a superior orders plea was the guard commander's case in 1661, where Captain Axtell, the guard commander, was tried at the execution of Charles I.⁵⁶ In the guard commander's case, the English court held:

The captain justified all that he did was a soldier, by the command of his superior officer, whom he must obey or die. It was resolved that was no excuse, for his

⁵³ Schwarzenberger first indicated this trial. Dinstein n 10 above 123

⁵⁴ Discussed in T. L. H. McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Regime', in T. L. H. McCormack and G. J. Simpson, *The Law of War Crimes: National and International Approaches*, Kluwer, 1997, 31-9 (cited in this paper "McCormack").

⁵⁵ 28 judges were from the confederate entities of the Holy Roman Empire.

⁵⁶ *Axtell's case* (1661), Kelying 13, 84 E.R. 1055 at 1060.

superior was a traitor and all who joined with him in that act were traitors and did by that, approve the treason; and where the command is traitorous, then the obedience to that command is also traitorous.⁵⁷

Apparently, the attempt of the superior orders plea failed, and individual responsibility of the defendant was established based on the rationale that ‘where command is traitorous, then the obedience to that command is also traitorous’. This is based on the idea that the subordinate should have rejected the illegal order. If so, it is interesting to see that England did not have unconditional obedience at this period. It is likely that the court did not agree to the doctrine of *respondeat superior*, which means the subordinate did not need to follow unlawful orders.

In the United States, a plea of superior orders was raised during the War of 1812. Bevens was standing guard on the ship *the Independence* in Boston Harbor. A pedestrian insulted the marine, and then he killed this person by his bayonet. Bevens was charged with murder. He raised a superior order plea, stating that the marines on *Independence* had been ordered to bayonet whomever showed them disrespect. However, Justice Joseph Story instructed the jury that such an order was illegal and void, and if given and carried out, both the superior and subordinate would be guilty of murder. Bevens was convicted in the court.⁵⁸ The court held the opinion that soldiers must not follow illegal orders, if so it was similar to the *absolute liability* principle. However, the next case showed a different view.

Another American case of a superior order plea is *United States v. Bright*, the court apparently addressed a lenient view on superior orders:

[i]n a state of open and public war, where military law prevails, and the peaceful voice of military law is drowned in the din of arms, great indulgences must necessarily be extended to the acts of subordinate officers done in obedience to the

⁵⁷ *Axtell's case* (1661), Kelying 13, 84 E.R. 1055 at 1060.

⁵⁸ *United States v. Bevens*, 24 F. Cas. 1138(C.C.D. Mass. 1816)(No.14,589) However, the Supreme Court reversed this decision on jurisdictional ground. *United States v. Bevens*, 16 U.S. (3 Wheat.) 336 (1818)

orders of their superiors. But even there the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against a charge of murder or trespass, in the regular judicial tribunals of this country.⁵⁹

In principle the court showed mercy to the defendant and said that it had to give special indulgences to subordinates on the battlefield. It seems that the court supported the *respondeat superior* doctrine at a glance. If it had stood on the *respondeat superior* doctrine, it would have freed him from any liability. However, it did not completely free the defendant from his responsibility, as the court held that the superior order to kill a civilian or to invade the sanctity of his house, or to deprive him of the property was not justified. It is assumed that the court was for an intermediate position.

During the Napoleonic Wars, Ensign Maxwell raised a superior order plea. He was charged with shooting and killing a French prisoner. The Scottish Court rejected the plea of superior orders as follows:

[i]f 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 given with reference to the circumstances in which he is placed; and thus every officer has a discretion to disobey orders against the known laws of the land.⁶⁰

Judging from the fact that the court held that soldiers had to have ‘a discretion to disobey orders’, it can be assumed that the court held that subordinates were not automatons and must not follow illegal orders. However, it was not clearly stated whether or not the court would have shown mercy to the defendant if it had not been an apparent illegal order.

⁵⁹ *United States v. Bright*, 24 F. Cas. 1232 (C.C.D. Pa. 1809) (No 14647)

⁶⁰ Quoted in Bassiouni, M. Cherif, *Crimes against Humanity in International Criminal Law*, (2nd ed.), Kluwer Law International, 1999, p. 465 (citedn in this paper “Bassiouni Crimes”)

During the Civil war, Francis Lieber, a German-born Columbia law School professor, wrote the Lieber Code, which was promulgated in 1863 as General Orders Number 100.⁶¹ The Code has 157 Articles, which had provisions concerning the treatment of prisoners and non-combatants, as well as direction on the pursuit of warfare's objectives. However, it did not answer the question of whether or not superior orders could be a legal defence against war crime prosecution. If this fact is taken as Lieber's intention excluding provisions of superior order issues, Lieber seems to have thought whether or not soldiers follow any kinds of superior orders was left to states' discretion.

In spite of the silence of the Lieber Code, Major Henry Wirz, the Swiss doctor and commandant of the Andersonville, raised the defence of superior orders in his trial.⁶² He was tried before a federal Military Commission for the maltreatment of the prisoners of war in his custody.

Wirz clearly raised a plea of superior orders saying he only followed the superior orders, therefore should not be held responsible. The prosecutor asserted against the claim above '[a] superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey such an order and distrou consequences result, the superior and the subordinate must answer for it...The conclusion is plain, that where such orders exist both are guilty'.⁶³

The commission held that Wirz was personally responsible for excessive acts and sentenced to death accordingly. As this case was dealt in a military trial, no formal judgment was delivered⁶⁴ but it is assumed that the judges shared the view expressed by the judge advocate, who stated that:

[a] superior Officer cannot order a subordinate to do an illegal act, and if a

⁶¹ See Wilner, Alan M., 'Superior Orders as a Defense to Violations of International Criminal Law', [1996] 26 Maryland Law Review 130.

⁶² Solis, Gar D., 'Obedience of Orders and the Law of War: Judicial Application in American Forums', [2000] 15 *Am. U. Int'L. L. Rev.* 492.

⁶³ *Ibid.* at 773-778

⁶⁴ Bassiouni, M. Cherif, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Bassiouni ed.), Transnational Publishers, Inc., 1996, p. 389.

subordinate obeys such an order and disastrous consequences result, both the superior and the subordinate must answer for it.⁶⁵

The commission did not consent to the possibility to free soldiers who followed illegal orders under obligation. Soldiers are treated as a rational human being. The *Wirz* case became the only case dealing with the defence of superior orders which arose during the Civil War.

In *Little v. Barreme*, Chief Justice John Marshall observed that ‘instructions cannot change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass’.⁶⁶ It can be assumed that John Marchall was of the opinion that superior officers’ orders would not justify any acts of subordinates.

In *Mitchell v. Harmony*, Chief Justice Roger Taney supported Chief Justice Marshall’s view that ‘it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify’.⁶⁷ Justice Roger’s view did not differ greatly as he said ‘the order of his superior...cannot justify’. It should be noted that the terminology ‘palliate’ would have been understood as mitigation.

However, Mr. Justice Story of the Supreme Court showed a lenient view on the plea of superior orders and held in its dicta, in *Martin v. Mott* in 1827 that:

[a] prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object...If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent

⁶⁵ H.R. Exec. Doc. No. 23, 40th Cong., 2d Sess. 764, 773 (1865) Quoted in Ibid.

⁶⁶ *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804)

⁶⁷ *Mitchell v. Harmony*, 54 U.S. (13 How) 115, 149 (1851)

proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation.⁶⁸

Contrary to the cases above, the dicta of the Supreme Court seems to have supported the *respondeat superior* approaches, based on the rationale that obeying superior orders is indispensable on the battlefield and that it could be an obstacle to maintain efficient and immediate command within a compliance system, if the subordinate starts to doubt the legality of the order. However, it is not clear the Supreme Court held the opinion that soldiers would not be held liable even when they knew that the order in question was illegal.

In the case of *R. v. Smith* during the Boer (South African) war, the defendant killed the internee following the order of his superior. However, Solomon J.P. stated:

[He] is responsible if he obeys an order that is not strictly legal is an extreme proposition which the Court cannot accept...Especially in time of war immediate obedience ...is required. ...I think it is a safe rule to lay down that if a soldier honestly believes that he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the order of his superior officer.⁶⁹

In *R. v. Smith* case, in its dictum it was held that the subordinate would be free from responsibility if (1) he believes he is doing his duty following the orders, (2) what he must or should have know is not manifestly illegal. Here the origin of the *manifestly illegal* doctrine is illustrated.

It is very interesting to note that the 1922 Treaty of Washington had Article III on the

⁶⁸ *Martin v. Mott*, 25 U.S. (12 Wheat.) 12, 19 (1827). Available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=25&invol=19>

⁶⁹ (1900), 17 S.C. at 561, 567-8 (Cape of Good Hope)

plea of superior orders but did not come into force because of the denial of French ratification.⁷⁰

The Signatory Powers, desiring to ensure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure service of any Power who shall violate any of those 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 as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

It is apparent that Article III of the 1922 Treaty was not following the doctrine of *respondeat superior*. However, the 1922 Treaty of Washington signed by the United States, Britain, France, Italy and Japan, showed that customs on the laws of war at an international level were still in dispute at this time. The fact that the efforts to try soldiers who followed superior orders finally failed by the French denial, indicates that the doctrine of *respondeat superior*, was still influential but may not have been internationally binding during 1922. This observation can be supported by Gawlik, a defence counsel for Naumann in the *Einsatzgruppen* case, who said ‘France especially declined to ratify this agreement just because of the provision in that the plea of superior orders should not be admissible’.⁷¹

6. The defence of superior orders in the Leipzig trial

During World War I it was debatable whether German combatants should be allowed

⁷⁰ Levie, Howard S., ‘The Rise and Fall of an Internationally Codified Denial of the Defence of Superior Orders’, [1991] 30 *Military Law & Law of War Review* 188 (cited in this paper “Levie”).

⁷¹ Quoted in Dinstein n 10 above 98. Dinstein also quotes Glueck’s argument that France declined to ratify the Washington Treaty “for a reason other than elimination of the defense of superior orders.” Ibid.

to rely on the defence of superior orders in court. Commander Sir Graham Bower of the Royal Navy endorsed Oppenheim's view and argued submarine officers and crews sinking vessels should not be held liable: 'the blame does not rest with them, but with their superiors'.⁷² On the contrary, Dr. Hugh Bellot emphasized that the British Manual of Military Law was an advisory statement of the law and lacked statutory force or authority in its presentation.⁷³ His point was that if we allowed the defence of superior order in this way, only the Head of the state would be liable for war crimes as a result it would end up charging no one. Despite criticisms, the arguments made during World War I did not carry a lot of weight, as in reality politics still prevailed over law. Bower's argument was correct in a sense that states needs were well considered. The Kaiser's argument was valid in that not many individuals were prosecuted because of superior order exemptions.

In theory Article 228⁷⁴ of the Treaty of Versailles⁷⁵ gave the Allied Powers the right to try German war criminals of the First World War and to put the German Government under an obligation to surrender the culprits.⁷⁶ However the German Government refused to comply with the demand,⁷⁷ so the Allied Powers accepted the proposal that the war criminals should be brought to trial before the German Supreme Court (Reichsgericht) in Leipzig.⁷⁸ As a result, only a handful of secondary offenders were tried and sentenced by this Court.

With regard to the German Emperor Kaiser Wilhelm II, the Netherlands actually refused to extradite him in order to stand trial for his conduct of waging war, stating that his crimes were 'political' in nature.⁷⁹ Though Germany resisted turning over those accused of

⁷² Quoted in Lippman, Matthew, (1996) 15 Dickson Journal of International Law, p. 4 (cited in this paper "Lippman Dickson").

⁷³ *Ibid.* pp. 160 to 161

⁷⁴ Article 228 of the Peace Treaty of Versailles provided that '[t]he German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war'.

⁷⁵ Bassiouni explains that the development of the Treaty of Versailles. See Bassiouni, M. Cherif, Combating Impunity for International Crimes, (2000) 71 *University of Colorado Law Review*, p.411

⁷⁶ Dinstein n 10 above pp.10-11.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Heads of State were no longer given immunity by Article 227 of the 1919 Treaty of Versailles. See Knoops n25 above7.

war crimes to the Allied Powers for prosecution, Germany as a result gave in to political pressure and brought thirty-three combatants to trial before the Penal Senate of the Reichsgericht (German Supreme Court) at Leipzig.

As to the defence of superior orders, the Treaty has no provision concerning the question of a superior orders defence.⁸⁰ Albeit, the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties did state in its Report that:

[c]ivil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility.⁸¹

The statement is very ambiguous in that the report did not clearly show the position of the Commission at this period, but it seems that the Commission at least thought that acquittal of executed soldiers was not automatic.

Three cases were identified at the Leipzig trial dealing with the defence of superior orders. In the *Llandovery Castle*⁸², the accused was tried at the German Reichsgericht in Leipzig for sinking a hospital ship and firing at the survivors on the torpedoed *Llandovery Castle*. The accused plead that they just followed the orders.⁸³ In rejecting their plea, the court held:

[The commander's] order does not free the accused from guilt. It is true that according to s. 47 of the [German] Military Penal Code, if the execution of an order in the ordinary course of duty involves such violation of the law as is punishable, the superior officer

⁸⁰ Green, L.C., *Superior Orders in National and International Law*, A.W. Sijthoff-Leyden, 1976, p. 265 (cited in this paper "Green")

⁸¹ Ibid.

⁸² See *Judgement in the Case Lieutenants Dithmar and Boldt* (the Hospital Ship "Llandovery Castle") (S.Ct. Leipzig, 2 June 1921), 16 AM J INTL L 708(1922)

⁸³ Dithmar and Boldt sought to rely on Patzig's orders. See Dinstein, n 10 above 15.

issuing such an order is alone responsible. According to paragraph 2, however, the subordinate obeying an order is liable to punishment, if it is known to him that the order of the superior involved the infringement of civil or military law. This applies to the case of the accused.

In *Llandovery Castle*, the court clearly rejected the plea of superior orders as the German Military Penal Code did not allow the plea of defence to use superior orders when he knew that the order was illegal. It can be said that the court was of the opinion that subordinates would not automatically be acquitted, which appears to go against the doctrine of *respondeat superior*.

In *Dover Castle*, Lieutenant Captain Karl Neumann, the commander of a German Submarine, was tried for torpedoing the *Dover Castle*. The defendant claimed that he acted following superior orders and believed that it was being used for military purposes. The Leipzig court held:

the subordinate is bound to obey the orders of his superiors...[w]hen the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible....According to §47 of the Military Penal Code No. 2, a subordinate who acts in conformity with orders is ...liable to punishment as an accomplice, when he knows that his superiors have ordered him to do acts which involve a civil or military crime or misdemeanor. There has been no case of this here....He was therefore of the opinion that the measures taken by the German Admiralty against enemy hospital were not contrary to international law, but were legitimate reprisals.⁸⁴

In *Dover Castle*, the accused was relieved from his responsibility because he did not know the

⁸⁴ See Judgement in the Case of Karl Neumann(the Hospital Ship “Dover Castle”)(S.Ct. Leipzig, 16 July 1921), [1922] 16 *AM. J. INT’L L.* 704.

order was illegal. Though this case dealt with a plea of superior orders, it was a case of ‘mistake of fact’ that negated the mental element of the accused, as he mistook the hospital ship for a military used ship. As a result, it was not conclusively known from the Leipzig trial cases alone whether that the accused should be relieved from his responsibility just because he followed the order.

The defence of superior orders was also invoked by Major Benno Crusius in the *Stenger* case. Crusius was charged with intentionally killing several French prisoners and wounded. Crusius raised the plea of superior orders based on the fact that he followed the order of General Karl Stenger, however Stenger and his subordinate testified that Crusius had misunderstood Stenger’s order. The court held that Crusius possessed a stellar moral and service record and suffered from a mental defect and convicted Crusius of killing through negligence and sentenced him to two years in prison.⁸⁵

The defence of superior order at Leipzig could be analysed as follows: 1) Ultimately, it was within the court’s discretion to assess what was excusable superior order; 2) Superior order was a defence unless the subordinate knew the order was illegal. If he had known, it couldn’t have been a defence; 3) The court upheld the position of Section 47 of the German Military Penal Code, which incurred liability of superiors. However, subordinates would have taken legal responsibility if he had known that the order was illegal; 4) The position of the Leipzig court is still unknown but it seems to have a preference for the doctrine of *respondeat superior* as it did not deny the principle of superior liability of Section 47 of the German Military Penal Code.

Dinstein analyzes the defence of superior orders at Leipzig and seems to conclude that the court used the manifest illegality principle as the auxiliary test.⁸⁶ Indeed the court may have been taking an intermediate position, but there is a possibility of the doctrine of *respondeat superior*. Section 47 of the German Military Penal Code reads ‘superior officer issuing such an order is alone responsible’. The position of the Code can be called the

⁸⁵ Quoted in Lippman Dickison n72 above 52.

⁸⁶ Dinstein n 10 above 19.

doctrine of *respondeat superior*. The problem is how the exception that subordinates followed orders knowing the order was illegal should be understood. It is not surprising that some states exclude superior order defence in the case of subordinates' awareness of illegality, but that does not mean the position is the manifest illegality principle. The manifest illegality principle may not perfectly coincide with the *mens rea*, as it does not allow defences if the order is manifestly illegal regardless of subordinates' awareness.

Dinstein also notes that the Reichsgericht in Leipzig applied principles of German national law not principles of international law.⁸⁷ At this stage, it could not be said that the decisions of the Leipzig trial truly reflected international law.⁸⁸

In summary, the German Supreme Court's judgments held that a subordinate may use the defence of superior orders under the circumstances that the subordinate believed that it was not illegal under international law, which would be called a revised *respondeat superior* doctrine. In other words, superior order cannot be a defence in which a subordinate carrying out superior orders was intentionally exceeding the scope of the command.⁸⁹ However, as the court judgements were solely by the German Supreme Court, it would be impossible to assume what was the position of the international community.

7. The defence of superior orders in military codes

Domestic law is not integrated into international law, therefore assumptions cannot be based on a state example. However, if a majority of states have similar provisions and there is a belief that the behaviour is done as it has legal obligation it may be possible to conclude that the principles in those provisions are part of customary international law. In terms of finding customary law applicable to international disputes, domestic cases and domestic laws are often used as evidence of state practice, which might eventually form

⁸⁷ Ibid.

⁸⁸ See Ibid, p.19-20.

⁸⁹ *Mattehw. Supra.* at 11 to 12.

customary international law. Although the criteria are debatable, it is acknowledged that ‘duration, consistency, repetition and generality’⁹⁰ are required. Examples of domestic laws cannot be ignored in that they might be recognized as custom if state practice and *opinio juris* are proved, which may be eventually considered as a source of international law.

a. The United Kingdom

In Britain the British military code of 1715 required combatants’ unconditional obedience, under which disobedience was punishable by death.⁹¹ Interestingly, a variation had been added to the British military code in 1749, which indicated that obedience was only applicable to lawful orders.⁹² Following this logic, it was possible that subordinates who followed illegal orders were punished along with the commander who issued the illegal order.

However, the 1914 edition of the Manual of Military Law seems to have reverted back to the early English rule of unconditional obedience. Paragraph 443 of the 1914 edition of the Manual of Military Law of Britain provided that:

[m]embers of armed forces who commit ...violations of the recognized rules of warfare as are ordered by their Government or their commander are not war criminals, and cannot, therefore, be punished by the enemy. He may punish the officials or commanders responsible for such order if they fall into his hands; but otherwise he may only resort to the other means of obtaining redress.⁹³

Professor Oppenheim created the doctrine of *respondeat superior*, according to which a subordinate who committed a crime following a superior order was acquitted automatically.

⁹⁰ Shaw, Malcolm N., International Law 5th edition, Cambridge, p. 72.

⁹¹ Quoted in Lippman Dickison n72 above 523.

⁹² See H. Lauterpacht, ‘The Law of Nations and the Punishment of War crimes’, [1944] 21 *Brit. Y.B. Int’l L.* 69, n.1.

⁹³ Paragraph 443 of the 1914 edition of the Manual of Military Law of Britain.

Thus, it can be said that in the UK during this period military discipline superseded the need to prevent atrocities on the battlefield.

In 1944, when the victory of the Allied powers was certain, the British Manual of Military Law was amended by the effort of Lauterpacht, paragraph 443 of which provided: ‘the fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of any individual belligerent commander does not deprive the act in question of its character of a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent.’⁹⁴ Paragraph 443 excluded unlawful order cases as a defence, which implies that those who followed illegal orders would have been punished. Although the criterion of illegal orders as such was not certain the *respondeat superior* doctrine was more than likely given up.

In addition, after World War II, the 1958 edition of the British Laws of War on Land completely ruled out the plea of superior orders as a defence, Article 627 of which provides that:

obedience to the order of a government or of a superior, whether military or civil, or to a national law or regulation, affords no defence to a charge of committing a war crime but may be considered in mitigation of punishment.⁹⁵

A note was attached, which stated that mitigating factors will not be recognized in the case of military commanders at the highest level of the military hierarchy.⁹⁶ This would have been a strict version of the *absolute liability* doctrine, as it did not allow mitigation even in the case of military commanders.

⁹⁴ Paragraph 443 of the revised 1944 British Manual of Military Law. Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume I, London, HMSO, 1949, p. 32. available at < <http://164.11.131.30/WCC/dostler.htm> > visited on 31st March 2007.

⁹⁵ *British Laws of War* (1958), Art. 627, p. 176

⁹⁶ Lewy, Guenter, ‘Superior Orders, Nuclear Warfare, and the Dictates of Conscience: The Dilemma of Military Obedience in the Atomic Age’, [1961] vol. LV *Political Science Review*, p 9

In 2005, the first conclusive statement to the Law of Armed Conflict since 1958 was published by UK Ministry of Defence on the *Manual of the Law of Armed Conflict*. In the Manual, it can be seen that the UK supports the view of the *manifest illegality* principle, as Article 33 of the ICC Statute is introduced as the fundamental rule to superior orders.⁹⁷ In addition, the Manual points out that possibilities of other defences such as lack of *mens rea*, mistake of fact, and duress.

In the early 18th century, unconditional obedience was required though the government made sure that the subordinate should follow only lawful orders in 1749. Because of Professor Oppenheim the stance of the UK became the doctrine of *respondeat superior*. Despite this, as other states did, Britain followed a trend of *absolute liability* doctrine after the end of World War II. Arguably, the current position of the UK is similar to the *manifest illegality* principle just as the ICC Statute.⁹⁸ It can be noted that courts could relieve him of criminal responsibility in some cases in the UK if certain circumstances are met. Other than that, any situation of superior orders would be considered as mitigating circumstances.

b. United States

The US position on superior order pleas has been similar to the UK, due to it previously being a colony of the UK. US military law should start from the Lieber Code promulgated in 1863, which did not refer to the issues of superior order defence. Lieber probably considered that the obedience was absolute.

In 1914, the US promulgated the Rules of Land Warfare⁹⁹, which provided that:

⁹⁷ The manual of the Law of Armed Conflict, UK Ministry of Defence, 2005, Oxford, P. 443.

⁹⁸ The Manual clearly states that '[a] serviceman is under a duty not to obey a manifestly unlawful order'. Ibid. p.444; the International Criminal Court Act 2001 does not mention superior order issues but this does not mean that the UK disagrees to Article 33. Considering the fact that the Manual explains Article 33 without reservation it can be evidence of the government stance.

⁹⁹ The 1914 Rules of Land Warfare is the first US manual concerning the law of war.

[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 fall¹⁰⁰

The 1914 Rules of Land Warfare exempting soldiers from prosecution was based on the doctrine of *respondeat superior*, which approach was reaffirmed in the 1934 Rules of Land Warfare, too.¹⁰¹

Under the influence of the doctrine of *respondeat superior*, the US Rules of Land Warfare (1940) provided:

[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, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.¹⁰²

The US Rules of Land Warfare (1940) stated that a subordinate would not be punished if he committed a crime pursuant of superior orders, which would have been the doctrine of *respondeat superior*. However, to deal with the pleas of superior orders in relation to the crimes of the Nazis, on 15 November 1944, one year prior to the Nuremberg trial, the revision

¹⁰⁰ Insko, James B., 'Defence of Superior Orders Before Military Commissions' [2003] 13 Duke Journal of Comparative and International Law 389. Page number is unknown. < <http://www.law.duke.edu/journals/djcil/articles/DJCIL13P389.HTM>> visited 25th March 2007 (cited in this paper "Insko").

¹⁰¹ Ibid.

¹⁰² UNITED STATES DEPT OF THE ARMY, FIELD MANUAL 27-10 § 347 (1940). Following the paragraph 347, § 354 stipulated that 'neglect or disobedience of orders or regulation' was considered 'offences'. There is no reference as to subordinates' responsibility in the case of following orders.

was attached to the United States Department of the Army Field Manual §345 (1), which provides that:

the fact that the acts complained of were done pursuant to the 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.¹⁰³

The reason being was that the US realized that having a provision on absolute acquittal of followed soldiers would not be helpful for charging Axis commanders and soldiers. From this time on, the United States Department of the Army Field Manual opened a possibility to deny a subordinate's plea of obedience pursuant to superior orders though the court can have much discretion as to culpability or mitigation of punishment. According to the terminology 'either by way of defense, or in mitigation of punishment' suggests that it was still possible that subordinates who followed illegal orders could be acquitted under certain circumstances. The position would not be called the *absolute liability* principle as it opened a possibility of a complete defence. At the same time, it can still be said that the United States did not supersede the doctrine of *respondeat superior*. Therefore, it may be suggested a compromised position.

In addition, in the 1956 United States Department of the Army Field Manual took a big step toward the rejection of the plea of superior orders, which provided that

[t]he 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 of 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

¹⁰³ The United States Department of the Army Field Manual § 345 (1).

know that the act ordered was unlawful... The fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.¹⁰⁴

The 1956 United States Department of the Army Field Manual considers the subordinates' execution followed by superior orders as mitigating circumstances in principle, and this has become the position of the United States after World War II.

In the US, there is no single criminal code as each state has its own criminal law, however the American Law Institute shows the most influential guideline Model Penal Code as follows: 'it is an affirmative defense that the actor, in engaging in conduct charged to constitute an offense, does no more than execute an order of his superior in the armed services that he does not know to be unlawful'.¹⁰⁵ Section 2.10 seems to give a subjective criterion to soldiers but in reality a number of states put the additional requirement the subordinates' mistake has to be reasonable.¹⁰⁶

In the United States, automatic acquittal of soldiers was probably guaranteed in the 1940s influenced by Professor Oppenheim's doctrine. However, in 1944 the US Military Manual started to revise the doctrine moderately, leaving a possibility of complete acquittal or mitigation. It was not until 1956 that the US started to accept the *absolute liability* principle and made it apparent that soldiers should obey only lawful orders. The position of American Law Institute would be considered a guideline so it cannot be evidence of the US position.

c. France

It should be noted that France had no military penal code until 1966.¹⁰⁷ Until this

¹⁰⁴ 1956 UNITED STATES DEPT OF THE ARMY, FIELD MANUAL § 509

¹⁰⁵ Model Penal Code 2.10 (1985) of the American Law Institute. Insc0, n100 above page number is unknown; according to Article 90, 91, and 92 of the Uniform Code of Military Justice, military personnel need to obey lawful orders of their superior officers, therefore it can be inferred that military personnel must disobey unlawful orders.

¹⁰⁶ Read Osiel's footnote 84 on page 963. Osiel, Mark J., 'Obeying Orders: Atrocity, Military Discipline, and the Law of War', [1998] 86 California Law Review 939, 963.

¹⁰⁷ Green n80 above 181.

period, the military forces were subject to the former French Penal Code devised in 1810¹⁰⁸, which did not mention the issues of the plea of superior orders except Article 190 referring to the position of public officials.¹⁰⁹ Article 190 of the former French Penal Code provided:

[t]he punishment of Articles 188 and 189 shall not be applicable to public officials or employees who have acted by superior orders, if within the scope of the superior's authority and of the nature they were bound to obey; in such cases the punishment above described shall be applicable only to the superior officers who have originated the order.¹¹⁰

Article 190 of the Code eliminated the responsibility of public officials or employees when they commit a crime following a superior order but put the responsibility on those who issued the order. According to Article 188 of the Code, any public official who actually ordered the intervention of public force against the execution of any law or order issued by legal authority was punished.¹¹¹ Article of 189 provided '[i]f such request or order has produced its effect, the punishment shall be maximum solitary confinement'.¹¹² It can be understood that those who committed crimes following superior orders would not have been punished, for the two Articles were not applicable to Article 190 therefore no punishment will be inflicted. This would have been the same as the doctrine of *respondeat superior*.

In addition, Article 327 of the former French Penal Code provided:

When the homicide, wounding or striking were ordered by law or lawfully

¹⁰⁸ The former French Penal Code was made in 1810, which experienced several amendments and supplements. See Mueller, Gerhard O. W., *the French Penal Code*, New York University, 1960, p.1 (cited in this paper "Muller")

¹⁰⁹ Green n80 above 181.

¹¹⁰ Mueller n108 above 79.

¹¹¹ Green n80 above 181.

¹¹² Mueller n108 above 79.

constituted authority, no felony or misdemeanor has been committed.¹¹³

Article 327 assumed that if subordinate committed a crime pursuant to a law or an order by authority it would be automatically exculpated.

However, the new Military Penal Code has made an exception to the rule.¹¹⁴ The Code ‘permits non-compliance with an order deemed to be unlawful and prescribes criminal liability on the part of a subordinate who carries out an order resulting in an illegal act’.¹¹⁵ The Code expressly made an exception that subordinate must not follow illegal orders. If fact, the Code was considered to have embodied former customs.¹¹⁶ The unconditional surrender in a military society was discarded, and with the exception that subordinates following the illegal order might be criminal, the doctrine of *respondeat superior* may have been abandoned.

Article 41 of the General Discipline Regulations provides that ‘he must obey his superior in everything which is ordered for the good of the service, for the carrying out of military regulations, for observance of the law and for the success of French arms’.¹¹⁷ At the same time, Article 21 of the Regulations ‘forbids a superior from ordering his subordinate to carry out any act which would result in the criminal liability of that subordinate’.¹¹⁸ According to the Articles, the regulation implies that a subordinate needs to obey only lawful orders in any manners, and if he does carry out any act pursuant to illegal orders, then it will incur criminal liability.

Article 3 of the French Ordinance of August 28, 1944, Concerning the Prosecution of War Criminals provided:

[l]aws, decrees or regulations issued by the enemy authorities, orders or permits

¹¹³ Ibid. p.113.

¹¹⁴ Green n80 above 182.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid. p. 183.

¹¹⁸ Ibid.

issued by these authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 327 of the *Code Penal*, but can only, in suitable cases be pleaded as an extenuating or exculpating circumstance.¹¹⁹

The Ordinance of 1944 partly negated the defence of superior orders though it was still possible such orders may be taken into account for exculpation or mitigation. The Ordinance denied superior order defences as justification allowing the court to consider the situation for mitigating or exculpating purposes, so it was a lenient intermediate position.

The former French Criminal Code was replaced by the new French Criminal Code in 1994, the purpose of which was to simplify ‘the language and providing clearer definition’.¹²⁰ Thus, no major reform can be seen.

Article 122-4 provides that ‘[a] person is not criminally liable who carries out an act ordered or authorised by legislative or regulatory provisions’.¹²¹ The next paragraph of the Article provides that ‘[a] person who carries out an act ordered by a legitimate authority is not criminally liable, except if this act is obviously illegal’.¹²² The two paragraphs of Article 122-4 have to be understood together. The word ‘a legitimate authority’ has various meanings but would not include a private authority.¹²³ The provision excludes a superior order defence in the case of obvious illegal orders, is called the *manifest illegality* principle. As to the criterion, the court will judge whether or not the act in question is obviously illegal. However, Article 213-4 clearly expresses that crime against humanity is obviously illegal, which will give the accused no change of exculpation.¹²⁴ It can be concluded that the

¹¹⁹ Law Reports of Trials of War Criminals, III, 96.

¹²⁰ Elliott, Catherine, *French Criminal Law*, Willan Publishing, 2001, p.10 (cited in this paper “Elliott”)

¹²¹ Ibid, p.211

¹²² Ibid, p.111

¹²³ Ibid, p.108.

¹²⁴ Article 213-3 states that ‘[l]egal persons may incur criminal liability for crimes against humanity pursuant to the conditions set out under article 121-2’. The translation is available at <http://www.legifrance.gouv.fr/html/index.html> ; See Elliott n120 above 109.

position of the current French Penal Code is the *manifest illegality* principle excluding crime against humanity as a defence.

In summary, the former French Penal Code did have provisions of superior orders and superior order defence was allowed for public officials and employees if the order given was within the authority of superior. However, the Military Penal Code discarded the position of *respondeat superior* and considers the fact that the accused was receiving orders from the superior would be a reason not for exculpation but for mitigation. The current French Penal Code in 1994 is more than likely based on the *manifest illegality* principle, which allows public officials and employees to use superior orders as a defence if the order is not obviously illegal.

d. Federal Republic of Germany

In the Federal Republic of Germany, Article 109b of the German Penal Code had a provision on superior orders:

[a]nybody who suborns a soldier of the Federal Defence Force to disobey an order and thereby endangers the security of the Federal Republic of Germany, the striking power of the military forces, the life or limb of a human being, or objects of considerable value not belonging to him, shall be punished....[but] the deed is not illegal if the order is not compulsory, especially if it is not given in the line of duty, if it violates human dignity or if by obeying it a felony or misdemeanour would be committed. This applies even if the perpetrator erroneously assumes the order to be compulsory.¹²⁵

Green indicated that this Article would appear to be based on the assumption that such an

¹²⁵ Green n80 above 175.

order would not be obeyed.¹²⁶

In Germany, there is a well cited provision on defence of superior orders to justify a rule of the Nuremberg Principles. Section 47 of the German Military Code adopted in 1872 provided:

If the execution of a military order in the course of duty violates the criminal law, then the superior giving the order will bear the sole responsibility therefor. However, the obeying subordinate will share the punishment of the participant: (1) if he has exceeded the order given to him, or (2) if it was within his knowledge that the order of his superior officer concerned an act by which it was intended to commit a civil or military crime or transgression.¹²⁷

This provision needs to be discussed, as the position of Section 47 of the 1872 German Military Code is ambiguous. Section 47 clearly states that subordinates might be liable for his deed in certain conditions. Put differently, if he did not know the order was illegal and did not exceed the order received, he could have been acquitted. This position is namely a new lenient intermediate position, though it did not refer to a manifest illegality condition. Sharing ‘the punishment of the participant’ might include full liability or mitigated liability. A general observation is that it cannot be inducted that Section 47 of the 1872 German Military Code was for the *absolute liability* doctrine but an intermediate position, the scholars used the Article as justification of the *absolute liability* principle would be inappropriate.

In 1940, Section 47 of the 1872 German Military Code was amended slightly, however it does not seem to have changed its position in principle. The wording ‘to him’ in subsection 1 was omitted and ‘civil or military crime or offence’ of subsection 2 was changed into ‘general or military crime or offence’.¹²⁸

¹²⁶ Ibid.

¹²⁷ Quoted in Bassinouni Crimes n60 above 455

¹²⁸ Bassiouni Cases n31 above 104.

In 1956 the Soldiers Act was promulgated, Article 11(1) of which provided:

[a] soldier must obey his superiors. He must execute their orders completely, conscientiously and immediately to the best of his ability....The erroneous assumption that an order would be one of this kind only relieves a soldier of if the mistake was unavoidable and if it could not reasonably be demanded of him, according to the circumstances known to him, that he should have invoked legal remedies against the order.¹²⁹

The 1956 Soldiers Act stressed the duty of obeying orders, the position of which was an intermediate position, as leniency is given to soldiers using a mistake of law standard. It is interesting to read the provision as it does not follow the Nuremberg Principles.

Subsequently, another German Military Code was made in 1957 (revised 1975), Article 19 (1) of which provided that: '[a]ny person who disobeys an order shall, if, at least through his negligence, serious consequences...are entailed, be punished by a term of imprisonment not exceeded three years'.¹³⁰ Article 19 (2) states that attempt of disobedience is also punishable.¹³¹ Section 3 and 4 of Article 19 are provisions of negligently causing trouble by disobeying orders. Since Article 19 did not mention the case of illegal orders, it has to be assumed that the provisions were made giving careful consideration to the function of the Army. Although Article 19(1) required serious consequences, Section 2 also punished attempt. Article 20 (1) also punished a person who 'refuses to execute an order by opposing it by word or deed',¹³² so refusal as such was punishable. Article 21 provided that negligent failure is also punishable.¹³³

In 1998, the German Penal Code was devised, but it does not have a superior order

¹²⁹ Keijzer, Nico, *Military Obedience*, Sijthoff & Noordhoff, 1978, P.78.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid, p.79.

provision. However, Section 16 concerning mistaking circumstances of the act and Section 17 on mistake of law might be applicable to superior order cases.¹³⁴

In 2002, the Code of Crimes against International Law has a provision on acts upon orders, Section 3 of which provides that '[w]hoever commits an offence pursuant to Section 8 to 14 [various war crimes] in execution of a military order or of an order comparable in its actual binding effect shall have acted without guilt so far as the perpetrator does not realise that the order is unlawful and so far as it is also not manifestly unlawful'.¹³⁵ The terminology 'without guilt' implies that if the accused knew the order in question was illegal, he would not be acquitted regardless of the fact that the order is manifestly illegal. In other words, if he executed it but did not know it was illegal but the order was illegal but not manifestly, he will have a chance of acquittal, the idea of which would be considered a version of the *manifest illegality* principle.

In summary, the well cited provision Section 47 of the 1872 German Military Code was misunderstood by some scholars and jurists. The position of Section 47 was not the *absolute liability* doctrine, for the subordinates who did not know it was illegal could have been acquitted, the knowledge standard of which seems to be solely subjective. Section 47 was, in principle, upheld in the amendment in 1940, so the position of the German Military Code remained unchanged. However, the 1957 Military Code gave some leniency to soldiers creating negligent disobedience or requiring serious consequences. The 1956 Soldiers Act punished the refusal of orders, but reasonable belief could be justified. Currently, the German Penal Code does not have a superior order provision but Section 3 of the Code of Crimes against International Law provides that those who followed just illegal orders might be acquitted, which is very similar to the ICC standard.

¹³⁴ See Section 16 of the German Penal Code .

The translation is available at <http://www.iuscomp.org/gla/>. Visited on 31st March 2007.

¹³⁵ Ibid.

e. Japan

In Japan, unconditional obedience had been required in a military society by laws and the government declarations.¹³⁶ Up until the end of World War II it was customary for the Japanese military society to obey the superior order absolutely.¹³⁷

The first military code concerning the obedience of superior orders was Rikugunkyoku-hatto, *the Law of the Army*, in 1868, which stated that ‘you have to abide strictly by the order of your superior’.¹³⁸ As seen, it merely stressed upon the importance of strict obedience; therefore the provision cannot be a basis of legal discussion.

In 1871, the Department of the Army promulgated ‘Doku-ho’, *the Law of Reading*, for the life of the members of the armed forces, which provided:

The serviceperson has to respect superior officers, and is required his obedience for military operations, should not disobey the order of superior, regardless of its importance of the case’.

The Law of Reading implied the need of absolute obedience, since it used a realistic term ‘should not disobey’ other than ‘should obey’. However, any reference to legality of orders cannot be seen on *the Law of Reading*, so it cannot be known whether the government was expecting soldiers to follow illegal orders, as well. Silence on legality of order as such may have meant ‘yes’ for soldiers, so the position of *the Law of Reading* actually imposed an absolute obedience on soldiers.

‘Doku-ho’, *the Law of Reading* was modified in January 1872 and the importance of obedience was changed into much stricter terms, which provided:

¹³⁶ Japanese Military Law did not mention what to do with illegal orders. See Kita, Yoshito, ‘Kokusaihodo no Menseki Jiyu to shi te no “Jokanmeirei” no Mondai---Kyu-Nihongun no Gunpo to Hanrei no Kento’, [1992] 22 Nihon hogaku, 51 (cited in this paper “Kita No.1”)

¹³⁷ Kita, Yoshito, ‘Senso hanzainin saiban to jokanmeirei no koben---Tokyo saiban no baai’, [1994] 59-2, Nihon hogaku, 444 (cited in this paper “Kita No.2”)

¹³⁸ Quoted in Kita No.1 n136 above 51.

When the serviceperson works under the command of your superior, in need for military operations, he will be punished if he disobeys the order, regardless of the importance of case.¹³⁹

As a result of the 1872 modification, the need of military operations was clarified and the wording of punishment was incorporated into *the Law of Reading*, which would have worked as threatening.

In February 1882, the Criminal Code of the Army and Navy was promulgated. As to the obedience of superior orders, Article 82 of the Code required strict obedience to superiors and provided:

Soldiers are not allowed to ask their own high or low ranking but required to obey superior orders obediently immediately...You are not allowed to ask him the questions of: whether it is good or not; whether it is possible or not; and whether it is disadvantageous or not. However, the person who found out the order was questionable, can report after he followed the order. In the case that his report is unsustainable, he will be charged with the laws of anti-superior crimes.¹⁴⁰

Under Article 82 of the Code it was noticeable that asking superiors a question was not allowed in principle. According to Article 82 when the order was questionable, it was allowed for subordinates to report on condition that they had to execute first, which would be evidence of imposing an absolute obedience by Article 82. This right of report was probably very nominal, as they must execute an order first. Article 82 did not give the right to disobey. If they are wrong, they might have been charged with anti-superior crimes, as well. It is easy to imagine that the subordinate would have followed any kinds of orders under this

¹³⁹ Quoted in Ibid.

¹⁴⁰ Article 82 of the Criminal Code of the Army and Navy.

condition.

In 1882, Gunjin-chokuyu, *the Imperial Announcement for the Serviceperson*, was issued, in which the section of decorum provided:

Observe proper decorum. The service person, belonged to the hierarchy from a simple soldier to the general, has to obey the order of the superior, and the novice has to obey the order of the older in the same rank. Commit yourself to the order of the superior as if it were the order of the Emperor.¹⁴¹

The importance of this Announcement should not be underestimated, as the rationale of the obedience of the subordinate was justified for the first in the name of the Emperor.¹⁴² The Announcement was used for justification of illegal orders many times.

In accordance with *the Imperial Announcement for the Serviceperson*, in the same year, Doku-ho, *the Law of Reading*, was revised. Article of the obedience of superior orders rectified and provided:

The order of the superior should be kept strictly regardless of the contents and should not be disobeyed.¹⁴³

Also, according to *the Imperial Announcement for the Serviceperson*, Rikugun-keiho, *the Law of the Army*, and Kaigun-keiho, *the Law of the Navy*, took effect in 1882.

Article 66 of *the Law of the Army* imposed capital punishment to those who

¹⁴¹ Gunjin-chokuyu, *the Imperial Announcement for the Serviceperson*, contained five sections; allegiance, decorum, valor, faithfulness, and frugality. See Kita No.1 n136 above 53; On the contrary, Prof. Takashi Doi indicates that in the late 1960s most officers came from the samurai class, however, as time goes by, the quality of the military officers was going down because most officers got to come from not other class. Therefore, the notion of absolute obedience in the name of the Emperor was needed. Quoted in Kita No.1 n136 above 60.

¹⁴² Quoted in Ibid, 53.

¹⁴³ Quoted in Ibid, pp. 53-4.

disobeyed in the face of the enemy.¹⁴⁴ Article 86 of *the Law of the Navy* had the same provision.¹⁴⁵

As to the enactment of *the Law of the Army*, the draft of Article 42 had a provision on the defence of superior orders, which provided: the action, carried out by the order of the superior, should not be punished.¹⁴⁶ However, Article 42 was deleted due to the fact that it had a lot of dissenting opinions.¹⁴⁷

In 1918, Rikugun-keiho, *the Law of the Army*, and Kaigun-keiho, *the Law of the Navy*, were drastically revised with a view to reducing the punishment of those who disobeyed.¹⁴⁸ The reason for this is considered to have been the development of the society and life, and the dissemination of education, caused by the Russo-Japanese War.¹⁴⁹

In 1943, the War in China started to protract the issue of disobedience which was aggravated in the armed forces,¹⁵⁰ so Guntai-naimu-rei, *the Interior Order for the Armed Forces*, was promulgated. Under the Order, the obligation of the Armed Forces was superseded the obligation of law.¹⁵¹

After the end of World War II, Japan's Imperial Army and Navy were dissolved. Accordingly, Japan made the *Jieitai*, the Self-Defence Forces, in 1954, the role of which is strictly limited on domestic issues in Japan by the Constitution.¹⁵² The *Jieitai* has *Jieitai-ho*, the law of the Self-Defence Forces, Article 57 of which provides that 'members are to obey superior orders faithfully'.¹⁵³ However, there is no reference to illegal orders in the law. According to Article 119 of the law of the Self-Defence Forces, a member who disobeys

¹⁴⁴ See Ibid, 54.

¹⁴⁵ Ibid. *The Law of the Army* and *the Law of the Navy* were used for the justification for inflicting punishment on the subordinate for his disobedience.

¹⁴⁶ Ibid. pp. 56-7

¹⁴⁷ See Ibid. pp. 56-7

¹⁴⁸ See Ibid. p. 56.

¹⁴⁹ See Ibid. p.56.

¹⁵⁰ See Ibid. p.57.

¹⁵¹ See Guntai-naimu-seitei-riyu-sho, *the Statement of the Reason for the Interior Order for the Armed Forces*. Quoted in Ibid, 57.

¹⁵² Article 9 of the new Constitution of Japan renounces the right to war or even settling international conflicts.

¹⁵³ Article 57 of the *Jieitai-ho*, the law of the Self-Defence Forces.

superior orders will be punished accordingly.¹⁵⁴ Although it should be noted that the maximum sentence is only seven years, the fact remains that there is not much difference between the law of the Self-Defence Forces and pre-war period laws and regulations in that the law does not provide the right to disobey and precise conditions of refusal.

In summary, Japan imposed absolute obedience on soldiers and has never given soldiers the right to disobey with clear cut conditions. The 1868 Law of the Army stressed the importance of obedience. And the 1871 Law of the Reading was the same but stricter way. The 1882 Criminal Code of the Army and Navy was promulgated, under which the importance of obedience was stressed again but the right to report was given only if the soldier executed the order in question. In 1882, the Imperial Announcement for the Serviceperson was issued with a view to use the Emperor as justification of any order of superior. In 1918, reflecting the development of the society and life, the Law of the Army and the Law of the Navy had to reach a compromise reducing the sentence amount. Faced with crisis in China, Japan issued the Interior Order for the Armed Forces and again assured the obligation of obeying. Although the current law of the Self-Defence Forces does have a provision on superior orders but it only focuses the obligation to follow orders. It can be said that the position of Japan is very unique that it has never given the right of disobey officially in terms of illegal orders and soldiers have been under dilemma; whether they should obey illegal orders and will be punished at an international court in the future or disobey now and will be punished by own superior.

f. China

In China, Article 64 of *the Criminal Law of the Armed Forces, 1929*, provided that:

[A]ny person who disobeys or ignores the order of command of a superior officer

¹⁵⁴ Article 119 of the Self-Defence Forces punishes members as follows: those who oppose or disobey superior orders.

shall be punished...¹⁵⁵

Article 64 imposed strict unconditional obedience on subordinates. However, Section 2 of *the 1938 Law concerning the Discharge of Duties by Civil Servants* seems to have shown an ambiguous view and provided that '[c]oncerning the order, however, the subordinate may express his opinion to the superior at any time'.¹⁵⁶ According to Section 2 orders are expected to be within the authority of superior, which means it must not be illegal. However, claiming that the subordinates had the right to disobey under Section 2 would be jumping to conclusions. This position was very broad because 'express his opinion' did not necessarily mean they could disobey the superior order. The silence of the right and duty of subordinates in questioning would have made this Section meaningless.

In wartime, Article 4 of *the 1950 Law of Wartime Military Discipline* provided that:

[A] person who defies orders or disobeys commands in the face of the enemy shall be punished with death...¹⁵⁷

The Chinese position had not shown any changes up to this period, the terminology of 'express his opinion' could not be seen here. Also nothing was suggested as to whether the orders shall be lawful or not, if anything, it implied that subordinates must follow any sort of orders 'in the face of enemy'.¹⁵⁸ The punishment of death would have been a threat to subordinates, and it was probably impossible for soldiers to defy or disobey orders.

Article 20(2) of the Security Administration Punishment Act, 1957, provided that:

persons who commit acts that violate security administration shall be punished lightly or shall be exempted from punishment in ... [the event of] coercion by others.

¹⁵⁵ Quoted in Green n80 above 212.

¹⁵⁶ Quoted in Ibid.

¹⁵⁷ Quoted in Ibid., p. 213.

¹⁵⁸ Green n80 above 213.

In case of coercion, it was possible for the subordinate to free from responsibility, although this was not directly related to the plea of superior orders.

The current Criminal Law of the People's Republic of China¹⁵⁹ adopted in 1979 (later revised in 1997), holds interesting provisions of superior orders and punishment. The Law's aim is to 'safeguard security of the State, to defend the State power of the people's democratic dictatorship and the socialist system...'¹⁶⁰

Chapter X of the law is concerned with crimes of servicemen's transgression of duties, Article 421 of the law provides punishment to '[a]ny serviceman who disobeys an order during wartime, thereby jeopardizing a military operation'.¹⁶¹ Article 421 appears to impose unconditional obedience on soldiers. As it does not clarify what kind of orders he should obey, the drafters of Article 421 probably did not want to exclude illegal orders, because Article 421's wording 'jeopardizing a military operation' can mean endangering an illegal military operation. It should be noted that just disobeying an order is not sufficient to prosecute under this Article as the condition 'jeopardizing a military operation' is clearly required. In addition, Article 428 prohibits disobedience of commanders if it causes serious consequences.¹⁶² Again, the legality of the order was not questioned but 'causing serious consequences' was attached. It is not difficult to assume that the drafters would have given priority to the unity of the military society regardless of the result caused by illegal orders.

In summary, China probably was based on the *respondeat superior* position. The fact that China allowed subordinates to ask questions in all cases did not actually change their position so much. China's stance towards superior orders has been quite clear since the

¹⁵⁹ The law is adopted as a result of Deng Xiaoping's seizure of power from the Gang of Four. The information is available at <<http://www.lectlaw.com/files/int01.htm>> , visited on 1st March 2007.

¹⁶⁰ See Article 2 of the Criminal Code. The Congressional-Executive Commission on China available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php>, visited on 1st March 2007.

¹⁶¹ Ibid.

¹⁶² Ibid.

1920s. The government imposed unconditional obedience upon soldiers. There were times when the 1938 law stated that the subordinate may express their opinion, but that was probably very nominal. The current position of Chinese criminal law is based on the *respondeat superior* as it does not clearly give the subordinates the right to disobey even when the order is illegal. Judging from the purposes of the criminal law and its contexts, it seems that the government's preference lies with state interests, rather than causing atrocities by soldiers on the battlefield. In reality, wise soldiers would just follow orders rather than trying to judge the legality of orders.

g. The Union of Soviet Socialist Republics and Russia

The Soviet Union's ideas on superior orders were well reflected in Lenin's declaration, which provides '[a] war is a war...and it demands an iron discipline'¹⁶³. Lenin's approach was just a slogan, which simply seemed to have stressed strong obedience. The approach of the Soviet Union at the time can be grasped through its texts in fragments even though it is not binding.¹⁶⁴ The Military Oath of 1918 declared that 'I pledge myself to observe revolutionary discipline strictly and resolutely and to fulfil without demur all orders of commanders appointed by the Workers' and Peasants' Government'¹⁶⁵. The Oath ends as follows; 'If by evil intent I depart from this my solemn pledge, then let universal scorn be my lot and let the hard hand of the revolutionary law finish me'¹⁶⁶. The Military Oath of 1918 probably stressed absolute obedience and did not expect soldiers to disobey at all, and the part of 'finish me' would probably have implied punishment by death.

In 1947, shortly after World War II the Military Oath provided: 'I...take an oath and

¹⁶³ Colonel Draper, G.I. A.D, 'An Outline of Soviet Military Law', [July 1959] Military Law Review, p. 6.

¹⁶⁴ The role of Military Oath is to let the serviceman read aloud on various occasions to make them realize the importance of it. Also, it might have been used for a legal justification. See Ibid, p. 7.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

solemnly swear to be an honourable, brave, disciplined and alert warrior, strictly to guard military and state secrets, to fulfil without demur all military codes and orders of commanders and superiors...[i]f by evil intent I break this my solemn oath, then may the hard penalty of the Soviet Law, and the universal hatred and contempt of the soldiers overtake me'.¹⁶⁷ The 1947 version of the Military Oath is similar to the former Oath, but the part 'finish me' was replaced by 'the hard penalty of the Soviet Law'.

In the Soviet Union, provisions of the duty to obey can be seen within military codes and criminal codes. In 1869, the Imperial Disciplinary Code had a provision on superior orders, Article 1 of which provided that '[m]ilitary discipline is the strict and exact observance by all servicemen of the order and rules established by laws and military codes'.¹⁶⁸

According to Article 96 of Disciplinary Code of the Armed Forces of The Union of Soviet Socialist Republics (1946), the military law of the Soviet Union allowed them to have 'the right to make complaints about illegal actions and orders of commanders'.¹⁶⁹ In the case of illegal orders, Article 96 gave the right to 'make complaints' to soldier not the right to disobey as such, for the right to ask did not mean he could disobey. Article 96 would have been nominal since the way it stipulated was not effective in saving soldiers in a dilemma.

Under Soviet Russian military law 'a soldier carrying out the unlawful order of an officer incurs no responsibility for the crime, which is that of the officer, except where the soldier fulfils an order which is clearly criminal, in which case the soldier is responsible together with the officer who issued the order'.¹⁷⁰ The Soviet Russian Military Law seems to have been a *manifest illegality* principle as it put the exception that 'where the soldier fulfils

¹⁶⁷ Ibid. pp. 6-7.

¹⁶⁸ Ibid. p. 7.

¹⁶⁹ Quoted in Lewy, Guenter, 'Superior Orders, Nuclear Warfare, and the Dictates of Conscience: the Dilemma of Military Obedience in the Atomic Age', [1961] 55 Political Science Review, p. 10.

¹⁷⁰ Chkhikadze, V. M., *Sovetskoe Voenno-Ugolovnoe Pravo* (Soviet Military Criminal Law), pp. 198-199, quoted in Greenspan n15 above p. 491. The year of the Soviet Russian military law was not indicated by Greenspan. However, we can assume that it was valid during the publishing year 1959.

an order which is clearly criminal’.

Article 238 of the 1965 Russian Criminal Code notes stated that:

insubordination, that is, openly refusing to obey an order of a superior or any other intentional failure to execute an order, shall be punished ...¹⁷¹

Article 238 merely focused on insubordination but did not specify how to deal with illegal orders, which would have been much help for subordinates. However, Article 239 provided that:

failure to execute a superior’s order, committed in the absence of the indicia specified in subsection a of Article 238, shall be punished...[However,] the same act committed under mitigating circumstances shall entail the application of the rules of the [1946] Disciplinary Code of the Armed Forces of the USSR.¹⁷²

As to the order of a superior, Article 6 of the 1946 Disciplinary Code provided:

The order of the commander shall be law for the subordinate, [and] an order must be executed without reservation, exactly and promptly.¹⁷³

Following this Article, it can be assumed that subordinates were under the duty of obedience and might have been able to use the situation for defence or mitigation. Green also points out that Article 38 of the 1965 Russian Criminal Code ‘would include the influence exerted by a commander and might thus extenuate’.¹⁷⁴ The Disciplinary Code seems to have been opposite to the *manifest illegality* principle and have gone back to the doctrine of *respondeat*

¹⁷¹ Quoted in Green n80 above 194.

¹⁷² Quoted in Ibid, pp. 194-195.

¹⁷³ Quoted in Ibid, p. 195.

¹⁷⁴ Green n80 above 195.

superior. Green notes that ‘the leading western commentators on the Soviet military code have stated that Article 6 must be interpreted literally, since it retreats from the position of earlier versions of the Disciplinary code which permitted disobedience to orders which were ‘manifestly criminal’.¹⁷⁵

As Green notes, the 1919 Code excused a subordinate from carrying out a ‘command which was... obviously criminal in its nature’.¹⁷⁶ Then, in 1925 the revision omitted the word ‘obviously’ to emphasize that there was no obligation to obey any order which was criminal in its nature.¹⁷⁷ Finally, in 1940, the requirement of unconditional obedience was added as seen in Article 6 of the Disciplinary Code above.¹⁷⁸

After the collapse of the Soviet Union, Russia made efforts to develop her own laws. The Criminal Code of the Russian Federation was adopted in 1996 replacing the old Code. Article 42 of the Criminal Code of the Russian Federation has a provision on superior order defences, which states;

1. Infliction of harm to legally protected interests shall not be¹⁷⁹ qualified as an act of crime provided it was caused by a person acting in execution of an order or instruction binding on him. Criminal responsibility for infliction of such harm shall be borne by a person who gave illegal order or instruction.
2. Person who committed intentional offence in execution of order or of instruction known to be illegal, shall be liable under usual terms. Failure to execute order or instruction known to be illegal shall preclude criminal liability.¹⁸⁰

Section 1 of Article 42 of the new Code has the idea that a higher principle justifies illegal

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ See Ibid.

¹⁷⁸ See Ibid.

¹⁷⁹ The word ‘beto’ is probably a mistake of the translator, just ‘be’ is proper.

¹⁸⁰ Translation of the code is available at <<http://www.russian-criminal-code.com/>> Accessed on 1st March 2007.

acts of subordinates, which can be considered under the *respondeat superior* doctrine as soldiers would be able to escape punishment when following orders of superiors. However, if he knew that the order was illegal and intentionally executed it, Section 2 of Article 42 says the person is ‘liable under usual terms’.¹⁸¹ It is not the *manifest illegality* principle but a type of the *respondeat superior* doctrine. In addition to that, the new Code has section XI discussing the responsibility of servicemen to military service. Article 332 notes that ‘[f]ailure to execute a superior's lawful order by a subordinate, if it has caused substantial harm to the interests of military service, shall be punishable by restriction in military service...’.¹⁸² The duty of servicemen to follow orders is ensured, and resistance to a superior and violent actions against a superior are also punishable under Article 333 and 334.

8. The defence of superior orders in the Nuremberg Trial

Prior to post-war trials, a committee was appointed to draft rules of procedure for future war crimes trials in 1941, when probably many states were not sure which side would win the war. A subcommittee delivered its opinion as follows:

the codes of law of the respective countries recognize the plea of superior orders to be valid if the order is given by a superior to an inferior officer, within the course of his duty and within his normal competence, provided the order is not blatantly illegal. The conclusion reached was that each case must be considered on its own merits, but that the plea is not an automatic defence.¹⁸³

Although the committee reported that the superior order defence was not automatic adding the condition ‘provided the order is not blatantly illegal’, it did as such recognize that the plea of

¹⁸¹ Article 42 of the code is available at Ibid.

¹⁸² Article 332 of the code is available at Ibid.

¹⁸³ *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948, quoted in Levie n70 above 183.

superior orders was a valid defence in the respective countries.¹⁸⁴ Another opinion was seen in the Legal Committee of the United Nations Commission for the Investigation of War Crimes, which was established in 1943. But superior order issues could not come to a unanimous agreement, so the purpose of the commission's argument cannot be seen as having an official effect to show any established principles or rules of international criminal law.¹⁸⁵ The conclusion of this commission was that 'the mere fact of having acted in obedience to the orders of a superior does not of itself relieve a person who has committed a war crime from responsibility'.

Putting aside state responsibility, the Nuremberg Charter specifically focused the notion of individual responsibility to indict high ranking soldiers and political leaders. The international community regretted that the total war had occurred despite the First World War experience. The international community newly focused on legal aspects to heal the wounds of war, which laid the foundations of principles of international criminal law. One of the principles of the Nuremberg Charter was 'that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.'¹⁸⁶ The intention of the drafters of the Nuremberg Charter was to charge all individuals regardless of their position.¹⁸⁷ Accordingly, Article 8¹⁸⁸ of the Nuremberg Charter became 'the first document dealing expressly with the criminal responsibility of subordinates' from the perspective of international law,¹⁸⁹ which provided that:

¹⁸⁴ Up until 1944 the United States and Britain upheld the view of absolute and automatic justification of the subordinate concerned, the doctrine of *respondeat superior* in the 1914 edition of the Manual of Military Law of Britain and the US Rules of Land Warfare (1940).

¹⁸⁵ Garraway, Charles, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied', [1999] 836 *International Review of the Red Cross*, pp. 785-794.

¹⁸⁶ Judgment of October 1, 1946, International Military Tribunal, Judgment and Sentences, 41 AM. J. INT'L L. 172, 221 (1947)

¹⁸⁷ See Farhad Malekian, *International Criminal Responsibility, in International Criminal Law* 168 (M. Cherif Bassiouni ed., 1999)

¹⁸⁸ Professor D.H.N. Johnson points out that "the Charter and Judgment of the Nuremberg Tribunal are not necessarily binding precedents in international law". See Johnson, D.H.N., The Defence of Superior Orders, [1985] 9 *Australian Yearbook of International Law* 298. (cited in this paper "Johnson")

¹⁸⁹ Triffterer, n21 above 575.

[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 if the Tribunal determines that justice so requires.¹⁹⁰

In the process of promulgating Article 8 of the Nuremberg Charter, the Allied countries had to compromise.¹⁹¹ However, unlike domestic military codes, Article 8 of the Nuremberg Charter seems to have promulgated without any consideration of applying them to other countries in the future, which as a result caused stagnation of international criminal law.

The US proposed the idea at international conference in London, which provided that ‘[t]he fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute an absolute defense but may be considered either in defense or in mitigation of punishment if the tribunal before which the charges are being tried determines that justice so requires’.¹⁹² Thus the US original plan still included a possibility of acquittal, which was more lenient than Article 8 of the Nuremberg Charter.

Considering the serious needs for the punishment of war criminals, the Soviet Union proposed that ‘[t]he fact that the accused acted under orders of his superior or his government will not be considered as justifying the guilt circumstance’.¹⁹³ The Soviet Plan did not allow superior orders as a defence but there was no reference to mitigation. Dinstein erroneously states that the Soviet proposal ‘does not deal with the problems of mitigation at all’.¹⁹⁴ The

¹⁹⁰ Article 8 of the Nuremberg Charter; Article 7 of the Nuremberg Charter denied the superior order defence completely denied the immunity of the official position from foreign trials, though the immunity of the head of state had been protected under traditional international law until the end of World War I. See also Article 7 of the Nuremberg Charter.

¹⁹¹ See Bassouni Crimes n60 above 469.

¹⁹² American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, available at <<http://www.yale.edu/lawweb/avalon/imt/jackson/jack04.htm>> visited in 1st April 2007.

¹⁹³ Aide-Mèmoire from the Soviet Government June 14, 1945, available at <<http://www.yale.edu/lawweb/avalon/imt/jackson/jack10.htm>> visited in 1st April 2007.

¹⁹⁴ Dinstein, n10 above 113.

Soviet plan merely ignored a statement of mitigation, so it would have been possible for an accused to use superior orders as mitigation under the proposal.

After considering that the waging of aggressive war is an international crime, the US finally revised the proposal as follows: '[t]he fact that a defendant acted pursuant to order of a superior or to government sanction shall not constitute a defense *per se*, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires'.¹⁹⁵ The revised plan of the US would have been an intermediate plan.

The Soviets also proposed the revised plan as follows: '[t]he carrying out by the defendant of an order of his superior or government shall not be considered a reason excluding his responsibility for the crimes set out in Article 2 of this Statute. In certain cases, when the subordinate acted blindly in carrying out the orders of his superior, the Tribunal has a right to mitigate the punishment of the defendant'.¹⁹⁶ Referring to mitigation, the Soviet Union compromised in the end. Finally, Article 8 of the Nuremberg Charter became very identical to both the US revised proposal and the Soviet revised proposal.

The Control Council 10 laid foundations for the trials of lesser war criminals in Germany, which is called US Nuremberg Military Tribunals. Article 4(b) of the Control Council 10¹⁹⁷ is identical to the view that Article 8 of the Nuremberg Charter.

In the Nuremberg Trial, more than a score of the leaders of the Third Reich and half a dozen Nazi organizations were prosecuted by the four Allied Powers based on the London Agreement. At Nuremberg, twenty-four individuals were indicted, and twenty-two were tried. Most of the defendants raised the plea of obedience, saying that 'I followed Hitler's order or Himmler's order'.¹⁹⁸ The Nuremberg Trial seriously considered this point and rejected their plea positively.

¹⁹⁵ Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945, available at <<http://www.yale.edu/lawweb/avalon/imt/jackson/jack18.htm>>visited on 1st April 2007.

¹⁹⁶ Last Soviet Draft, International Conference on Military Trials : London, 1945 Draft Showing Soviet and American Proposals (in Parallel Columns) available at <<http://www.yale.edu/lawweb/avalon/imt/jackson/jack23.htm>>visited on 1st April 2007.

¹⁹⁷ Article 4 (b) of Allied Control Council Law No. 10 (20 Dec. 1945)

¹⁹⁸ *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, His Majesty's Office (1946) , pp. 130-131.

The American prosecutor Jackson addressed his firm position to the defence of superior orders in his opening speech:

[o]f course, we do not argue that the circumstances under which one commits an act should be disregarded in judging its legal effect. A conscripted private on a firing squad cannot expect to hold an inquest on the validity of the execution. The Charter implies common sense limits to liability just as it places common sense limits upon immunity.¹⁹⁹

Jackson apparently had a view that a soldier on the battlefield could be relieved of responsibility, however with the expressions ‘common sense limits’ it is unknown whether or not he meant the *respondeat superior* doctrine.²⁰⁰ As stressed by Dinstein, Jackson’s Report to the President was made prior to the London Conference, but surprisingly no one challenged the proposal.²⁰¹ It can be seen as evidence that America was not fully supportive of the *absolute liability* doctrine at this stage. However, Jackson apparently changed his opinion in his closing speech and stated the provision on Article 8 ‘corresponds with the justice and with the realities of the situation’. Jackson’s opinion was strongly influenced by the decision of the London Conference; therefore the concept of the *absolute liability* may have been preferred.

In the Nuremberg Trial, the *Fuhrerprinzip* or leadership principle was greatly contested as an issue of the defence of superior orders.²⁰² The defendants argued that the defendants should be relieved of responsibility since they had followed orders from the *Fuhrer*.²⁰³ However, the chief Soviet prosecutor, Rudenko, delivered a strong rebuttal as to the defence of the *Fuhrer*’s order:

¹⁹⁹ Nuremberg trial, Opening Speech for the Prosecution (by Jackson), *I.M.T.*, vol. 2, pp. 150-151.

²⁰⁰ Dinstein n10 above 126.

²⁰¹ *Ibid.*

²⁰² Quoted in Bassiouni Crimes n60 above 470.

²⁰³ *Ibid.*

it is quite incomprehensible what logical or other methods have led him to assert that the provisions of the Charter, specially drafted for the trial of major war criminals of fascist Germany, did not factually imply the very conditions themselves of the activities of these criminals. What orders then issued by whom and in what country are meant by the Charter of the Tribunal?²⁰⁴

Lord Shawcross, another Allied prosecutor, criticized the illegality of the orders regardless of who gave the order:

By every test of international, of common conscience, of elementary humanity, these orderswere illegal.

The British chief prosecutor, Shawcross, in his closing speech, addressed his opinion as to the defence of superior orders.

[t]here is no rule of international law which provides immunity for those who obey orders which... are manifestly contrary to the very law of nature from which international law has grown.²⁰⁵

The French chief prosecutor, Menthon, stated:

[o]rders from a superior do not exonerate the agent of a manifest crime from responsibility.²⁰⁶

²⁰⁴ Quoted in *Ibid*, pp. 470-471.

²⁰⁵ Nuremberg trial, Opening Speech for the Prosecution (by Shawcross), *I.M.T.*, vol. 19, pp. 465-466.

²⁰⁶ Nuremberg trial, Opening Speech for the Prosecution (by Menthon), *I.M.T.*, vol. 5, pp. 418.

The Soviet chief prosecutor, Rudenko, in his closing speech, that:

the authors of the Charter ...made a special proviso to the effect that the execution of an obviously criminal order does not exonerate one from criminal responsibility.²⁰⁷

The Nuremberg Tribunal delivered the opinion on the validity of Article 8 as follows:

[t]he provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations is not the existence of the order, but whether moral choice was in fact possible.²⁰⁸

The Tribunal comments were confusing as it probably conflicted with Article 8 of the Nuremberg Charter. Rejecting superior orders as a defence, the Tribunal apparently agreed to the *absolute liability* doctrine but simultaneously put a standard of the moral choice test. The question is whether the moral choice expression gave a possibility of defence. Greenspan indicates that the moral choice test went against Article 8 and made sure that the moral choice test was applicable.²⁰⁹ Bassiouni tries to understand this point without any conflict using the notion of duress. The author takes the view that the moral choice test gave a possibility of a defence if the accused was unable to make a moral choice at the time of the commission of the crime. This means that he will be acquitted if he was forced to act using psychological or physical power, or unable to make a moral choice when he was ordered a petty crime, or was so afraid of disobeying the orders for other reasons. The moral choice

²⁰⁷ Nuremberg trial, Closing Speech for the Prosecution (by Rudenko), *I.M.T.*, vol. 19, pp. 577.

²⁰⁸ XXII Trial of the Major War Criminals Before the International Military Tribunal 411, 466 (1948)

²⁰⁹ Greenspan n15 above 493.

test mentioned in the Nuremberg Trial would have just indicated the possibility of a defence when the moral choice was impossible.

Though the Nuremberg judgment can be read that the Tribunal upheld the doctrine of *absolute liability*, not allowing a subordinate to use superior orders as a defence, the international community does not have a concurrent idea on the defence of superior orders at this period. It cannot be denied that the principles of the Nuremberg Trial were quickly prepared to deal with the war criminals.

Nevertheless, the principles of international law recognized by the Nuremberg Charter of the Nuremberg Tribunal and the Judgment of the Tribunal were unanimously endorsed by the UN General Assembly Resolution 95 (1) on December 1950.²¹⁰

The said Nuremberg principles, which contain the principle of negation of the defence of superior orders as principle IV, were formulated by the International Law Commission and accepted by the United Nations General Assembly on 12 December 1950.²¹¹ This means nothing, but in fact that the negation of the defence of superior order might have seen as evidence of customary international law at this period.

In summary, the international community did not have a concurrent idea on superior order pleas at the end of World War II. A subcommittee held in 1941 showed its opinion, which would have been the *manifest illegality* doctrine. Thereafter, the Legal Committee of the UN commission for the Investigation of War Crimes was established in 1943, which could not reach a unanimous conclusion. In the drafting process of the Nuremberg Charter, the issues of superior orders were well discussed, which was strenuous efforts. In the beginning the US had a lenient view allowing a possibility of acquittal, but finally revised the proposal. The Soviet has a strict view without mentioning a possibility of mitigation, but finally revised the proposal. Article 8 of the Nuremberg Charter was a compromise among the Allied countries, and superior orders became just a matter of mitigation. However, the judgement

²¹⁰ Professor D.H.N. Johnson indicates that ‘subsequent experience has shown an unwillingness, at least on the part of certain military establishments’. Johnson n188 above 310.

²¹¹ (1950) ii *Yearbook of the ILC* 374-5.

of the Nuremberg Trial seems to have been happy with the principles they established, saying that the principles of the Charter corresponded with international law. The Nuremberg Trial tackled the issues of superior order squarely, and negated it as a defence, but allowed it for mitigation.

9. The defence of superior orders in the Tokyo Trial

Following the Nuremberg Trial, General MacArthur issued a Special Proclamation in Tokyo on 19th January 1946, to which the Charter of the International Military Tribunal for the Far East was attached. Article 6 of the Tokyo Charter seems to have been the counterpart of Article 8 of the Nuremberg Charter. Article 6 of the Tokyo Charter provided:

[n]either the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.²¹²

Although a lot of scholars and jurists hold the opinion that Article 6 of the Tokyo Charter and Article 8 of the Nuremberg Charter are identical, Article 6 of the Tokyo Charter seems to slightly differ in that Article 6 is lenient to defendants to some extent, as it can be read that it was showing a defendant the preconditions of exculpation. Compared with Article 8 of the Nuremberg Charter, '[n]or the fact that an accused pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility' is more lenient than 'shall not free him from responsibility', which looks like introducing preconditions

²¹² Article 6 of the Tokyo Charter.

necessary to free himself from responsibility. In other words, if the situation had arisen where he followed a superior order, then the defendant might have been freed from responsibility.

Interestingly, Dinstein points it out that ‘in Tokyo the fact of obedience to orders was not prevented from contributing, in conjunction with other facts, to discharge from responsibility and was rejected only as a defence *per se*’.²¹³ But he himself admits that the Tokyo Charter was not fully for the *absolute liability* doctrine.²¹⁴ A person may have been allowed if some circumstances are fulfilled together with other conditions, which did not actually happen in Tokyo.

It can be seen that the Tokyo Charter was not apparently for the doctrine of *respondeat superior*; but may have been able to give a possibility of acquittal or mitigation. However, the Charter was ambiguously silent on the precise conditions of reducing or deleting criminality and made sure that superior orders would be considered in mitigation. Horwitz, United States attorney, adequately described the difference between Article 6 of the Tokyo Charter and Article 8 of the Nuremberg Charter in his treatise, too.²¹⁵ Article 6 is basically the same as Article 8 of the Nuremberg trial but Horwitz is appropriately recognized that it was necessary to deal with special circumstances of Japan. Japan was an extremely hierarchical society, which no doubt had an effect on the subordinate superior relationship in a military society.

However, this slight difference on the provisions did not make any difference in trying the defendants because only one person actually raised the defence of superior orders in the Tokyo Trial unlike the Nuremberg Trial.²¹⁶ The reasons of the difference are considered as follows:²¹⁷ First, the court was set up without considering the court system of Japan. The information given to Japanese was not sufficient to argue in a common law style environment.

²¹³ Dinstein n10 above 157.

²¹⁴ Ibid.

²¹⁵ Horwitz, Solis, ‘The Tokyo Trial’, *International Conciliation*, No. 465 (1950), p.486

²¹⁶ Ibid.

²¹⁷ See Kita No.2 n137 above 225 (459).

Japanese courts system is an inquisitorial system, where judges are expected to act more than a fair referee. As a result, they experienced the trial without knowing the adversarial system of the Tokyo Trial. Second, the defendants were trying to protect the Emperor even when the war was over. The Emperor did not lose its popularity just because Japan lost war, for the Emperor was still ‘god’ based on the mythology of Japan. Third, it can be said that there was the unspoken understanding among the defendants that the government interests prevailed over the individual interests and they understood it. Probably, they would have felt very shameful if they had allowed the Emperor to be called in to the court. Fourth, in the philosophy of *Samurai*, Japan’s traditional idea of swordsmen, raising a defence of superior orders was a disgrace, as it would have been the same as criticizing own lord for whom they were fighting.²¹⁸

Only one defendant, Shunroku Hata, clearly raised the defence of superior orders²¹⁹ in the Tokyo trial though the former Japanese military had an absolute rule to obey any superior orders. Shunroku Hata, Commander-in-Chief of Expeditionary Force in Central China, contributed his power to the formulation and execution of the aggressive plans: war in China. HATA was charged with waging aggressive war and other crimes²²⁰ In his defence, he raised the plea of superior orders, saying that he had no choice as the Chief of the General Staff ordered him to do so. Without considering the issue of the defence of superior orders, the Tokyo Trial found Hata guilty and sentenced him to life imprisonment.²²¹

As a concurring opinion, Mr. Justice Jaranilla, member of the Republic of the Philippines, stated his opinion on individual responsibility and the plea of superior orders:

²¹⁸ In the idea of *Samurai*, dying for the lord is a virtue. So, raising a superior order defence would be opposite.

²¹⁹ Hata, Shunroku clearly raised the plea of obedience in the Tokyo trial. Kita No.2 n137 above 225 (459).

²²⁰ He was charged with Count 1, 27, 29, 31, 32, 35, 36, 54 and 55. He was found guilty under Counts 1, 27, 29, 31, 32, and 55. Roling, B.V.A. and Ruter, C.F., *The Tokyo Judgment, The International Military Tribunal for the Far East (I.M.T.F.E)* 29 APRIL 1946 – 12 NOVEMBER 1948, APA-UNIVERSITY PRESS AMSTERDAM BV AMSTERDAM, 1977, pp. 445-446 (cited in this paper “Roling”).

²²¹ ‘[T]he traditional defense of “obedience to superior orders” was eliminated in the Far East’, Knoops n25 above 7.

[the] theory therefore that the state should be held liable, instead of the individual, is contrary to the above provision of the Charter. The idea that a state or a corporation commits crimes may now be considered as fiction. The accused cannot shield themselves in superior orders or in the fact that their acts were acts of a state. Neither can the accused of lower ranks protect themselves against the liability by order of their superiors, alleged as acts of state.²²²

Justice Jaranilla apparently assented to the decision of the Tokyo Trial, confirming the fact he followed the superior orders cannot relieve him from liability. The rationale of his approach was probably to negate any excuse of superior authority or states and to establish individual responsibility, giving up the traditional view of state responsibility. Jaranilla's rationale as such would have been debatable, as Jaranilla erroneously tried to justify his conclusion based on the negation of state responsibility. State responsibility is completely another issue and not obsolete at all, for state responsibility and individual responsibility can coexist. In the final analysis he seems to have supported the *absolute liability* doctrine, under which both superior officers and soldiers were held liable.

Interestingly, the Dutch judge Roling stated a different opinion as to a superior order plea as follows:

[n]o soldier who merely executed government policy should be regarded as a criminal, as guilty of the crime against peace. The duty of an army is to be loyal. Soldiers not sailors, generals nor admirals should be charged with the crime of initiating or waging an aggressive war, in case they merely performed their military duty of fighting in a war waged by their government.²²³

On the subject of crime against peace, Judge Roling implied acceptance of the defence of

²²² Roling n220 above 508.

²²³ Ibid, at 1117.

superior orders to some extent. He dissented from the majority opinion and probably intended to show a possibility of defendants' acquittal or mitigation in the case of crime against peace. He seems to have had a different approach agreeing to the idea that just an execution of a government policy is not sufficient for crime against peace. Though Judge Roling's idea on superior orders was ambiguous at this stage, his actual opinion can be seen in his treatise afterward.²²⁴

Justice Pal, the Indian judge, in his dissenting opinion, stated that the Tribunal should have acquitted all the defendants on the ground that the notion of individual criminal responsibility was not established under international law. Justice Pal did not comment precisely on superior order issues,²²⁵ yet from his opinion negating the idea of individual responsibility, it is not very difficult to assume that Justice Pal would have thought superior order could be a defence, which was similar to the *respondeat superior* doctrine. As his approach was not for individual responsibility, he probably did not agree on any of the superior order approaches. If chances are given, he would not have agreed to the *absolute liability* doctrine.

In Tokyo, the Tribunal did not have a chance to address its opinion on the defence of superior orders, as only one actually raised a superior order plea and all of them were relatively high ranking officials and military personnel. However, the Tribunal could have stated that the defence of superior orders is not a defence at all or mitigation only, inheriting the doctrine of *respondeat superior*, for theoretically the Tokyo Trial was supposed to succeed to the Nuremberg principles.

The Tokyo Trial had no problems with the comments and conclusions of the Nuremberg Trial and stressed its consistency as follows:

²²⁴ In later years Judge Roling wrote a treatise on the defence of superior orders.

"The superior order to commit a war crime is a complete defence if it leads to an excusable *error juris*...if there did not exist any negligence on his part---the only conclusion should be that he cannot be punished. Bert Roling, 'Criminal Responsibility For Violations of the Laws of War', 12 *Revue Belge De Droit International*, 1976, pp. 18-19.

²²⁵ *Id.*

[w]ith the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this Tribunal is in complete accord.²²⁶

A significant problem lies in the fact that the Tokyo Trial did not deal with superior order issues directly while one defendant actually claimed it. The court erroneously disregarded the issues of superior orders and not only possibility of defence but also possibility of mitigation was not even discussed. Probably, the court seems to have had the idea that all of them were high ranking commanders and politicians so they were not allowed to have a defence of superior orders following Article 6 of the Charter. It was unquestionable that the Tokyo trial intended to use the same principles established at Nuremberg, but the result was actually different since only one defendant raised a superior order plea and the Tokyo trial disregarded the issues of superior orders.

In addition, the social and cultural background suppressed the reality of the chain of command in Japan's military society and political affairs. Most of the defendants followed orders of superiors but did not raise superior order pleas in order to protect the Emperor. The defendants' silence at the court did not mean they all had had the criminal intent to commit war crimes. Perhaps some of them did not know it was illegal or did know but they were under duress,²²⁷ which might be a cause of at least mitigation under current international criminal law. However, the adversarial court system of common law countries did not shed light on the reality of the Japan's military society. This problem cannot be argued without the existence of the Emperor, who was never allowed to be tried because of political considerations. The negation of superior order defence based on the *absolute liability* principle leads to the fact that both of those who ordered and those who followed are

²²⁶ Roling n220 above 28.

²²⁷ During World War II, dozens of subordinates were executed every year because of the crimes against the superior; assault against the superior, intimidation, killing and wounding, lethal damage, insult, and, disobedience. Kumazawa, Kyojiro, Tenno no Guntai, Gaidai-hyoron-sha, 1974, p.131

liable, but the Tokyo Trial did not deal with the responsibility of the Head of government the Emperor. For this reason, it cannot be denied that the Tokyo was a partly politically motivated trial, in that the Emperor was not prosecuted though other leaders were tried, and the idea of the plea of superior orders was never discussed at the cost of misunderstanding of the court system.

10. Other Notable Cases of the defence of superior orders in domestic courts

a. The *Eichmann* Case

In *Eichmann*, Adolf Eichmann was brought to trial in the District Court of Jerusalem on charges of Crimes against the Jewish People, crimes against humanity, and war crimes. The accused's principal defence was that everything he did was in accordance with orders from his superiors. The Counsel for the defence raised a superior orders defence as follows 'faith in the leadership is the basic principle of all states....He who has obeyed is unlucky; he has to pay for his loyalty.'²²⁸

The District Court rejected the argument of the defence as follows:

[i]n fulfilling this task, the accused acted in accordance with the general directives from his superpowers, but there still remained to him wide discretionary powers in planning operations on his own initiative. He was not a puppet in the hands of others; his place was amongst those who pulled the strings.²²⁹

The District Court admitted that the accused acted pursuant to his superior orders but rejected the plea of superior orders, pointing out that he held 'wide discretionary powers' in his hand and took initiative. The rationale of this decision was that he was more an actor not 'a

²²⁸ *Att'y Gen. Of Isr. v. Eichmann*, 36 I.L.R. 18 (Isr. Dist. Ct. 1961)

²²⁹ *Id.*

puppet’.

The Supreme Court’s decision was in complete accord with the District Court emphasizing that ‘his status was not inferior at all but high and exalted, and that by reason thereof he fully controlled Jewish affairs....the appellant did not receive orders “from above” at all’. ²³⁰ The Supreme Court also negated the fact that the accused received orders from higher authorities; therefore he was found guilty.

The *Eichmann* case was not tried at a domestic court, which was established solely by the Israeli government under the Nazis and Nazi Collaborators Law. For this reason, the validity of the law applied to the case; therefore the structure of the court is highly questionable. The question whether the government had the right to enact retroactive law has to be examined since the idea of war crimes during that time was at the early stage. In order to justify jurisdiction of the court, the Israeli government probably had two sources of jurisdiction; the passive personality principle and the universality principle. As the validity of the passive personality principle was not recognized, the only acceptable option for the government was to rely on the universality principle. However, when a court relies on the universality principle, it has to be found that when this doctrine was accepted under international law.

In relation to superior orders pleas, the district court cited the Criminal Code Ordinance of 1936 showed the *manifest illegality* doctrine under the Israeli law.²³¹ Though the establishment of the court was highly questionable, the judgment of the court seems to have been similar to other trials punishing World War II criminals. The court did not accept the defence of superior orders but permitted the court to consider the order as grounds for mitigation.

²³⁰ Attorney General of the Government of Israel v Eichmann, 36 I.L.R. 328, 339-40. (Supreme Court of Israel 1962).

²³¹ Ibid, para. 218.

b. The *Calley* Case

In *Calley*, Lieutenant William Calley was charged with a massacre of civilians in My Lai in March 1968 during the Vietnam War. Calley was a platoon leader but was ordered to kill women and children by Captain Medina therefore the defence council contended that Calley did not have the required *mens rea*. In its judgment on the defence of superior orders of Calley for the massacre at My Lai,²³² the judge advocate at his court martial ruled and the Military Court of Appeal upheld this. The Military Court of appeals recognized that ‘if you find that Lieutenant Calley received an order directing him to kill unresisting Vietnamese within his control or within the control of his troops, that order would be an illegal order’. However, the court seems to have shown a different approach that ‘[a] determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it’. Apparently, the Military Court did not rely on the *absolute liability* doctrine, and the rationale of the judgment was as follows:

[s]oldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.²³³

²³² *U.S. v. Calley* (1971) 48 C.M.R. 19; Please note that national law is not part of international law. However, if a majority of the states have similar provisions we can say it is general principles of international law or customs. Therefore the *Calley* case as such is not customary law but can be evidence of customary international law or general principles of law.

²³³ *US v. Calley*, U.S. Court of Military Appeals (1973), 22 USCMA 534, 48 CMR 19 Available at < http://www.law.umkc.edu/faculty/projects/ftrials/mylai/MYL_uscma.htm >

Discarding the *absolute liability* doctrine, the court used the ordinary person's standard to evaluate the accused's criminality, which would be called an intermediate approach. The position of the court was seen in the holding that:

[t]he acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.²³⁴

Surprisingly the court introduced this approach as it was more lenient than the Nuremberg Principles. The Calley's approach was that criminality is not imposed when (1) the accused knew that the order was illegal or (2) a man of ordinary sense would have realized that the order was illegal. In order to evaluate his knowledge, the court also stated that it might be inferred from circumstantial evidence. The Court negated a superior order defence based on the question of whether a man of ordinary sense and understanding would have known the order was unlawful. Some may draw the conclusion that the same approach was taken as did in Nuremberg and Tokyo.²³⁵ However, the standard the court used was '[t]he standard is that of a man of ordinary sense and understanding under the circumstances', which was not addressed in Nuremberg and Tokyo. The ordinary person's standard still leaves possibility of negating criminality of the accused, unless he knew it was illegal. The case indeed addressed the question of the defence of superior orders, but it is very surprising to know how the US actually reduced his sentence from the life imprisonment to six month imprisonment. In 1971, he was convicted and sentenced to life imprisonment with hard labour. On the other hand, Calley's sentence was reduced to twenty years' imprisonment by the Third Army Commander following the order of US President Nixon. In 1973, the Court of Military review upheld Calley's conviction and sentenced him twenty years imprisonment, and it was

²³⁴ Ibid.

²³⁵ Green Modern n13 above 328

upheld in the Court of Military Appeals. In 1974, the US Secretary of Defence reduced his sentence to ten years imprisonment. A district court overturned Calley's conviction and he was released on parole. In the same year, the US Court of Appeal for the Fifth Circuit reversed the decision of the district court and he remained free on parole. As a result, he just served six month of his sentence in prison. The *Calley* case has problems in that the court did not follow the *absolute liability* doctrine established at Nuremberg and the government in reality reduced his sentence up to six months. The position of the US government as to Calley, is inappropriate as his superior order plea was somehow considered in mitigation but Captain Medina who ordered it to Calley, was found not guilty. Under the Nuremberg Principles, those who ordered are liable and those who followed also liable, this was not true in the *Calley* case.

11. The defence of superior orders in the post-war period and the establishment of the ICTR and ICTY

Since Nuremberg the international community had become reluctant to develop the rules on superior orders until the early 1990s, under the influence of the tension among superpowers during the Cold War era. The tension between the United States and Soviet Union let down the enthusiasm of the international community in order to develop the principles of international criminal law, so the provisions of superior orders pleas stopped to be codified.

In the drafting process of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the Genocide Convention), the question of the plea of superior orders was discussed but the Genocide Convention failed to insert a provision on the defence of superior orders. The Secretariat Draft submitted in 26th June 1946 had an article concerning superior order pleas, which provided: '[c]ommand of the law or superior

orders shall not justify genocide.²³⁶ The draft apparently supported the *absolute liability* doctrine, denying the doctrine of *respondeat superior*. However, this approach was not maintained in the Ad Hoc Committee Draft, which merely described direct participation of individuals and the immunity of heads of State, public officials or private individuals were denied. Article V of the Ad Hoc Committee Draft provides that '[t]hose committing genocide or any of the other acts enumerated in Article IV shall be punished whether they are heads of State, public officials or private individuals'.²³⁷ The doctrine of *respondeat superior* was discussed but the majority of the Committee objected this doctrine, claiming that it would not be appropriate to demand the subordinate to judge the legality of orders on the battlefield. In 1948, the Genocide convention was finally made without referring to the issues of superior order pleas because the majority of the Committee rejected the article of the Secretariat Draft.²³⁸

Even though the Nuremberg principles were promulgated by the International Law Commission and was accepted by the UN General Assembly in 1950,²³⁹ there was no unanimous agreement as to superior orders issues in the year of the Genocide Convention. The international community was willing to adopt when it comes to establishing rules and principles applicable to a particular type of states like Nuremberg or Tokyo but suddenly became reluctant to establish the rules applicable to them. The Genocide Convention could have chosen the *absolute liability* doctrine or the *manifest liability* doctrine, but none of them were applied.

Bassiouni justifies the background of the codification process and states that one of the reasons of the rejection of any provisions of superior orders was not to intervene in the

²³⁶ Article V of the Convention on the Prevention and Punishment of the Crime of Genocide - the Secretariat and Ad Hoc Committee Drafts, Prepared by the UN Secretariat, [May] 1947[UN Doc. E/477]

²³⁷ Second Draft Genocide Convention, Prepared by the Ad Hoc Committee of the Economic and Social Council (ECOSOC), meeting between April 5, 1948 and May 10, 1948 [UN Doc. E/AC. 25/SR. 1 to 28]

²³⁸ See Bassiouni Crimes n60 above 478.

²³⁹ (1950) ii *Yearbook of the ILC* 374-375.

codification work of the bodies of the United Nations.²⁴⁰ Though Dinstein also makes a similar comment on this issue,²⁴¹ failure of agreement as to the defence of superior orders is not considered as evidence of customary international law. The international community should have made efforts on promulgating treaties rather than spending time on making non-binding UN decisions. It can be said that the international community did not have any international agreement of superior orders since the Nuremberg Principles.

Neither the Geneva Conventions of 1949²⁴² nor the Additional Protocols of 1977 did refer to the issues of the defence of superior orders. Article 86 and 87 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (hereinafter the Protocol I) states the responsibility of commanders, however the Protocol I did not include the provision on the defence of superior orders.

The drafting process of the four Geneva Conventions produced the same result.²⁴³ In 1948, four experts on the laws of war were invited by the International Committee of Red Cross (the ICRC) in order to research into the issues of superior order pleas.²⁴⁴ Following the advice of the experts, the ICRC proposed rules on superior order pleas to the Diplomatic Conference held to formulate and sign the Conventions.²⁴⁵ In 1949 the ICRC proposed a rule of the defence of superior orders. The third draft article of the ICRC stated that:

[t]he fact that the accused acted in obedience to orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show

²⁴⁰ Bassinouni Crimes n60 above 478.

²⁴¹ Dinstein n10 above, pp.224-225.

²⁴² Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949; Geneva Convention (III) Relative to the Treatment of Prisoners of War; August 12, 1949; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

²⁴³ See Bassinouni Crimes n60 above 478.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify.²⁴⁶

The 1949 ICRC proposal was similar to the traditional *respondeat superior* doctrine, which punishes subordinates only when they are assumed to have known the illegality of the order, leaving the possibility of mitigation or remission but the reasonable grounds would have been assumed by circumstantial evidence. Moreover, the following sentence should not be ignored; ‘Full responsibility shall attach to the person giving the order, even if in giving it he was acting in his capacity as a servant of the State’²⁴⁷. Regardless of the efforts of the ICRC, the four Geneva Conventions of 1949 unfortunately failed to contain any article on the defence of superior orders as a number of states opposed the ICRC proposal, which might have been evidence of non-existence of customary law on this issue.

The 1974 - 1977 proposal was issued by the ICRC, which had a provision on the defence of superior orders, which stated that:

- (1) No person shall be punished for refusing to obey an order of his government or of superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol.
- (2) The fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from penal responsibility if it is established that, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the Conventions or of the present Protocol and that he had the possibility of refusing to obey the order.²⁴⁸

²⁴⁶ Bassinouni Crimes n60 above 478.

²⁴⁷ Ibid.

²⁴⁸ Gaeta, Paola, ‘The Defence of Superior Orders: the Statute of the International Criminal Court versus Customary International Law’, [1999] 10 EJIL 172, pp.187-188 (cited in this paper “Gaeta”)

The ICRC proposal did not automatically remove criminality from the subordinates, punishing subordinates who knew the illegality of order from the objective point of view. The proposal also confirmed the right to disobey illegal orders. However, this approach, too, was not contained in the Additional Protocols of 1977 as a number of states disagreed to these proposals for fear of creating many possibilities of subordinates' disobedience in the field.²⁴⁹

From the end of World War II to the early 1990s, the international community continuously failed to promulgate any international codification concerning the defence of superior orders except the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 2 of the Convention provides that: '[a]n order from a superior officer or a public authority may not be invoked as a justification of torture'.²⁵⁰ The provision negated any possibility of freeing him from the responsibility even if he acts under the order of a superior officer. However, Article 2 is not considered to have reflected customary international law as other international criminal law conventions did not refer to the defence of superior orders around this period. For instance, the International Convention on the Suppression and Punishment of the Crime of Apartheid did not mention it, as well. Article 3 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, only mentions international criminal responsibility, which asserts that:

international criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions, and representatives of the State.²⁵¹

Article 3 of the International Convention on the Suppression and Punishment of the Crime of

²⁴⁹ Ibid.p 188.

²⁵⁰ Article 2 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, U.N. G.A. Res. 39/46

²⁵¹ Article 3 of the International Convention on the Suppression and Punishment of the Crime of Apartheid.

Apartheid did not address the defence of superior orders. One may claim that the phrase of 'irrespective of the motive involved' may have included superior orders. Nevertheless, motive is a narrow term, which generally denotes 'willful desire', so superior orders would not have been considered as 'willful desire'.²⁵² Article 3 is an immature provision as it just described the criminality issues without mentioning mitigation issues. It would be a hasty conclusion that Article 3 rejected a plea of superior orders.

However, the collapse of the Soviet Union and subsequent emerging regimes and states of Russia changed a trend of international relations, which has made it possible for the international community to develop and codify the principles of international criminal law established at Nuremberg and Tokyo. The international community took big steps toward the revival of the idea of the negation of superior order pleas after an interval of five decades. The Security Council established two ad hoc international tribunals; The former is the ICTY established in 1994 by the United Nations Security Council Resolution 827, following the ICTY Statute; and the ICTR established in 1994 by the United Nations Security Council Resolution 955 (8 Nov. 1994), following the ICTR Statute.

One year prior to the establishment of the tribunals, the Report of the U.N. Secretary-General concerning the International Criminal Tribunal for Former Yugoslavia addressed that superior orders are not a defence but a mitigation factor:

[a]cting upon an order of a Government or a superior cannot relieve the perpetrator of the crime or his criminal responsibility and should not be a defence. Obedience to superior orders may, however, be considered a mitigating factor, should the International Tribunal determine that justice so requires.²⁵³

The report apparently dealt with the defence of superior orders the first time since Nuremberg

²⁵² Blacks Law Dictionary, (2nd ed., West Group) p.461.

²⁵³ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N.S.C. Doc. S/25704 (1993), *reprinted* in 32 I.L.M. 1163 (1993) at para. 57.

and confirmed that superior orders are not a defence but can be a mitigation cause, following the Nuremberg principles. However, it should be noted that the Report merely showed a possibility of defence if it is combined with other situation like coercion or lack of moral choice. One point, which is not known from the report, is if the report allowed a defence where a subordinate was ordered and the moral choice was not available. There would be a situation where someone cannot have a moral choice but the threat he is facing is not tantamount to coercion. But the report does not clearly state this situation should be a mitigation factor or get rid of criminality.

As to the defence of superior orders, the ICTY and ICTR have similar provisions following the Nuremberg Charter. Article of 7 (4) of the ICTY statute provide:

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.²⁵⁴

Superior orders are expressly excluded as a defence in the ICTY statute as they were at Nuremberg. The provision does not free him from responsibility even if he followed superior orders regardless of clarity of the order, the circumstances of the accused will be considered in mitigation of punishment. These principles completely follow the Nuremberg principles.²⁵⁵

The ICTR Statute has also identical provisions on the defence of superior orders, Article 6 (4) of which provide:

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

²⁵⁴ Article 7 of the ICTY Statute.

²⁵⁵ See (1950) ii Yearbook of the ILC 374-5.

in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.²⁵⁶

Article of 7 (4) of the ICTY and Article 6 (4) of the ICTR are the same closely following the Nuremberg principles. From the early 1990s on, the international community seems to have started to deal with superior orders as illegitimate in principle.

Though a number of scholars claim that Article 7 of the ICTY and Article 6 of the ICTR would be evidence of customary international law on superior order pleas, a question has to be posed whether the idea of negation of superior orders is really accepted in an international arena. The principle of *absolute liability* established at Nuremberg was confirmed in the ICTY but the cases of Nuremberg, Tokyo, ICTY, and ICTR show a tendency to be applied only to particular countries. The universal application of this doctrine has never been recognized since Nuremberg. This observation would be bourn out by the fact that none of international treaties has successfully codified the *absolute liability* doctrine since World War II.

There are few cases concerning superior order pleas in the ICTY and ICTR. The reason would be that most of the defendants are relatively high ranking officials and commanders, who seem to have committed a crime as an active perpetrator or an accomplice. For defendants who are just concerned their severe punishment, a guilty plea or duress would be a better deal than just raising a defence of superior orders since superior orders are merely a mitigation factor at present.

The most cited case concerning a superior orders plea of the ICTY is the *Erdemovic* case, where Drazen Erdemovic participated as a member of the Bosnian Serb army in executing Bosnian Muslims. He was charged with the violations of the laws or customs of war or crimes against humanity. Erdemovic raised the plea of superior orders in the Trial Chamber as follows: '[y]our honour, I had to do this. If I had refused, I would have been

²⁵⁶ Article 6 of the ICTR Statute.

killed together with the victims’.²⁵⁷ Erdemovic pleaded guilty to crimes against humanity, stating that it was a superior order under duress.

Following Article 7(4) of the ICTY Statute, the Trial Chamber held that the Nuremberg Trial did not accept superior orders as grounds for reducing the penalty. Following the decisions of some cases in which the defence of superior orders was allowed, the Trial Chamber took the view that:

in practice, the Trial Chamber therefore accepts that tribunals have considered orders from superiors as valid grounds for a reduction of penalty. This general assertion must be qualified, however, to the extent that tribunals have tended to show more leniency in cases where the accused arguing a defence of superior orders held a low rank in the military or civilian hierarchy. The Trial Chamber emphasises, however, that a subordinate defending himself on the grounds of superior orders may be subject to a less severe sentence only in cases where the order of the superior effectively reduces the degree of his guilt.²⁵⁸

The Trial Chamber did not recognize a superior order as a defence but allowed it in mitigation because Erdemovic’s guilty mind was undermined. It was observed that subordinates who were in a low rank in the military or civilian hierarchy would get a lenient sentence. On November 29, 1996, the Trial chamber accepted the guilty plea and dismissed a violation of the laws or customs of war, and Erdemovic was sentenced to a ten-year term of imprisonment.

Subsequently, the Appeals Chamber was asked to revise the sentencing judgment on 14th April 1997. However, the majority rejected the appellant application. Then the Appeals Chamber remitted the case to a new trial chamber, the reasons of which were that the accused should ‘be allowed to replead with full knowledge of both the nature of the charges

²⁵⁷ *Prosecutor v. Erdemovic*, IT-96-22-T, 29 November 1996, para.10

²⁵⁸ *Ibid.* para.53.

against him and consequences of his plea'.²⁵⁹ The case was accordingly remitted in order to allow him to have the opportunity to make another plea to the charges. The new Trial Chamber, on 14 January 1998, took another plea from Erdemovic. Without referring to the issue of the defence of superior order, the Trial Chamber dealt with duress issues seriously. Though the Chamber accepted there was duress in this case, the Chamber held that duress 'may be taken into account only by way of mitigation'.²⁶⁰ The Chamber confirmed the Appeals Chamber's ruling that 'duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings'.²⁶¹ The chamber substituted superior order issues for the issue of duress and plea-bargaining agreement. In the end, the Trial Chamber, taking his new plea-bargaining, finally showed a lenient attitude and sentenced Erdemovic to five years in prison.

The *Erdemovic* case was not exactly a pure superior order case since he raised it together with duress in his guilty plea with a view to being sentenced the least. Though the Trial Chamber noted that the provisions in the Statute dealing with superior orders were 'practically identical'²⁶² to the counterpart at Nuremberg, the attitude the Trial Chamber took to Erdemovic was not clear-cut because the Trial Chamber practically did accept his guilty plea and mitigated his sentence from 10 years to 5 years.

However, the fact that the Trial Chamber switched a precise examination of evidence of superior orders and duress with plea-bargaining might undermine the authority of the ICTY. It should be noted that not many states have a plea-bargaining system, so the legal justification of plea-bargaining is very doubtful. In addition, the judgment of the Chamber erroneously disregarded the issue of superior orders accepting his guilty plea, which would inappropriately affect the function of the ICTY. In terms of reducing sentence, mitigation by the reason of superior orders should be stronger than mitigation by guilty plea, as superior order plea is based on the lack of guilt at the time of the commission influenced by the

²⁵⁹ Ibid. para. 7.

²⁶⁰ Ibid. para.17.

²⁶¹ Ibid.

²⁶² Ibid. para.48.

superior orders. The Chamber should have considered superior orders issues first and made clear that to what extent superior order will mitigate his penalty. Superior order plea in order to get a less sentence should not be mixed with guilty plea issues, which probably would have come up in the process of his defence strategy. Judge Sir Ninian Stephen, in a separate and dissenting opinion in the Appeals Chamber, argued that the Trial Chamber mistakenly accepted the defendant's guilty plea and should have entered a plea of not guilty and engaged in a precise and prudent examination of the evidence at trial.²⁶³

In the *Cesic* case, Ranko Cesic was charged with committing crimes against humanity, and violations of the laws or customs of war.²⁶⁴ The defence claimed that 'Ranko Cesic was at the lowest possible level in the hierarchy and had no superior or public authority',²⁶⁵ and stated Cesic 'acted pursuant to orders and that he would have been killed if he had failed to execute them'.²⁶⁶ The ICTY 'rejected as mitigating circumstances the submission that Ranko Cesic simply executed orders when committing the crimes and found that the submission of good character was not established'.²⁶⁷ The *Cesic* case showed some important aspects. The fact that the ICTY Statute allows superior orders as mitigating circumstances does not mean the court have to allow it when it is raised. It is true to say that courts have discretion as to considering the circumstances in mitigation. Therefore, the ICTY rejected superior orders even as mitigating circumstances in this case. Another aspect is that the accused statement is not sufficient as evidence of superior orders. The Trial Chamber probably needed objective evidence inferred from other circumstances in order to grant mitigation. Finally, the court did not accept superior orders as mitigation just because the accused is a relatively low rank. It can be said that the position of low rank will help to be mitigated, yet not an essential condition, so superior orders pleas in mitigation will have to explain other circumstances, too.

²⁶³ Lippman Penn n2 above 240.

²⁶⁴ *Prosecutor v Cesic*, IT-95-10/1-S, 11 March 2004, para. 3.

²⁶⁵ *Ibid.*, para. 95.

²⁶⁶ *Ibid.*, para. 95.

²⁶⁷ *Ibid.* para. 109.

In the case of *Jelusic* of the ICTY, the defendant was charged with genocide, violations of the laws or customs of war and crimes against humanity.²⁶⁸ Together with diminished psychological responsibility, one of the defendant's arguments was that 'the accused allegedly acted on the orders of his superiors and hierarchical duress'.²⁶⁹ The Trial Chamber did not discuss the issue of a superior order defence but held that 'even if it had been proved that Goran Jelusic acted on the orders of a superior, the relentless character and cruelty of his acts would preclude his benefiting from this fact as a mitigating circumstance'.²⁷⁰ Although the superior order was rejected as a defence, the opinion of the *Jelusic* case was not mentioned. It can be said that *Jelusic* was seen more as a perpetrator than as an automaton because of his relentless and cruel acts. The court seems to have believed that a condition of the lack of relentless character and cruelty of the acts is necessary to grant mitigation to the accused although it is not mentioned in Article 7(4) of the ICTY Statute.

In the case of *Bralo* of the ICTY, the Chamber showed a detailed view on the defence of superior orders. Miroslav Bralo was a member of Special Forces within the HVO called the JOKERS and was charged with violations of crimes against humanity and the laws of customs of war.²⁷¹ Bralo entered a plea of guilty and one of the circumstances the defence raised was 'the use of Bralo by his superiors'.²⁷² He acknowledged that he knew the order to be wrong.²⁷³ The Chamber explained the principles of mitigating issues of the ICTY and held that '[t]he acceptance of certain circumstances as mitigatory in nature does not detract from the gravity of the crime committed, nor diminish the responsibility of the convicted person or lessen the degree of condemnation of his actions'.²⁷⁴ Recognizing that superior orders could not be a defence, the Chamber noted that either duress or superior orders can be

²⁶⁸ Prosecutor v. Jelusic, IT-95-10-T 14 December 1999, para.2.

²⁶⁹ Ibid. para.12.

²⁷⁰ Ibid. para.126.

²⁷¹ Prosecutor v. Bralo, IT-95-17-S, 7 December 2005, para. 1.

²⁷² Ibid. para. 43

²⁷³ Ibid. para. 54.

²⁷⁴ Ibid. para. 42.

a reason for mitigation and raised the question whether he ‘was under some pressure to become a member of the “Jokers” and to be actively involved in combat operations carried out by the HVO’. The Chamber took up the issue of the moral choice test, and held that Bralo had ‘a moral choice with regard to his continued participation in the combat activities of the HVO following his release from prison...It has not been argued that he suffered any negative consequences in the sense of disciplinary or other action following his refusal to fight at that point. Bralo therefore could, and should, have refused to participate in combat activities at an earlier stage if he was given orders that he knew to be unlawful or was required to engage in activities that he knew to be illegal’.²⁷⁵

In *Bralo* the Chamber erroneously showed the view that either of duress and superior orders can be a mitigation cause. In principle, superior order is based on ‘ignorance of the illegality’ about the illegal order but the defence of duress is based on impaired free will at the time of commission to form the required *mens rea*.²⁷⁶ So, a superior order plea does not completely include duress plea. A better view is that both can be a reason of mitigation.

Probably the intention of the Chamber’s reference to the moral choice issue was to prove that Bralo was not under duress in order to deny his duress plea Bralo raised. Though the moral choice test is not a test for superior order defence²⁷⁷ it may be a test for the defence of duress. The Chamber held that submitting any negative consequence of the accused disobedience would be good evidence that he was unable to disobey, but that was not actually argued by the party. The Chamber also mentioned the *manifest illegality* principle and held that ‘these orders would have been so manifestly unlawful that Bralo should have refused to implement them’.²⁷⁸ The Chamber erroneously discussed issues of *manifest illegality* doctrine, under which a person can be acquitted if the order is not manifestly illegal, however, the approach was not promulgated in the ICTY Statute. Since Article 7(4) of the ICTY

²⁷⁵ Ibid. para. 55.

²⁷⁶ See Knoops n25 above 53.

²⁷⁷ At Nuremberg, the tribunal actually mentioned the term ‘moral choice’, the purpose of which is still debatable as the Nuremberg Charter did not allow a superior order defence at all.

²⁷⁸ Bralo para. 55.

Statute makes clear that superior orders will not be a defence,²⁷⁹ discussing manifest illegality was not helpful for the defence of superior order issues. The Chamber seems to have relied on the *manifest illegality* doctrine at the level of mitigation. The manifest illegality test seen in the past was a matter of defence but it is not used as a mitigating factor. The Bralo case is complicated as he raised superior orders, duress, and guilty plea altogether.

In summary, it can be said that the international community was unable to codify the rules and principles of international criminal law established in a series of post World War II trials during the Cold War era. It was not until the collapse of the Soviet Union that the international community started to make efforts to codify the Nuremberg Principles. Immediately after the end of World War II, the rules and principles of newly established international criminal law were recognized and promulgated as the Nuremberg Principles made by the ILC, which was subsequently unanimously accepted by the UN General Assembly. Nevertheless, there were few international documents concerning superior orders during the Cold War era. The Genocide Convention failed to reach a unanimous agreement as to the defence of superior orders. However, the ICRC proposed a few drafts on superior order pleas, neither the Geneva Convention nor the Additional Protocols did address superior order defence issues. The only exception would be the Torture Convention, which is applicable to state parties, Article 2 of which did address that superior orders are not a defence, but was silent on mitigation issues.

The ICTY and the ICTR have laid a cornerstone of reaffirming the principles of international criminal law, which was once disregarded in the Cold War era. Following the Nuremberg Principles, the doctrine of *absolute liability* has revived and superior order defence has been rejected with no exception. A superior orders defence has become impossible but will be considered in mitigation, which position would have been the same at the Nuremberg Trial. Interestingly, the ICTY and the ICTR have only a few cases on the defence of superior orders, the reason of which would be that raising duress or guilty plea is

²⁷⁹ Article 7(4) of the ICTY Statute.

better than raising superior orders for accused persons, since superior orders are not a defence under the Statutes anymore and do not promise mitigation. Accordingly, superior orders were not accepted as a defence in *Erdemovic*, *Cesic*, *Jelusic*, and *Bralo*.

Regarding mitigation, the ICTY cases showed principles of superior order pleas in fragments. The accused's statement is not sufficient as grounds for the defence of superior orders, which was held in *Cesic*. In *Erdemovic*, a possibility of mitigation based on civilian superior orders was also confirmed. In *Cesic*, a mere position of low rank will not be sufficient to raise a superior order defence. *Jelistic* case held that the lack of relentless character and cruelty of the acts are necessary conditions to grant mitigation.

The Chamber of the ICTY newly introduced the *manifest illegality* doctrine as a mitigation factor, under which the accused may get a mitigated sentence if the order he received is not manifestly illegal. This approach has to be called new, as the original version of the *manifest illegality* principle is that the accused can successfully raise a defence of superior orders, if the order is not manifestly illegal. So, the accepted *manifest illegality* principle was actually a defence factor but under the ICTY it can be a mitigation factor, which was not seen in the ICTY Statute but the court showed an objective criterion for granting mitigation.

Cases prove that guilty plea will be considered as mitigating circumstances, and duress might be a defence if the crime in question is not crime against humanity or war crime taking innocent lives. The *Cesic* case provided that a guilty plea 'is an important mitigating circumstances'.²⁸⁰ However, opening a possibility of mitigation to the accused based on guilty plea should not be mixed with other mitigating issues since guilty plea as such will not deter future crimes.

There is no doubt that the ICTY does not accept superior orders as a defence, which was proved in *Erdemovic*, *Cesic*, *Jelusic*, and *Bralo*. Concerning mitigating issues of

²⁸⁰ The Chamber justifies a guilty plea as an important mitigating factor from the perspectives of time, effort and resource of the trial. See *Prosecutor v Cesic*, IT-95-10/1-S, 11 March 2004, paras 58-60.

superior orders, the author disagrees with the ICTY as it used the *manifest illegality* principle only for mitigation purposes, which was not seen in the ICTY Statute. The Chamber apparently denied the possibility of mitigation in the cases of the subordinates' awareness of illegality of the order or assumes his guilt using a reasonable person's standard. The view is too harsh considering that the ICC Statute allows the manifest illegality principle for defence if certain conditions are met.²⁸¹ Mitigation should be allowed in any kinds of situation when justice so requires, as duress does not encompass all of superior order cases. Otherwise, superior orders not tantamount to duress will not be considered as a cause of mitigation.

12. The history of the codifications of the ILC

The International Law Commission's 1951 Draft Code of Offences against the Peace and Security of Mankind, had a provision on the defence of superior orders. Article 4 of the 1951 Draft provided:

[t]he fact that a person charged with an offence defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him.²⁸²

The 1951 Draft Code was based on the *moral choice* test as an intermediate position, which was apparently more lenient than the *absolute liability* doctrine, as it in principle allowed superior orders as a defence if the moral choice was impossible. The problem with the *moral choice* test is that the test can be used at the discretion of judges as it can be very subjective. The criteria of the moral choice test have to be clarified. It can be said that a few years after the Nuremberg Trial a compromise has started to show up although the Draft as such was not binding.

²⁸¹ See Article 33 of the Rome Statute of the International Criminal Court.

²⁸² Report of the I.L.C, 3rd Session, *I.L.C. Yearbook*, 1951, vol.2 p. 137.

The 1954 Draft Code of Offences against the Peace and Security of Mankind, also had a similar provision on superior orders. Article 4 of the Draft provided:

[t]he fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.²⁸³

In the 1954 Draft Code, the expression ‘a moral choice was in fact possible to him’ was substituted by ‘in the circumstances at the time, it was possible for him not to comply with that order’.²⁸⁴ The expression was substituted because ‘moral choice’ was an ambiguous concept to understand.²⁸⁵ However, ‘it was possible for him not to comply with that order’ would have included any kinds of situations like coercion, mistake of law or fact, mental disease, intoxication, and, necessity. The availability of defence seems to have depended on the definition of ‘it was possible’. Article 4 of the Draft would not have been sufficient to be used for a guideline for soldiers on the battlefield.

The International Law Commission made a draft in 1986 and added a new text, which allowed exceptions to individual criminal responsibility. One of the exception to criminal responsibility was ‘the order of a Government or of a superior, provided a moral choice was in fact not possible to the perpetrator’.²⁸⁶ Apparently, the ‘moral choice’ criterion revived.

The International Law Commission’s Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind in 1991(hereinafter the 1991 Draft Code) also had a provision on the defence of superior orders. The intention of the 1991 Draft Code was to

²⁸³ Article 4 of the 1954 Draft Code of Offences against the Peace and Security of Mankind.

²⁸⁴ Triffterer n21 above 575.

²⁸⁵ Ibid.

²⁸⁶ Thiam, Doudou, ‘Fifth Report on the draft Code of Offences against the Peace and Security of Mankind’, Documents of the Thirty-Ninth Session, 1987, (1987) 2 (part1) Y.B.I.L.C., p.7.

function as a jurisdictional basis for domestic courts and international courts. The only Article on defence of superior orders is Article 11 of the 1991 Draft Code, which provides;

[t]he fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances of the time, it was possible for him not to comply with that order.²⁸⁷

The 1991 Draft reverted back to the previous 1954 Draft approach, as it says ‘it was possible for him not to comply with that order’ without using the term ‘moral choice’.

In addition, it should be noted that Article 11 has to be read with Article 14, which states that;

[t]he competent court shall determine the admissibility of defenses under the general principles of law in the light of the character of each crime [and] in passing sentence, the court shall, where appropriate, take into account extenuating circumstances.²⁸⁸

Article 14 as such did not give defences or mitigations but they are left to the competence of the court.²⁸⁹ The intention of this approach seems to have been to leave each issue on an *ad hoc* basis.²⁹⁰ This approach was a result of ‘the inability of the members to agree upon which defenses ought to be recognized or how they ought to be formulated’.²⁹¹ This provision is slightly different than the Nuremberg Charter, in that orders of a superior were never grounds for exculpation but could be considered in mitigation of punishment. In the

²⁸⁷ Article 11 of the 1991 Draft Code.

²⁸⁸ Article 14 of the 1991 Draft Code.

²⁸⁹ Commentaries on the International Law Commission’s 1991 Draft Code of Crimes Against the Peace and Security of Mankind (Bassiouni ed.), Association Internationale De Droit Penal, 1993, p.199.

²⁹⁰ Ibid.

²⁹¹ Ibid.

Nuremberg Charter, it did not allow the subordinates to use the defence of superior orders as freeing him from responsibility in the tribunal, only in mitigation.

Article 11 of the 1995 Draft Code of Crimes Against the Peace and Security of Mankind provided that:

[t]he fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a government or of a superior, does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order.²⁹²

Article 5 of the Draft Code of Crimes Against the Peace and Security of Mankind also provided that:

[t]he fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.²⁹³

The 1996 Draft Code is slightly different because it eliminated the possibility of escaping responsibility when subordinates executed superior orders and used the situation only for mitigating circumstances, which was identical to the Nuremberg Principles.

The International Law Commission also stated in its commentary to article 6 of the 1996 Draft Code of Crimes:

the culpability and the indispensable role of the subordinate who actually commits the criminal act cannot be ignored. Otherwise the legal force and effect of the

²⁹² Article 11 of the 1995 Draft Code of Crimes Against the Peace and Security of Mankind.

²⁹³ Article 5 of the 1995 Draft Code of Crimes Against the Peace and Security of Mankind.

prohibition of crimes under international law would be substantially weakened.²⁹⁴

The commentary focuses on the responsibility of the superior who actually ordered illegally, but also notes that the culpability of subordinates ‘cannot be ignored’. Since the Nuremberg the international community has had the strong belief that the subordinate who committed a heinous crime pursuant to superior orders should not be expelled unconditionally.

13. The International Criminal Court

In 1993, the Sixth Committee at UNGA 48 discussed the International Law Commission’s (ILC) Draft Statute for an International Criminal Court.²⁹⁵ The ILC revised the Draft Statute for an international Criminal Court in 1994 and the new Revised Draft Statute represents the discussion of ten years and analysis by the ILC and marks one of the major attempts by the UN to introduce a comprehensive and universal normative framework for international criminal regulation in the international community.²⁹⁶ However, the Draft Statute did not codify the provisions of the defence of superior orders ‘because of its emphasis on enforcement and jurisdiction’.²⁹⁷

After two years of discussion and examination by the Sixth Committee of the General Assembly, an Ad Hoc Committee and a Preparatory Committee on the Establishment of an International Criminal Court, the International Criminal Court (hereinafter the ICC) was established by the Rome Statute of the International Criminal Court (hereinafter the ICC Statute) in 1998. The 1994 Draft statute²⁹⁸ did not have any provision on the defence of

²⁹⁴ 1996 ILC Draft Code of Crimes, Commentary to article 6. Available at < http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf> visited 20th June 2007.

²⁹⁵ See the Report of the Working Group on a Draft Statute for an International Criminal Court, in *Report of the International Law Commission on Its Forty-Fifth Session*, UN Doc. A/48/10 (1993) at p.255.

²⁹⁶ McCormack n54 above, pp 178-9.

²⁹⁷ Triffterer n21 above 577.

²⁹⁸ The 1994 Draft Statute did not contain any provision on superior orders. The reason for this was that the emphasis was on enforcement and jurisdiction of the International Criminal

superior orders, as it was focused on structure issues. Accordingly, the 1995 Ad Hoc Committee failed to consider this issue precisely, though the defence of superior orders was listed under possible excuses.²⁹⁹

Finally, the ICC Statute has the provision on the defence of superior orders. Article 33 of the ICC Statute was very much relied on the proposals of Canada and France.³⁰⁰ Both of the proposals are apparently more lenient than Articles of the ICTY³⁰¹ and ICTR³⁰² since both the ICTY and ICTR can be called the *absolute liability* doctrine. Both of the proposals included the knowledge requirement of subordinates unlike the ICTY and ICTR.³⁰³ In the Preparatory Committee in 1988 there was no agreement as to knowledge requirement, because there were many participants in the discussions.³⁰⁴

One of the most criticised issues at the Preparatory Committee in 1998 was an exemption provision under the authority of the Security Council.³⁰⁵ Under this proposal ‘persons who have carried out acts ordered by the Security Council or who have acted on its behalf and in accordance with a mandate issued by it shall not be criminally responsible and may not be prosecuted before the Court’.³⁰⁶ The idea was finally dropped, receiving a great deal of criticism.

The French proposal is that the defence of superior orders was possible only in war crimes, which means ‘rules of international law in armed conflicts or with duly ratified or approved international conventions’.³⁰⁷ The French proposal introduced ‘the idea of

Court. Ibid.

²⁹⁹ Ibid.

³⁰⁰ Lee, Roy S., *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Result*, Kluwer Law International, 1999, p. 211 (cited in this paper “Lee”)

³⁰¹ See Article 7 (4) of the ICTY Statute.

³⁰² See Article 6 (4) of the ICTR Statute.

³⁰³ Article 7 (4) of the ICTY and Article 6 (4) of the ICTR do not have any mental element requirement to be considered in mitigation.

³⁰⁴ Lee n299 above 211.

³⁰⁵ Ibid.

³⁰⁶ Bassiouni, M. Cherif, *The Statue of the International Criminal Court: A Documentary History*, Transnational Publishers, 1998, p.495.

³⁰⁷ Ibid.

regulating not only superior orders but also prescription of law in the case of genocide, crimes against humanity and aggression'.³⁰⁸

Article 33 of the ICC statute provides:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.

2 For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.³⁰⁹

Article 33 of the ICC statute provides 'certain exceptions under which a person may be relieved of criminal responsibility if he or she acted pursuant to an order of a Government or of a superior'.³¹⁰ Article 33 allows subordinates to exempt from criminal responsibility as long as they meet three conditions: 1) the person was under a legal obligation to obey the order; 2) the person did not know the order was unlawful; 3) the order was not manifestly unlawful. According to Section 2 of Article 33 orders to commit genocide or crimes against humanity are deemed 'manifestly unlawful' but orders to commit war crimes may not be manifestly unlawful. This means that if the requirements of (1) and (2) are met, then whenever an order is not manifestly illegal, it can be considered as a complete defence.³¹¹

³⁰⁸ Lee n299 above 211.

³⁰⁹ Article 33 of the ICC Statute.

³¹⁰ Eser, Albin, *Commentary on the Rome Statute* (Otto Triffterer, ed., 1999), p.542.

³¹¹ Gaeta n248 above pp.173-174.

14. Conclusion

The issues of superior orders are very controversial. Most states had similar provisions that allowed the defence of superior orders in the early 20th century as the priority was given to the unity of their armed forces. Indeed, a majority of states have provisions of the doctrine of *respondeat superior* in their military laws, where subordinates automatically were acquitted. Paragraph 443 of the 1914 edition of the Manual of Military Law of Britain provided that soldiers following government or superior orders were not war criminals. The US Rules of Land Warfare promulgated in 1940 stated that a soldier who followed government or commander's orders would not be punished.

The doctrine seems to have changed completely with World War II as a turning point. In order to deal with the crimes by the Axis countries, the international community decided to establish the Nuremberg Trial and the Tokyo Trial. This trend put soldiers in a serious dilemma as they were unrealistically required to judge the legality of orders on the battlefield instantly, for the Nuremberg Principles were based on the idea that soldiers are not automatons. This 'thinking for themselves' doctrine is called the *absolute liability* principle, and was used effectively at Nuremberg and Tokyo.

After World War II the international community believed that the *absolute liability* principle was part of international law. Accordingly, in 1950 the UN General Assembly confirmed the Nuremberg Principles. However the belief was interrupted by the tension between superpowers during the era of Cold War. The Genocide Convention could not reach a general agreement as to defence of superior orders despite thorough discussions. Both the Geneva Conventions of 1949 and the Additional Protocols of 1977 did not have provisions of the defence of superior orders, which also counted against the unanimous agreement of the Nuremberg Principles. The establishment of the ICTY and ICTR revived the *absolute liability* doctrine, where soldiers are not allowed to use superior orders as a defence but as mitigation. Some scholars still claim that the doctrine of the absolute liability has been

upheld since Nuremberg, but there have been discontinuation of defence of superior order theories.

The lack of consensus of the defence of superior orders was sufficiently seen in the process of the ICC establishment. The international society, however could not uphold the *absolute liability* doctrine in the ICC Statute, Article 33 (2) of which was a result of a big compromise. The *manifest illegality* principle, created by Article 33 (2) was based on the idea that soldiers followed not manifestly illegal without knowing that the order was illegal would be freed. A number of states seem to have retreated when their own people encountered a possibility of being prosecuted at the ICC. Perhaps, the intermediate approach is a better view in that slight consideration is given to soldiers on the battlefield, and yet it excludes a possibility of acquittal in the case of manifestly illegal orders. This view would be currently considered the standard of superior order defence from the perspective of international criminal law.

A problem of the current approach would be that it was a result of compromise so it is not sure whether it can be called actually customary international law. Also, history proves that victorious countries easily impose strict principles like *absolute liability* principle to some countries from time to time, but they sometimes become reluctant when it comes to making rules applicable to themselves. The establishment of the ICC was a typical example. Unfortunately, these issues of superior orders would not be seen in cases so much because a number of suspects being indicted in international tribunals tend to be very high ranking officials or commanders, so not many people actually raise defence of superior order pleas as they are seen as more direct participants rather than just an automaton. With regards to raising superior orders, the ICTY cases shows that the defendants tend to raise a duress plea or a guilty plea. Since superior orders are not a defence under the ICTR Statute and the ICTY Statute, a duress plea gives better deals under strict conditions of the ICC Statute so defendants prefer duress pleas rather than superior order pleas. Also, current cases at the ICTY and the ICTR show that courts are willing to accept a guilty plea, where accused have a

possibility of mitigation, which is actually similar result of superior order pleas. Now that superior orders can be a defence under the ICC Statute, which would be currently considered as part of customary international law; therefore both of the Statutes of the ICTR and ICTY erroneously excluded the possibility of superior order defence. Guilty plea based on the defendant's repentance should never be equivalent to the superior order issues, as subordinates' *mens rea* is undermined at the time of commission. It should be noted that the person who raises a guilty plea he is not denying the *mens rea* at the time of the commission.

Chapter III: Command Responsibility

1. Introduction of Command Responsibility

When a commander issues an illegal order he would be held liable, as he is ultimately in charge on the battlefield. The liability incurred by this situation is direct responsibility for issuing illegal orders regardless of the fact that the order was actually executed. However, in some cases the commander does not notice what is going on the battlefield or even try to stop the atrocities by his subordinates. In these cases, the commander apparently does not have the required *mens rea*. Herein comes a question; How far the commander has to take responsibility for the subordinates' conduct?

Command responsibility includes two concepts of criminal responsibility: the first concept is direct responsibility, where the commander is held liable for ordering unlawful acts, and the other is imputed criminal responsibility, where the commander is held liable for a subordinate's unlawful conduct.¹

The former is called direct responsibility of commanders, where the superior² actually delivered illegal orders to the subordinates, which will be unlawful. The latter is called indirect responsibility of commanders or just command responsibility, under which superiors might incur criminal liability for war crimes by their subordinates if they fail to exercise sufficient control over their subordinates.³

Imputed criminal responsibility, which is usually called indirect responsibility or just

¹ See Bassiouni, M. Cherif, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, 1996, p. 345(cited in this paper "Bassinouni ICTY")

² Under the doctrine of command responsibility a person in command need not to be from a military society, can be from government, or police any kinds of organizations. See Ibid p. 420.

³ Mitchell, Andrew D., 'Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes', [September, 2000] 22 Sydney L. Rev. 381(cited in this paper "Mitchell"); Please note that imputed criminal responsibility is not based on the commander's orders. See Bassiouni, M. Cherif, *Crimes against Humanity in International Criminal Law*, Kluwer Law International, 2nd ed., 2000, p. 419 (cited in this paper "Bassiouni Crimes")

command/superior responsibility only, is based on the commander's failure to act.⁴ Although the accountability of the individual has probably been accepted as being beyond doubt, the important aspects of the command responsibility doctrine remain unsettled. If the standard of the responsibility required from commanders is unreasonably high in an imminent combat situation, then this doctrine would not just reflect reality and but would impose a heavy burden.⁵

2. The Rationale of Leader Responsibility

Since the *Yamashita* case and subsequent war crime trials, international criminal law has imposed heavy responsibility on commanders to prevent and punish heinous crimes, as they are in a responsible position as commanders. The reason for the responsibility is that those who have superior positions are the most appropriate persons to control or stop subordinates' acts on the battlefield in terms of position and power.⁶ Following this logic, the burden of duty is imposed where he has a choice to stop, which means that he should have stopped the subordinates when he found out that the atrocities were happening or had reason to know them regardless of the fact that the atrocities are happening under his command or not.⁷

However, it would be extreme to punish superiors without any fault for the crimes unknowingly committed by their subordinates. International criminal law has never admitted vicarious or collective liability, which imposes a crime of a person on another. Criminal liability can extend to those who assist directly or indirectly a crime in various ways⁸ but can never go beyond the line. This chapter will examine under what kind of

⁴ Ibid.

⁵ Ibid.

⁶ Similar reasoning is explained. See Timothy Wu & Yong-Sung King, 'Criminal Liability for the Actions of Subordinates --- The Doctrine of Command Responsibility and its Analogues in United States Law', (1997) 38 Harvard International Law Journal p. 290.

⁷ See Celebici Appeal Judgment para 239.

⁸ *Kordic* (2001) Para.373.

situations superiors must be liable for the own conducts and for the subordinates' conducts.

3. Superiors' Direct Liability for Issuing Illegal Orders

A definition of direct order can be found in an ICTY case. In *Kordic*, the Appeals Chamber held that order 'means that a person in a position of authority instructs another person to commit an offence'.⁹ Order does not need to 'be given in writing, or any one particular form, or directly to the individual executing it'.¹⁰ The existence of such an order can 'be proven through direct or circumstantial evidence'.¹¹

A person must be in a position of authority, which means he is an 'either *de jure* or *de facto*' superior.¹² Civilian officers can be charged with issuing illegal orders. However, mere by having a civilian position would not be enough to incur superior responsibility. The ICTY held that '[a] formal superior-subordinate relationship between the accused and the perpetrator is not required'.¹³ The fact that a formal relationship is not required implies that there should be at least an informal superior-subordinate relationship.¹⁴ Otherwise there is no difference between order and incitement. The key point of superior responsibility is that 'the person in a position of authority uses it to convince another to commit an offence',¹⁵ which is why the person under the authority will be forced to act so.

As to the necessary *mens rea* of the crime of ordering, the accused who issued an order 'intended to bring about the commission of the crime, or was aware of the substantial likelihood that it would be committed in the execution of the order'.¹⁶

Once the superior issued an illegal order, he is not in a position to excuse himself for the crime, saying that 'I ordered but I did not do it'. The orders of superior have a strong

⁹ *Kordic* (2004) para. 28.

¹⁰ *Prosecutor v Strugar*, IT-01-42-T, 31 January 2005. para.331.

¹¹ *Ibid.*

¹² *Prosecutor v Musliu*, IT-03-66-T, 30 November 2005

¹³ *Kordic* (2004) para. 28.

¹⁴ *Ibid.*

¹⁵ *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, Para. 483 (hereinafter "Akayesu")

¹⁶ *Strugar*, para.333.

influence. One of the main issues of direct responsibility is whether or not the fact that his subordinate actually commits is needed to charge the superior with the crime of ordering.

Article 2 (3) of the ILC's Draft Code of Crimes Against the Peace and Security of Mankind, 1996, provides that an individual shall be responsible for a crime....if that individual orders the commission of such a crime which in fact occurred or attempted. The Draft does need not only the existence of such an order but also the condition 'occurs or attempted'. This 'occurs or attempted' condition was strongly supported in the deliberation for the ICC statute and as a result adopted in Article 25 (3)(b).¹⁷ Article 25 (3)(b) of the ICC adopts the ILC Draft and provides that 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person....[o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted'.

In summary, in the case of superior's issuing illegal orders, there are not many issues. The criminal act of ordering has been established for centuries but current international criminal law punishes civilian superiors who actually issue illegal orders to a person using his *de facto* authority. The idea of punishing a civilian superior who issued illegal orders would be perilous as incitement as such is not punishable except the case of inciting genocide under the ICC Statute. Therefore, imposing responsibility for issuing illegal orders when the principal does not even attempt to commit it seems unreasonable. In addition, an issue remains datable whether the superior should take responsibility when the illegal order was not actually executed, because historically superiors have taken responsibility in most cases, which would be part of customary international law.¹⁸ This issue will be discussed in Chapter IV.

4. The Scope of Indirect Responsibility

¹⁷ Bantekas, Ilias, Principles of Direct and Superior Responsibility in International Humanitarian Law, Manchester University Press, 2002, p. 51 (cited in this paper "Bantekas").

¹⁸ Prosecutor v Stakic, IT-97-24-T, ICTY, 31 July 2003, Para.458.

Leader liability must not be an unlimited concept. Commanders must not be held liable for all the crime his troops committed. The ICTY clearly noted that '[s]uperior responsibility is not a form of strict liability.'¹⁹ Grotius and his immediate scholars accepted the principles 'that no one who was innocent of wrong may be punished for the wrong done by another'.²⁰

However, international courts also have accepted the idea of indirect responsibility since the *Yamashita* case. This notion has been debatable as it was not used before World War II and the idea might punish any superiors just because of its position. The notion of indirect responsibility as such may be customary international law, as seen in *United States v. von Leeb*. Judge Harding addressed his opinion on indirect responsibility as follows:

[commanders'] criminal responsibility is personal...There must be personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the later case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.²¹

The notions of the 'had knowledge' and 'should have known' doctrine were newly introduced after World War II, which seem to go beyond the concept of negligence, extending the responsibility of commanders drastically. When the notion of indirect responsibility goes beyond the notion of negligence, it cannot put a brake on the arbitrary application of the 'should have known' principle. The international community was ignorant of the possibility of unreasonable trials when they were on the side of victorious countries and but realized the danger of this doctrine in making the ICC Statute. The reason of this confusion was that

¹⁹ Ibid. para.459.

²⁰ Wright, Quincy, 'International Law and Guilt by Association', 43 American Journal of International Law, 1949, p. 751.

²¹ Paust, Jordan J., 'Superior Orders and Command Responsibility', International Criminal Law, 2nd ed., Bassiouni ed., 1999, p. 228.

each state has different rules and principles on superior responsibility, so international consensus was hard to achieve.

5. Comparative Aspect of Command Responsibility

The doctrine of leader responsibility was originated in domestic military law. In each state, the doctrine of direct liability of leaders seems to have established for a hundred of years in order to unify the chain of command. However, the experience of World War II changed the practices. Since the *Yamashita* case,²² the notion of imputed liability of superiors caused by the subordinates' acts has emerged. Though the *Yamashita* case seems to have been accepted in the international arena at the ICC,²³ the ICTR,²⁴ and the ICTY,²⁵ the attitude of each state has varied. The purpose of this Section is to explore the development of the doctrine of superior responsibility focusing on domestic criminal law and military law.

a. The United States

In 1914, Chapter 10 of the US Rules of Land Warfare of the Field Manual 27-10 had a provision on punishment of individuals, paragraph 366 of which provided that:

The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.²⁶

²² The *Yamashita* case is tried at the Supreme Court of the United States at Manila. Law Reports of Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission. Volume IV. London: HMSO, 1948. available at <<http://www.ess.uwe.ac.uk/WCC/Yamashita1.htm>> visited 1st April 2007.

²³ Article 28 (1) of the ICC Statute stipulates the knew or should have known standard.

²⁴ Article 6 (3) of the ICTR Statute has the knew or had reason to know standard.

²⁵ Article 7(3) of the ICTY stipulates the knew or had reason to know standard.

²⁶ US department of the Army, Field Manual 27-10 § 366 (1914).

Paragraph 366 was based on the doctrine of *respondeat superior*, where subordinates do not need to take responsibility, and simultaneously, the commander who issued the illegal order will be liable influenced by the publication of Professor Oppenheim. No reference was made to indirect responsibility of commanders in the 1914 US Rules of Land Warfare.

Subsequently, the US Rules of Land Warfare of the Field Manual 27-10 was promulgated in 1934. Paragraph 352 of the 1934 Rules of Land Warfare provided that '[t]he commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall'.²⁷ Paragraph 352 did not mention commanders' imputed responsibility cause by the subordinates.

The US Rules of Land Warfare of the Field Manual 27-10 promulgated in 1940 did not refer to indirect responsibility of commanders caused by the subordinates.²⁸ Paragraph 347 was a main provision on the direct responsibility of commanders, which provided that '[t]he commanders ordering the committed by their troops, may be punished by the belligerent into whose hands they may fall'.²⁹ Paragraph 347 clearly stipulated the direct responsibility of superiors where commanders actually issued illegal orders, under which those who delivered illegal orders would have been liable only by belligerent. Therefore, commanders who issued illegal orders would not have been held liable by their home country. Paragraph 347 was also silent about indirect responsibility of commanders.

However, in 1944, just before the end of World War II, a revision was attached with a view to consisting with rules and principles to try Axis leaders, commanders, and soldiers as follows;

[i]ndividuals and organizations who violate the accepted laws and customs of war

²⁷ US department of the Army, Field Manual § 352 (1934).

²⁸ US department of the Army, Field Manual § 347 (1940). Following the paragraph 347, § 354 stipulated that 'neglect or disobedience of orders or regulation' was considered 'offences'. There is no reference as to subordinates' responsibility in the case of following orders. See the Manual 27-10 § 354(1940).

²⁹ Ibid.

may be punished therefor. However, the fact that the acts complained of were done pursuant to the 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.³⁰

Together with soldiers' partial responsibility pursuant to superior orders, direct responsibility of commanders was hereby established. For the first time, the expression 'punished by the belligerent' was omitted for criminalization of individual responsibility of commanders; therefore commanders issued illegal orders would have been punished.

Drastic changes have been made to the Field Manual 27-10 after World War II. The United States promulgated the Field Manual 27-10 (1956) of the US Army in order to educate U.S military personnel on the law of war. Paragraph 501 of the Manual is a well-cited provision on command responsibility, which provided:

'[i]n some cases' military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control....The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or punish violators thereof.³¹

The Manual, which is still valid as of today, promulgates not just direct responsibility of commanders' acts but indirect responsibility caused by the subordinates, and the latter seems to have imposed liability where the superior had the actual knowledge of the crime or should

³⁰ The United States Department of the Army Field Manual § 345 (1).

³¹ US Department of the Army, Law of Land Warfare § 501(Field Manual 27-10); Quoted in Bassiouni Crimes n3 above pp.434-435.

have known it, which would be identical to the Yamashita standard. ‘In some cases’ probably implies the Manual is not based on vicarious liability or collective liability.

It should be noted that the Field Manual may not be officially legally binding, but would be an authoritative guidance. In addition, the Department of the Army as such seem to have considered the ‘should have known’ principle is too broad³², though this standard, as will be seen later, was created by a US court in the Philippines.

Following the 1956 Field Manual, Command responsibility is stated in *the Army Subject Schedule* (1970) as follows:

Since a commander is responsible for the actions of those he commands, he can be held as a guilty party if his troops commit crimes pursuant to his command, or if he knew the acts were going to be committed even though he did not order them. The commander is also responsible if he should have known, through reports or by other means, that those under his command are about to commit or have committed war crimes, and he fails to take reasonable steps to prevent such crimes or punish those guilty of a violation. As a minimum, such a commander is guilty of dereliction of duty.³³

The Schedule provided that commanders are liable for their own command, but also made sure that they may be liable for the subordinates’ acts if some conditions are met. Apparently, vicarious liability and collective liability are again denied. In the case of indirect responsibility, the ‘should have known’ standard was stated.

In summary, prior to World War II, the US had a provision on direct responsibility of commanders in Field Manuals. However, the responsibility of commanders was based on

³² Quoted in Ambos, Kai, ‘Superior Responsibility’, I The Rome Statute of the International Criminal Court: A Commentary (Antonio Cassese ed.), Oxford University Press, 2002, p.842 (hereinafter “Ambos”)

³³ US department of the Army, Army Subject Schedule, No. 27-1, at 10 (1970) quoted in O’Brien, William V., ‘The Law of War, Command Responsibility and Vietnam’, (1970) 60 Georgetown Law Journal, pp. 627-628.

the punishment by the belligerent not the home country. So, actual criminalization of an individual was not established until the omission of the expression ‘punished by the belligerent’ in 1944. Since then, there would be no disagreement as to the establishment of direct responsibility of commanders in the US military rules. As the current Field Manual 27-10 is still valid, it can be said that the Yamashita standard is well recognized in the US. However, as to the scope of indirect responsibility no much reference has been made since the 1956 Manual 27-10.

b. The United Kingdom

In the UK, Military Manuals as such are not binding but may be a source of the UK policy. Paragraph 443 of the 1914 British Manual of Military Law provided that:

[m]embers of 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 order if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress.³⁴

Paragraph 443 imposed responsibility on government officials and commanders, when they issued illegal orders. In the case of his negligence on the subordinates’ illegal acts outside of his order, no reference was made. It should be noted that the direct responsibility of leaders stipulated in Paragraph 443 was punishable by the enemy not by his own country. Paragraph 433 was maintained until it was finally amended in 1944.

In 1958, the British Manual of Military Law refers to the direct and indirect responsibility of commanders, which would have been the similar wording as the US Field

³⁴ Paragraph 443 of the 1917 British Manual of Military Law.

Manual. Paragraph 631 of the Law of War on Land: the Manual of Military Law provides:

[i]n some cases military commanders may be responsible for war crimes committed by subordinate members of the armed forces or other persons subject to their control...The commander is also responsible, if he has actual knowledge or should have knowledge, though reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and if he fails to use the means at his disposal to ensure compliance with the law of war.³⁵

This promulgation is very timely as it was right after the US Field Manual 27-10. At least it can be seen that the UK does not object to the accepted view, as it reads that the British Military Law has officially provisions of direct criminal liability of commanders' acts and indirect liability of subordinates' acts, the standard of the latter would be close to the Yamashita standard.

The Geneva Conventions Act 1957 and the Geneva Conventions (Amendment) Act 1995 incorporated the grave breaches of the four Geneva Conventions and the four Geneva Conventions into English law.³⁶ Although Article 86 and 87 of Additional Protocol I address superior responsibility, the 1995 Amendment Act may not have incorporated these Articles into English law.³⁷

Section 65 of the ICC Act 2001³⁸ helps to establish new criminal liability for failing to prevent or punish the crimes of their subordinates compared with the existing form of English liability. However, it should be noted that the ICC Act will apply only to three

³⁵ *The British Manual of Military Law* (1958), Part III, para. 631.

³⁶ May, Richard and Powles, Steven, 'Command Responsibility---A New Basis of Criminal Liability in English Law?', (May 2002) *Criminal Law Review*, p. 375 (cited in this paper "May and Powles").

³⁷ Geneva Conventions (Amendment) Act 1995

<http://www.opsi.gov.uk/ACTS/acts1995/Ukpga_19950027_en_1.htm#tcon>; Ibid.

³⁸ Section 65 of the International Criminal Court Act 2001.

crimes: genocide, crimes against humanity, and war crimes, so the principles they make will not be applied to other cases.

In 2005, the UK Ministry of Defence published the first major statement of the British approach to the Law of Armed Conflict. Paragraph 16.36 of *the Manual of the Law of Armed Conflict*, which stated superior responsibility as follows;

[m]ilitary commanders are responsible for preventing violations of the law (including the law of armed conflict) and for taking the necessary disciplinary action. A commander will be criminally responsible if he participates in the commission of a war crime himself in one of the ways set out in paragraph 16.35.2, particularly if he orders its commission. However, he also becomes criminally responsible if he ‘knew or, owing to the circumstances at the time, should have known’ that war crimes were being or were about to be committed and failed ‘to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authority for investigation and prosecution’.³⁹

The view of the UK Ministry seems to follow the judgment of the *Yamashita* case, where he was found to be liable for having failed to exercise ‘effective control’ of the subordinates.

In the UK, leader responsibility is a well known concept especially the liability for planning, instigating, or ordering illegal acts⁴⁰ though the punishment of leaders were possible only when they were caught by the enemy in pre-war periods. Therefore, the concept of direct responsibility of superior was regulated but it can be said that the direct acts of superior were not completely criminalized.

On the contrary, indirect responsibility of superior caused by subordinates was not known to the UK in pre-war days, the idea has drastically developed since the *Yamashita* trial. For this reason, it is undeniable that the Yamashita standard was probably not established as

³⁹ UK Ministry of Defence, *the Manual of the Law of Armed Conflict*, Oxford, 2005, P.438.

⁴⁰ See May and Powles, n36 above 376.

customary law before World War II. The 1958 British Manual of Military Law was a revolutionary step in order to catch up the principles made by the military courts after the war. In the UK, a Military Manual can be evidence of a state policy, though it may not be binding, and also finding out how the UK incorporated the rules of direct and indirect responsibility of superiors into domestic law may be another way, as the UK needs statutory provisions in order for treaties to take effect. A UK Act of Parliament in post-war period might be seen as evidence that the ‘knew or had reason to know standard’ is valid in the country, as well.

c. France

In France, Article 4 of the Ordinance of 28 August 1944 concerning the suppression of war crimes provided that:

[w]here a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices insofar as they have organized or tolerated the criminal acts of their subordinates.⁴¹

Article 4 implied that superiors have duty to prevent criminal acts of the subordinates. The word ‘organize’ probably implies his direct participation, and ‘tolerated’ denotes his indirect responsibility of the subordinates’ acts. It is very interesting to see that French law noted both of them should not be equally responsible and treated a superior’s failure as a kind of accomplice liability. It seems that the precise rules of superior responsibility cannot be found in Article 4. At the same time, it has to be noted that the purpose of the Ordinance was to give the basis for the trials of the war crimes during World War II, so actual principles applicable in France would have been found in French Codes.

⁴¹ Quoted in Bantekas n17 above 96.

Article 6 of the former French Penal Code, enacted in 1810, had a general provision on accessories, which provided that ‘any person who instigates the commission of a felony or a misdemeanour by gifts, promises, threats, abuse of authority or power, plots or by any wrongful trickery or guile, or who counsels the commission of the offence’.⁴² In the case of a superior or commander issuing illegal orders, they would have been prosecuted as an accessory in France.

As seen Article 190 of the former French Penal Code upheld the doctrine of *respondeat superior* therefore imposed liability to superior officers as follows; ‘in such cases the punishment...shall be applicable only to the superior officers who have originated the order’.⁴³ It can be said that there was understanding that superiors took responsibility in the case of illegal orders.

As to negligence of superiors, Article 63 would have been used, which provided that ‘[a]ny person who, by his immediate action and without danger to himself or others, could have prevented either a felonious act or a misdemeanor against the person, willfully fails to do so, shall be punished...’⁴⁴ Although Article 63 was not exactly indirect responsibility of commanders or superiors, it was possible for the court to prosecute the person of authority with the Article. The expression ‘willfully fails to do so’ implies that the standard of Article 63 would have been more lenient than the Yamashita standard.

The current French Penal Code has a provision relevant to direct responsibility of commanders though it can be committed by any person, Article 121-7 of which provides: ‘[t]he accomplice to a felony or misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission’.⁴⁵ And the second paragraph of the paragraph states that ‘[a]ny person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to

⁴² Mueller, Gerhard O. W., *the French Penal Code*, New York University, 1960, p.38.

⁴³ Ibid. p.79.

⁴⁴ Ibid. p.38.

⁴⁵ Article 121-7 of the French Penal Code.

commit it, is also an accomplice.’⁴⁶

Article 121-7 as such is not exactly a provision on command responsibility as it punishes instigation and expects all of the offenders would have the position of authority. With regards to commanders and superior officers, it can be assumed that a commander or a superior who ordered or gave instructions would be found an accomplice under 121-7. The terminology ‘abuse of authority’ denotes that the person who abuses the authority must have *de facto* or *de jure* authority at least.

As to indirect responsibility of superiors, in principle Article 121-7 may not be able to use as ‘[a] positive act is usually required’.⁴⁷ Mere presence of a person would not sufficient to prosecute the person as complicity.⁴⁸ However, it is possible for the court to convict a person if his or her absence means encouragement to the principle under 121-7.⁴⁹ So, applying these principles, commanders and superiors might be liable for failing to prevent the subordinates’ illegal acts if the absence or presence without taking any action is blameworthy. This might be considered as ordinary negligence but not the same as the ‘knew or had reason to know’ standard.

In summary, France dealt with military issues with the former Penal Code, Article 190 of which clarified the direct responsibility of commanders when they actually issued illegal orders in order to acquit those who followed orders under the doctrine of *respondeat superior*. However, as to the indirect responsibility of commanders and superiors, the former French Criminal Code did not mention, but one and only possible Article of which was Article 63 concerning wilful failure. Article 63 could have been applied to anyone who had authority or power to prevent ‘a felonious act or misdemeanour against a person’. The newly made French Criminal Code punishes instigation and negligence under Article 121-7, and the accused will be liable as an accomplice. However, Article 121-7 is not exactly a provision on superior responsibility, as it can be committed by non-military people without

⁴⁶ Ibid.

⁴⁷ Elliott, Catherine, *French Criminal Law*, Willan Publishing, 2001, p.87.

⁴⁸ Ibid.

⁴⁹ Ibid.

any authority. France has developed the notion of superior responsibility in its own way, without following the accepted standard of the Yamashita case completely.

d. Germany

Section 47 of the German Military Code adopted in 1872, provided that '[i]f the execution of a military order in the course of duty violates the criminal law, then the superior giving the order will bear the sole responsibility therefor'.⁵⁰ In Germany the direct responsibility of a superior issuing illegal orders was already established in the 19th Century though there was no reference to indirect responsibility of commanders.

Article 10 (4) of the 1956 Soldiers Act clarified that a superior gives orders only for military service purposes. Thus, orders for other purposes would have been unlawful.

In 1987, a scholar translated the Penal Code of the Federal Republic of Germany.⁵¹ The Code did not have an exact provision on superior responsibility, so the direct order by superior officers would have been punished by Section 26, which provided that '[w]hoever intentionally incites another to intentionally commit an unlawful act shall be punished as an instigator in the same as the perpetrator'.⁵² There was no reference to indirect responsibility of superior officers, but Section 13 of the Codes clarified that omission by anyone is punishable when the person 'was under a legal duty to prevent the harm, and if his failure to act was equivalent to an affirmative act'.⁵³

In Germany, Section 357 (1) of the Strafgesetzbuch, the German Criminal Code⁵⁴ provides:

⁵⁰ Section 47 of the German Military Code adopted in 1872.

⁵¹ The translation of Penal Code of the Federal Republic of Germany is available at <<http://wings.buffalo.edu/law/bclc/Germind.htm>> visited in 1 April 2007.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ The new German Criminal Code was promulgated on 13 November 1998. <<http://www.iuscomp.org/gla/statutes/StGB.htm>> visited in 1st April, 2007.

[a] superior who suborns or undertakes to suborn a subordinate to commit an unlawful act in public office or allows such an unlawful act of his subordinate to happen, has incurred the punishment provided for this unlawful act.⁵⁵

It seems that German Criminal Law punishes the superior who make the subordinates to commit a crime, which would be considered direct responsibility of superior officers.

The German Military Criminal Code (called Wehrstrafgesetz –WStG, which was adopted in 1974 and amended in 1979) had direct responsibility of superiors. Section 32 of which is a provision on abuse for inadmissible purposes of the authority to give orders, which provides that ‘[a] person who abuses his authority to give orders or his official position vis-à-vis a subordinate to give orders, or demands or makes unreasonable expectations which do not relate to official duties, or are contrary to official purposes, shall be punished with imprisonment for up to two years if the act is not subject to punishment by a more severe penalty in other provisions’.⁵⁶ Section 32 is on abuse of authority but is limited to aggressive acts rather than omission.

As to indirect responsibility, Section 41 of the German Military Criminal Code punishes superior officers who failed to control the subordinates’ acts.⁵⁷ Section 41 provides that the requisite *mens rea* is gross negligence and a grave consequence is required to apply.⁵⁸

Finally, the new German Code of Crimes Against International Law (came into force in 2002), implementing the Rome Statute of International Criminal Court into national law, has provisions of superior responsibility. As to indirect responsibility, Section 4 (1) of the Code provides that ‘[a] military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the

⁵⁵ Ibid.

⁵⁶ Committee Against Torture, Consideration of reports submitted by State Parties under article 19 of the Convention, Germany, U.N. Doc. CAT/C/49/Add.4 (2003) available at <http://www1.umn.edu/humanrts/cat/germany2003.html> visited 1 April 2007.

⁵⁷ Ambos *supra* note 32, pp.842-843.

⁵⁸ Ibid.

same way as a perpetrator of the offence committed by that subordinates'.⁵⁹ With regards to direct responsibility, Section 4 (2) provides that '[a]ny person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and control in a civil organisation or in an enterprise shall be deemed equivalent to a civilian superior.'⁶⁰

In Germany, the direct responsibility of commanders was already established in the 19th Century, but the principle of indirect responsibility of commanders caused by subordinates would not have been recognized yet in this period. The Penal Code of the Federal Republic of Germany had a provision on superior orders at the time of 1987, which was just on direct responsibility caused by their own acts of intentional incitement. Simultaneously, it may have been still possible for a superior to be charged with omission in the case of subordinates' crimes where he did not order anything but failed to take a necessary step to prevent them. The Military Criminal Code adopted in 1974 had direct responsibility of superiors more precisely. Section 32 prohibits giving orders or demands by abusing his authority. Section 41 punishes superiors' negligence that failed to control subordinates, which requires the *mens rea* of gross negligence. Thus, the Military Criminal Code is very similar to the principles of current international criminal law, however the 'had reason to know' standard cannot be seen here. The new German Code of Crimes Against International Law came into force in 2002 has a provision on superior responsibility. The Code stipulates not only direct responsibility of superior but indirect responsibility of superiors caused by subordinates. Although the standard is 'omits' is very ambiguous compared with the ICC standard, the Code has implemented the ICC Statute into national law.

e. Japan

⁵⁹ The English translation of the new German Code of Crimes Against International Law can be obtained at <http://www.iuscomp.org/gla/>.

⁶⁰ Ibid.

In 1908 *Rikugun-keiho* the Criminal Code of the Army⁶¹ had a Chapter of crimes exercising one's ability overstepping one's authority. Article 35, 36, 37, and 38 provided crimes of superiors committed without authority.⁶² The provisions of the 1908 Criminal Code of the Army were related to commanders' responsibility, all of which was direct responsibility of commanders. Likewise, Article 30 to 34 of *Kaigun-keiho* the 1908 Criminal Code of the Navy did have identical provisions related to direct responsibility of commanders.⁶³

Article 46 of the 1908 Criminal Code of the Army provided that 'when a number of the subordinates collectively were committing a crime, the person who did not take a necessary step to calm the situation will be sentenced to less than three years imprisonment.' This was the only Article of the Code referring to persons' responsibility caused by subordinates' exceeding acts. However, wording 'the person' is ambiguous in terms of the position and the sentence less than three years imprisonment is quite lenient for a principal perpetrator. In addition to that, the *mens rea* of Article 46 was not defined, so it is difficult to clarify whether the standard of Article 46 is just negligence or more than that. The 1908 Criminal Code of the Army established the idea of indirect responsibility on commanders.

In 1954, *Jieitai-ho*, the law of the Self-Defence Forces, which is still valid as of today, was promulgated. Chapter 9 of the current law of the Self-Defence Forces has provisions on crimes of the members of the Self-Defence Forces, Article 119 (8) of which provides that 'a person who led the troops without the required authority or against the order of superior in line of duty' will be sentenced to less than three years' penal servitude or three years imprisonment.⁶⁴ Article 120 (4) provides that when you are ordered for public security operation 'a person who led the troops without the required authority or against the order of

⁶¹ Both of the Criminal Code of the Army and the Criminal Code of the Navy were abolished in 1947.

⁶² Original text of the Criminal Code of the Navy is also available at < <http://www.geocities.jp/nakanolib/hou/hm41-46.htm> >, Website of the Nakano Library, visited on 1st March 2007

⁶³ Ibid.

⁶⁴ *Jieitai-ho*, the law of the Self-Defence Forces, is available at < http://www.houko.com/00/FS_BU.HTM > visited on 1st March 2007.

superior in line of duty' will be sentenced to less than three years'. These as such are not exactly Articles of commanders as anyone could commit the crime regardless of the rank but Article 119 (8) and Article 120 (4) can punish direct participation of superior officers in command. Unfortunately, the law of the Self-Defence Forces does not have any other Articles on crimes of superior officers, one of the major reasons is that it does not expect members of the Self-Defence Forces to fight outside of Japan so it is not surprising that the drafters of the law did not include provisions concerning combat in a foreign field. Neither the exact Article on direct responsibility of commanders nor the one on indirect responsibility can be found in the law of the Self-Defence Forces.

Alternatively, Japan's Criminal Code promulgated in 1907 can be applicable. Though there is no superior responsibility provision, Article 61 concerning inducement might be applied. Article 61 states that '[a] person who induces another to commit a crime shall be dealt with in sentencing as a principal'.⁶⁵ Other than that, the Criminal Code has a provision on accessory and complicity promulgated in Article 62 and 65, but none of which will be used to superiors and commanders who actually issued illegal orders or failed to take necessary steps to prevent subordinates' crimes.⁶⁶ As to indirect responsibility, Article 38 promulgates that crime needs intent except otherwise stated in law.⁶⁷ In order to prosecute someone with omission, a special provision is required, which seems to be difficult to use negligence in the case of commanders' and superiors' ignorance.

In summary, in Japan there have been provisions of direct responsibility of commanders but not much reference has been made to indirect responsibility caused by subordinates' exceeding acts or illegal acts. The 1908 Criminal Code of the Army had a Chapter of crimes concerning overstepping authority, all of which are direct responsibility of

⁶⁵ Translation of Criminal Code of Japan is available at <http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf> visited on 1st April 2007.

⁶⁶ Complicity needs collaboration with a principal and accessory need to aide the principal.

⁶⁷ Article 38 of the Criminal Code provides "An act performed without the intent to commit a crime is not punishable; provided, however, that the same shall not apply in cases where otherwise specially provided for by law". Article 38 of the Criminal Code of Japan.

commanders. In addition to that, an exact Article of illegal orders could not be seen. Interestingly, crimes of commanders' omission was seen in Chapter 3, most of which seems to have promulgated to protect the states interests. Article 46 was the only provision dealing with superiors' indirect responsibility caused by the subordinates but the Article 46 was not sufficient to conclude that indirect responsibility of superiors was established. After the war, Japan abolished the Armed Forces and made the Self-Defence Forces in order to maintain the peace and security in Japan. Probably, Article 119(8) and 120 (4) are not exactly superiors' crimes but can punish direct participation of commanders. Japan does not have a military court anymore as it abolished it after the war. In order to deal with commanders and soldiers crimes, the Criminal Code of Japan might be applicable. Under the Criminal Code, a superior who actually issued an illegal order would be considered as a principal. Article 61 is the only provision concerning inducement, which could deal with superiors who issued illegal orders. Omission is a crime if it is stated in law under Article 38, but it may be difficult to apply.

f. China

Article IX of the Chinese Law of 24 October 1946 Governing the Trial of War Criminals, reads:

Persons who occupy a supervisory or commanding position in relation to war criminals and [who] in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals.⁶⁸

China takes view that a superior officer's failure is a kind of accomplice liability. It can be

⁶⁸ Quoted in Bantekas n17 above 96.

said that the law seems to have thought that commanders have responsibility to prevent crimes. However, the criteria of command responsibility caused by subordinates are unknown. It may not be considered as evidence of state practice of China, as it was promulgated to prosecute war crimes during World War II, provisions of which were not expected to apply to Chinese soldiers.

The current Criminal Law of the People's Republic of China adopted in 1979 and revised in 1997, has provisions of leader responsibility. Paragraph 3 of Article 370 provides that '[w]here a unit commits the crime mentioned..., it shall be fined, and the person who are directly in charge and the other persons who are directly responsible for the offence shall be punished...'.⁶⁹ Article 370 has an idea of punishing the person in charge or the person who is mainly involved. Article 373 punishes incitement, which provides '[w]hoever incites a serviceman to desert from the unit or knowing employs such a deserter, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance'.

In relation to negligence Article 425 provides that '[a]ny person in command or on duty who leaves his post without permission or neglects his duties, thereby causing serious consequences, shall be' punished and this applies in wartime, as well. The standard of the knowledge requirement of Article 425 is unknown from this Article.

Article 427 provides that '[a]ny officer who abuses his power and instigates his subordinates to act in transgression of their duties, thereby causing serious consequences, shall be' punished. Article 427 is exactly the Article dealing with direct responsibility of commanders. The drafter of this Article probably was not particular about the rank of the criminal, and the wording 'officer' probably meant to include civilian officers, too. Article 428 provides that '[a]ny commander who disobeys an order, or flinches before a battle or is inactive in a military operation, thereby causing serious consequences, shall be' punished,

⁶⁹ The current Criminal Law of the People's Republic of China. The Congressional-Executive Commission on China available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php>, visited on 1st March 2007.

which certifies that even commanders have the obligation to follow orders. Article 429 states that '[a]ny commander on the battlefield who is in a position to rescue the neighbourly forces he knows are in a critical situation but does not do so upon request, thus causing heavy losses to the latter, shall be sentenced to fixed-term imprisonment of not more than five years. Article 429 is a provision on negligence of commanders, the criteria of responsibility as such is ambiguous in this Article, however the knowledge of the situation is clearly required to prosecute him.

In China, there are provisions of direct responsibility of commanders, most of which were promulgated from the perspective of national interests. The Criminal Law of the People's Republic of China does have provisions of direct responsibility of commanders but those articles were promulgated without paying attention to prevent atrocities as priority has been given to the unity of the Armed Forces. Interestingly, some provisions are on indirect responsibility of commanders using the notion of omission. The drafters of these Articles intended to protect national interests. To support this observation, the requirement of 'causing serious consequences' would be interesting evidence.

g. The Soviet Union and Russia

In the Soviet Union, the Disciplinary Code of 1946 had a provision on commander's duty. Article 7 provided that 'a commander who does not take active measures for the restoration of order and discipline shall bear responsibility for that'. In the Disciplinary Code, however, it should be noted that an admiral or a general would not have been subject to ordinary penalties. Warning, reprimand, demotion in command or reduction in rank were the possible penalties of them⁷⁰, therefore it can be assumed that some high ranking military persons were not seriously punished.

In the Criminal Code of the Russian Socialist Federated Soviet Republic

⁷⁰ Draper, Colonel G.I. A., 'An outline of Soviet Military Law', (July 1959) Military Law Review, p.7

(promulgated in 1926 and amended in 1952) also dealt with military crimes. Article 193 of the Code had a list of military crimes,⁷¹ among which commander related crimes were abuse of authority, excess of authority, neglect of authority, and a negligent attitude toward service duties. The provision stipulated the direct responsibility of a person of authority when a person of authority abused it or exceeded the boundary of it, which would have been applied to military cases, as well. Probably, the drafters of this provision would not have expected to prevent the atrocities violating international criminal law as ‘disorganization of forces’ is an interest of own country.

In 1959, a translation of the Federal Criminal Law of the Soviet Union⁷² was published by a scholar, a part of which was the Law on the Criminal Responsibility for Military Crimes promulgated in 1958. Under the influence of strict discipline in the Soviet forces, the law relatively seems to have had a number of subordinates’ Sections⁷³ contrary to commanders’ crimes. However, Section 24 (a) specifically is a provision on abuse of power, which provided that:

[a]buse by a commander or an official person of his authority or his position in the service, inactivity or the exceeding of his powers, as well as a careless attitude towards his duty, if such acts or omissions were committed systematically, or from selfish motives or any other personal interest, or if they caused serious damage---are punishable by deprivation of liberty for a period of from six months to ten years.

⁷¹ Article 193 (1) to (31) have a long list of military crimes. For example, evasion of service, failure to carry out orders, insubordination, coercing, insult, crimes against military property, breach of guard duty, disclosure of military secrets, abuse of official position. Berman, Harold J., and Kerner, Miroslav, *Document on Soviet Military Law & Administration*, Harvard University Press, 1955, pp.85-95.

⁷² J., Budapest, *The Federal Criminal Law of the Soviet Union*, (A. W. Sythoff, Leyden 1959) p. 87

⁷³ Section 2 was a provision on insubordination, Section 3 was on failure to execute an order, Section 4 was on Resisting a superior or forcing him to violate his military duty, Section 5 was on threatening a superior, and Section 6 was on using violence against a superior. See Ibid. 87-91

Section 24 (c) stated that the principles of 24 (a) would be applied to a war and war like situation. Section 24 certified that commanders are not just liable for their own acts but also omissions. Probably ‘omission’ did not include indirect responsibility of commanders caused by their subordinates’ exceeding acts. It can be said that Section 24 was far from the Yamashita Standard.

The current Criminal Code of the Russian Federation adopted in 1996 has Chapter 33 regulating Crimes Against Military Service, all of which seems to have promulgated with a view to protecting public order and security.⁷⁴ Therefore Chapter 33 of the Code does have a number of subordinates’ crimes but does not have command responsibility Articles. Chapter 33 has several superior orders Articles regulating anti-superior crimes, but they do not concern the situation where the order was illegal. Likewise, there is no reference to the situation where commanders issue illegal orders.

Although there is no specific provision on command responsibility, some crimes can be committed by superiors even though they do not mention ‘superior officers’ or ‘commanders’ in the provisions. Article 42 stipulates that ‘[c]riminal responsibility for infliction of such harm [caused by subordinates by your order] shall be borne by a person who gave illegal order instruction’.⁷⁵ The current code imposes responsibility on commanders and superior officers who actually ordered illegally when they issued illegal orders.⁷⁶

In summary, the Soviet Union gave priority to the obedience of soldiers in pursuit of state’s interests but superiors’ responsibility was not promulgated precisely. The 1946 Disciplinary Code had a provision on obligation, but the purpose of Article 7 was to restore order and discipline in the Army. So, the drafter’s intention was not to prevent atrocities by

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⁷⁵ Article 42 of the Criminal Code of Russian Federation. Available at < <http://www.russian-criminal-code.com> > visited on 1st April 2007.

⁷⁶ In the case of international crimes, Article 42 (2) states that ‘[p]erson who committed intentional offence in execution of order or instruction known to be illegal, shall be liable under usual terms. Failure to execute order or instruction known to be illegal shall preclude criminal liability’. Article 42 of the Criminal Code of Russian Federation. Ibid.

commander or his subordinates. Plus, making exceptions of light punishment for an admiral and a general undermined the needs of preventing atrocities. The 1958 Criminal Law of the Soviet Union did have a provision on commander's responsibility, Section 24 (a) of which provided that commander who abused his power or exceed it would be liable whether it was done by acts or omissions. However, it is not clear if Section 24(a) intended to punish a commander where his subordinates committed a crime without his order. Probably, the expression 'caused serious damage' would have been interpreted to his interest when his omission did not cause serious damages. The current Criminal Code of the Russian Federation has a number of anti-superior crimes but it does not seem to be much concerned by superiors' crimes but it should be noted that when commanders issues illegally, it is accepted that such commanders will take responsibility.

6. Mens Rea Requirement of Command Responsibility

a. Ordering

A superior of a military commanding authority who ordered illegal acts will be liable for his own acts, the idea of which has been accepted since pre-war periods. Therefore, where the superior did not order anything, the acts of the subordinates are not his responsibility. After the atrocities of World War II, a drastic change has been added to these principles of international criminal law. Not just the idea of direct responsibility is imposed to commanders and superiors, but also the notion of the indirect responsibility of superiors started to be accepted either under the *absolute liability* doctrine or the *manifest liability* doctrine. Under the newly introduced notion of command responsibility, a commander who knew, should have known, or had reason to know the illegal acts of his subordinates are liable for failure to control them. Command responsibility has become applicable to a person of either *de jure* or *de facto* authority, which means that the superior responsibility doctrine is not

limited to military persons anymore, but without authority no one will be indicted for issuing orders. Thus, the nexus of direct responsibility of superiors is to use their effective authority to make subordinates commit a crime. The *actus reus* of ordering is that ‘a person in a position of authority instructs another person to commit an offence’.⁷⁷ The *mens rea* is that the superior ‘must have either intended to bring about the commission of the crime, or have been aware of the substantial likelihood that the crime would be committed as a consequence of the execution or implementation of the order’.⁷⁸ It is not required that the subordinates who actually executed the order should share the same *mens rea*.⁷⁹ The reason of this would be that the person who has *de jure* or *de facto* authority has responsibility for his instruction therefore he has to take responsibility for his order and probably the result of it.⁸⁰

b. Actual Knowledge

Under current international criminal law when the superior knew of the subordinates’ illegal acts, he can be still responsible even where he did not issue orders as a superior has a duty to prevent crimes. In this case, he is charged because he knew but did not prevent the commission of the acts. Article 7(3) of the ICTY Statute states that a superior is responsible ‘if he knew...that the subordinate was about to commit such acts or had done so’ and the superior failed to stop it or to punish it thereof. Here, ‘knew’ means that he was aware that ‘subordinates were committing or about to commit crimes’, which will be ‘established through direct or circumstantial evidence’.⁸¹ In *Krajisnik*, the accused’s knowledge was established by the fact that he did not inquire when he was informed the attacks on Muslims.⁸² Thus, actual knowledge can also be established through his behaviour. Virtual certainty

⁷⁷ *Prosecutor v Limaj*, IT-03-66-T, 30 November 2005, para 515 (hereinafter “Limaj”).

⁷⁸ *Ibid.*

⁷⁹ *Kordic* (2001) para. 388.

⁸⁰ In *Kordic*, the Trial Chamber cites the *Tadic* case and held that ‘it should be demonstrated that he intended to participate in the commission of the crime and that his deliberate acts contributed directly and substantially to the commission of the crime’. *Ibid.*

⁸¹ *Celebici* para. 383.

⁸² *Prosecutor v Krajisnik*, No IT-00-39-T, 27 September 2006, para. 947.

about a particular situation can be also knowledge. Even wilful blindness would be considered as knowledge. However, international courts have never changed the view that actual knowledge cannot be presumed, which will be examined hereinafter.

c. Strict Liability and Vicarious Liability

As to the *mens rea* of indirect responsibility of superiors caused by the subordinates' acts, three approaches would probably be identified. The first approach derives from a legal notion of strict liability, according to which 'a superior is criminally responsible for acts committed by his subordinates on the basis of his position of responsibility'.⁸³ Under this doctrine, prosecutors do not need to prove criminal intent of the superior.⁸⁴ Just a proof of an official position is enough to charge him with a crime committed by his subordinates. According to the approach even if he did not issue illegal orders, he will be liable for the acts of subordinates regardless of the fact that he took all the necessary steps to prevent it.

Strict liability has been established in common law countries since 18th century, most of which would have been petty crimes with a view to protecting public interests.⁸⁵ But strict liability should not be applied to criminal offences, for it may violate the principles of international criminal law.⁸⁶ Vicarious liability might help the enforcement of legislation,⁸⁷ but will cause trouble, as it can punish someone who does not have the required *mens rea* just because of its position. Article 30 of the ICC Statute states that 'intention and knowledge' is required to commit an offence.⁸⁸ Under current international criminal law a commander cannot be liable just because he is in a position of authority.⁸⁹ Thus, the first approach would

⁸³ Prosecutor v Musena, Judgment, No ICRT-9613-A, 27 January 2000, para.129.

⁸⁴ *Akayesu*, para.488.

⁸⁵ See Leigh, L.H., *Strict and Vicarious Liability--- A Study in Administrative Criminal Law*, (Sweet & Maxwell, 1982), pp.11-25 (cited in this paper "Leigh").

⁸⁶ In *Celebici* the Trial Chamber clearly rejected strict liability. *Celebici* para. 383.

⁸⁷ Vicarious liability is rooted in legal tradition of the UK. See Leigh n85 above pp.18-19.

⁸⁸ However, the reservation of 'unless otherwise stated' makes it possible to commit an offence without the *mens rea*. Article 30 of the ICC Statute.

⁸⁹ Neither vicarious liability nor strict liability is accepted under international criminal law. See Bantekas, Ilias, [1999] 93 'Contemporary Law of Superior Responsibility', American

be inappropriate.

d. Negligence

The second approach is based on negligence where commander's failure to act is 'so serious as to be tantamount to consent or criminal intent'.⁹⁰ The idea was indicated by the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, under which Article 86 was referred as follows: 'the negligence must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took place'.⁹¹ This approach was certified in the Tokyo Trial, which held that: 'Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result....His inaction amounted to criminal negligence'.⁹²

However, it is still not known whether the legal nature of indirect responsibility is based on negligence or something else. If it is based on negligence, the legal nature of it would be dereliction of a duty, which means that a superior needs to take responsibility only when he fails in his duty.

The nexus of negligence is a dereliction of duty, which cannot be applicable where atrocities are happening beyond the duty of a superior. If the concept of command responsibility is based on negligence it would maintain consistency with the principles of international criminal law. However, the difficulty would be that the Yamashita standard, a series of World War II trials established, probably has gone beyond the idea of negligence.

e. New approaches

Journal of International Law, p. 577.

⁹⁰ *Akayesu*, para488.

⁹¹ *Akayesu*, para488.

⁹² *Ibid.* para490.

The last approach is a higher standard, which sometimes explains as the ‘knew or had reason to know’ standard or the ‘knew or should have known’ standard. In the *Yamashita* case, where ‘the accused knew or had the means to know of’ the widespread commission of atrocities by members and units of his command; his failure to inform himself through official means available to him of what was common knowledge throughout his command and throughout the civilian population can only be considered as a criminal dereliction of duty on his part’.⁹³ The ‘had the means to know’ standard seems to be very broad in that it depends on the possibility of availability of information attached to a certain position, which may not be so different from strict liability imposed because of its position. In Tokyo, following the *Yamashita* case, the Trial held that ‘[i]f crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes.’⁹⁴ The notion of indirect responsibility of superiors was recognized in Tokyo, and the mental requirement was ‘had, or should have had knowledge in advance’. The ‘should have known’ standard originated in the *Yamashita* Trial was subsequently upheld in Tokyo, the application of which were not seen at Nuremberg. The standard was close to strict liability but the courts never admit the standard was strict liability as they require the *mens rea*. An extreme version would be Article 10 of the Canadian War Crimes Regulation⁹⁵. Article 10 shifted the burden of proof from the prosecutor to the accused, under which subordinates’ crime under the command will be considered as *prima facie* evidence of the liability.

Objective criteria were seen in the ICTY. Article 7(3) of the ICTY imposes a superior liability where he knew or had reason to know that his subordinates were about to commit a war crime.⁹⁶ In *Delalic*, otherwise known as Celebici, the Chamber explained the

⁹³ Quoted in Parks, Major William H., ‘Command Responsibility for War Crimes’, [1999]25 *MIL. L. Rev.* 3, pp. 32-33 (hereinafter “Parks”).

⁹⁴ Roling, B.V.A. and Ruter, C.F., *The Tokyo Judgment, The International Military Tribunal for the Far East (I.M.T.F.E) 29 APRIL 1946 – 12 NOVEMBER 1948*, APA-UNIVERSITY PRESS AMSTERDAM BV AMSTERDAM, 1977, pp.30-31 (cited in this paper “Roling”).

⁹⁵ *Law Reports of Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission. Volume IV.* London: HMSO, 1948, p.85.

⁹⁶ Also, the ‘knew or had reason to know’ standard is identical to Article 6(3) of the ICTR

‘had reason to know’ standard as follows:

[t]he Trial Chamber takes as its point of departure the principle that a superior is not permitted to remain wilfully blind to the acts of his subordinates. There can be no doubt that a superior who simply ignores information within his actual possession compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty for which he may be held criminally responsible under the doctrine of superior responsibility.⁹⁷

The Trial Chamber of the *Celebici* case of the ICTY clarified that actual ‘knowledge cannot be presumed, but must be established by way of circumstantial evidence’.

The ICC Statute distinguishes the standards of civilians’ responsibility of superiors and military commanders’ responsibility. Article 28(1) (a) provides that military commanders and persons’ standard is ‘either knew or, owing to the circumstances at that time, should have known that the forces were committing or about to commit such crimes’.⁹⁸ With regards to civilian superiors, Article 28(2) (a) provides a lenient standard ‘either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes’.⁹⁹ The ICC Statute deals with civilian omission issues with the notion of ordinary negligence and uses a strict standard for military commanders. The approach is better in that the duty and power that civilian superiors enjoy is much smaller than military commanders, which was completely disregarded in *Yamashita* and subsequent war crime tribunals. Using the criteria of *de jure* or *de facto* authority, international courts erroneously have not differentiated civilian responsibility and military

statute. However, Article 28, 1(a) uses slightly different expression: The military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.

⁹⁷ *Celebici* para. 387.

⁹⁸ Article 28(1) (a) of the Rome Statute of the International Criminal Court.

⁹⁹ Article 28(2) (a) of the Rome Statute of the International Criminal Court.

authority. Therefore, the standard of the ICTR and ICTY would be too harsh for civilian superiors.

One might say that the ‘knew or had reason to know’ standard is the same as negligence. Indeed both of the approaches do not seem to require the specific intent to prosecute the accused, and they accuse the perpetrators’ inaction. Nevertheless, the third approach is probably much wider than negligence in that the approach can impose liability based on ‘the widespread commission of atrocities by members and units of his command’. The ICTY of the *Halilovic* case clearly held that ‘criminal negligence is not a basis of liability in the context of command responsibility’.¹⁰⁰ With regards to negligence, where the accused fails to meet the ordinary people’s standard, it is possible to acquit an accused as long as the person fulfils the ordinary people’s criteria at the time of commission but the Yamashita standard can be applicable based on the criteria as seen in *Celebici*, which are much higher standard. Negligence would be caused by anyone as long as a person who has any duty does not do the required act failing to meet the ordinary standard, but the knew or had reason to know standard would be applied to senior officers and commanders only and the duty of them are specifically imposed because of its position. With regards to the ICC Statute, an ordinary negligence standard seems to be applied to civilian cases, and the ‘should have known’ standard is applied to military commanders. The problem still remains if the ‘had reason to know’ or ‘should have known’ standard is fair to superiors. It should be noticed that imposing an unreasonable standard will not deter unlawful acts of subordinates in the future and it will just undermine the chain of command in a military society. Superiors cannot be charged with a crime of others, as vicarious liability is not accepted, so certain illegal positive acts or dereliction of a duty has to be recognized. If there is no blameworthiness on them, there would be no punishment. The punishment of indirect responsibility of superiors should not be a scapegoat as a threat to other superiors that you might be charged if your subordinates caused trouble behind their back.

¹⁰⁰ Prosecutor v Halilovic, IT-01-48-T, 16 November 2005, para.71.

7. Mistake of Fact and Mistake of Law of Superior Officers

The mistake arguments of superior officers are unique in that they are required to know what is happening in the area of their authority at the level of experts, to take control of the subordinates, and to stop exceeding, unwanted, or illegal acts of subordinates. That is why they received the position and were authorized. So, mere mistake of facts would not be considered as a defence. The same can be said to a mistake of law. However, Article 32 of the ICC Statute does not deal with the specific background of superiors and commanders, which merely gives a collective solution. Under Article 32 mistakes of fact and law can be a defence if the mistake in question negates the accused's criminal intent.

When he issues orders, he will be liable for his own mistake. Mistake of fact may be a defence to him if it negates the *mens rea*. Though superiors and commanders are required to know legal aspects of their own action, a mistake of law may be a defence under Article 32 of the ICC Statute as Article 32 does not exclude superiors. The author takes the view that the application concerning mistake of fact or law to superior cases would be too lenient as they are required to know the legality of their orders, their claim that they made a mistake or they did not know it was illegal should be considered as negligence.

When he does not issue orders but fails to prevent a crime of his soldiers, he will be liable if he has the required *mens rea*, which must correspond with the 'knew or should have known' standard under Article 28 (1) and (2) of the ICC Statute. However, the idea of indirect command responsibility creates confusion as it does not free a superior who does not know of the subordinates' acts but failed to take a necessary steps based on the size of the atrocities but he who made a mistake of fact or law may be acquitted applying the said ICC standard. This situation seems unfair to superiors as the person does not have intention to commit crimes in the case of failure to act but the ICC Statute does not seem to care about superiors' mistakes. Article 32 puts a condition 'if it negates the mental element' but indirect

superior responsibility do not have that kind of escape. Rather the ICC imposes strict responsibility on superiors even in the case of ignorance.

8. Incitement and Instigation

Article 6 (1) of the ICTR Statute provides that a person who instigated shall be individually responsible for the crime.¹⁰¹ The definition of instigating is ‘prompting another to commit an offence’.¹⁰² The word ‘prompt’ does not mean just positive acts but omissions, too.¹⁰³ It is necessary to prove the causal connection between the instigation and the perpetration,¹⁰⁴ which means that the instigation ‘is punishable only where it leads to the actual commission of an offence desired by the instigator’.¹⁰⁵ However, there is no need to prove that ‘the crime would not have been perpetrated without the accused’s involvement’.¹⁰⁶ Instigating and incitement appear to be synonymous¹⁰⁷ in English but differ in that incitement can be a crime without the commission of the crime. As to incitement of genocide without the commission of the crime, it is possible to prosecute a person who incited directly and publicly even when the act of genocide is not attempted or successful. Other than incitement of genocide, incitement would require the commission of the crime by the principal when a person is tried.

The most famous trial of incitement was Julius Streicher at the Nuremberg Trial, where he was convicted for having published anti-Semitic articles in his weekly newspaper *Der Sturmer*.¹⁰⁸

In *Blaskic* of the ICTY, the Trial Chamber defined instigation as follows:

¹⁰¹ Article 6 (1) of the ICTR Statute; Article 7(1) of the ICTY Statute.

¹⁰² *Limaj*, para.514.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Akayesu*, para.482. According to the Chamber, incitement can be prosecuted without the actual commission of an offence of the perpetrator.

¹⁰⁶ *Kordic* (2001) para. 387.

¹⁰⁷ *Akayesu*, para.481.

¹⁰⁸ *Akayesu*, para. 555.

[i]nstigating entails "prompting another to commit an offence"...[B]oth acts and omissions may constitute instigating and that this notion covers both express and implied conduct. The ordinary meaning of instigating, namely, "bring about" the commission of an act by someone, corroborates the opinion that a causal relationship between the instigation and the physical perpetration of the crime is an element requiring proof.¹⁰⁹

The Trial Chamber confirmed that instigation is committed not just by acts but by omissions. Incitement can be a crime only under the condition that: '(1) it must be direct and explicit; (2) commission of the crime must follow it up'.¹¹⁰ Since actual commission of the crime is required to incitement, it would not be a crime *per se* but a crime only if it leads to the commission of a crime by the principal.¹¹¹ The exception is the incitement of genocide, where actual commission of the crime is not required to prosecute a person for incitement.

In *Akayesu*, the trial chamber held the view that incitement to commit genocide can be punished even where the incitement was unsuccessful or attempted.¹¹² With regards to incitement of genocide, prosecutors will not need to show the commission of the crime was successful. However, it has to be noted that the approach was the exception to the rule because of the dangerous nature of the crime.

Direct responsibility of superiors is similar to incitement or instigation in that the accused does not need to be at the scene of the crime and expect others to carry it out with verbal expression. However, commander or superior must have a superior-subordinate relationship whether it is *de jure* or *de facto* authority in order to call it an order. In the case of incitement, a commander can incite a war crime but it does not necessarily require a

¹⁰⁹ Blaskic judgment, para.280.

¹¹⁰ Cassese, Antonio, *International Criminal Law*, Oxford University Press,2003, p.189 (cited in this paper "Cassese")

¹¹¹ Ibid.

¹¹² *Akayesu*, para. 562.

hierarchical relationship.¹¹³ Any person can incite someone to commit a war crime, as the *actus reus* of incitement is ‘taking all those psychological or physical measures designed to prompt somebody else to commit a crime’.¹¹⁴ So, superior-subordinate relationship is not a condition to charge a person as incitement. In addition, in the case of issuing illegal orders by superior or commander, the commission of the crime is usually not required; just the fact of issuing an illegal order with the required *mens rea* would be sufficient to indict him, but for principle incitement and instigation needed as a condition. Incitement as such is not punishable under current international law but a superior issuing illegal orders will be punished whether it is executed or not.

9. Aiding and abetting

Aiding and abetting are recognized liability modes of individual responsibility under international criminal law. Aiding and abetting occur when the accused’ acts comprise ‘practical assistance, encouragement or moral support to the principal offender of the crime’.¹¹⁵ Aiding means providing assistance but the acts of abetting ‘need involve no more than encouraging, or being sympathetic to, the commission of a particular act’.¹¹⁶ What is a common factor for both of terms is that both of them ‘have a substantial effect on the perpetration of a certain crime.’¹¹⁷ A causal relationship between the conduct of the aider or abetter and the commission of the principal offender is not required.¹¹⁸

In order to charge the accused with aiding and abetting prosecutors have to prove that ‘the accused carried out an act that consisted of practical assistance, encouragement or moral

¹¹³ See Cassese n110 above 189.

¹¹⁴ See Ibid.

¹¹⁵ Prosecutor v Bradanin, IT-99-36-T, 1 September 2004, para. 271.

¹¹⁶ *Limaj*, para.516.

¹¹⁷ Ibid.

¹¹⁸ Ibid. para.517.

support to the principal offender of the crime’.¹¹⁹ However, omission can be the *actus reus* of the crime. So, just having a position of a superior or a commander would be insufficient to charge them with aiding and abetting, but mere presence at the scene can be aiding and abetting if it is construed as encouragement.¹²⁰

The *mens rea* of aiding and abetting is knowledge that ‘the aider and abettor is assisting or facilitating the commission of the offence’.¹²¹ The knowledge of the aider and abettor does not need to express explicitly.¹²² They do not need to share the *mens rea* of the crime with the perpetrator but the aider and abettor should know the ‘essential elements of the crime’, which means that they do not need to know the names of the crime.¹²³

A prominent case of aiding and abetting would be the *Akayesu* case of the ICTR. Akayesu had a duty to maintain law and public order, but he was ‘present during the acts of violence and killings, and sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi.’¹²⁴ Although the case is not directly linked to aiding and abetting, he was found that he gave ‘tacit encouragement’ and is responsible ‘for having abetted in the preparation or execution of the killings of members of the Tutsi group’.¹²⁵

Another case is the *Furundzija* case, where he did not rape a woman nor was he a co-perpetrator but he was present at the scene of the rape. The Chamber recited the standard of aiding abetting as follows; the *actus reus* of the aiding and abetting is giving assistance having a substantial effect on the principal, and the *mens rea* is that the acts taken would assist the perpetrator’s crime. The Trial Chamber found the accused guilty of aiding and abetting a violation of the Laws of Customs of War.¹²⁶

Aiders and abettors cannot be called the principal as they are borrowing criminality

¹¹⁹ Prosecutor v Bradanin, IT-99-36-T, 1 September 2004, para. 271.

¹²⁰ *Limaj*, para.517.

¹²¹ *Ibid.* para.518.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Akayesu*, para.704.

¹²⁵ *Ibid.* p. 706.

¹²⁶ Prosecutor v Furundzija, IT-95-17/1-T, 10 December 1998, para. 270-275.

from the principal. Indirect responsibility of a superior is incurred by superiors' indifference to the crime committed by the subordinates without taking a proper action so in a way it does not need to be encouragement, but omission of aiding and abetting must be understood as 'an encouragement or support' as mere presence usually cannot be considered as aiding and abetting.¹²⁷ If a superior officer or a commander actually assists subordinates' illegal acts, it is possible to charge him with aiding and abetting. The differences are to commit aiding and abetting you do not need to be in a position of authority. What is common to superior crimes and aiding and abetting is that they both expect other people to commit a crime by influencing heavily on them.

10. Civilian and Superior Responsibility

It has been customary throughout international law since Nuremberg that civilians may be charged with an illegal order or failure to act, if they maintain effective command or control over their subordinates.¹²⁸ Political leaders are theoretically civilians but the strong authority; however, they do not belong to the military, thus civilians are prosecuted in case of direct participation or indirect responsibility of superiors.¹²⁹

The Tokyo Trial dealt with political leaders rather than commanders in the Army or Navy. Hirota, former Foreign Minister of Japan was convicted for the atrocities named the 'rape of Nanking'. There was no evidence that Hirota as foreign minister was a person effectively acting as a military commander.¹³⁰ The Tokyo Trial held Hirota liable based on the notion of negligence.¹³¹

However, Judge Roling dissented from the judgment and claimed that Hirota should

¹²⁷ *Limaj*, para.517.

¹²⁸ See Bantekas n17 above pp. 82-83.

¹²⁹ See Vetter, Greg R., 'Command Responsibility of Non-military Superiors in the International Criminal Court (ICC), 25 Yale Journal of International Law, p. 95 (cited in this paper "Vetter").

¹³⁰ *Ibid.* p. 126.

¹³¹ *Akayesu*, para.491.

be acquitted. He expressed his concern of the danger of civilian superior responsibility as follows:

a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the army in the field. Moreover, the Tribunal is here to apply the general principles of law as they exist with relation to the responsibility for omissions. Considerations of both law and policy, of both justice and expediency, indicate that this responsibility should only be recognized in a very restricted sense.¹³²

Judge Roling was correct in the statement that application of civilian superior responsibility should be limited, since the duty of civilians does not always include preventing atrocities. For example, an employee of a car factory committed acts of genocide, outside his working hours, it would be unreasonable to charge the manager of this person.¹³³

In the *Akayesu* case of the ICTR, the chamber examined the *Hirota* case previously mentioned but took a case by case approach as follows:

[t]he Chamber therefore finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in Article 6 (3), to civilians remains contentious... it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.¹³⁴

During the *Celebici* case, the Trial Chamber concluded that a superior-subordinate

¹³² Quoted in *Akayesu*, para.491.

¹³³ Triffterer, Otto, Commentary on the Rome Statute of the International Criminal Court, p.521. (hereinafter "Triffterer")

¹³⁴ *Akayesu*, para. 491.

relationship may include civilians, too.¹³⁵ One scholar states that the civilian responsibility standard should be the same as command responsibility.¹³⁶ However, the military commander has a more influential position than civilian leaders, as he has pre-established authority with threat, punishment, or discipline over their subordinates. Thus, the Appeals Chamber of the *Celebici* case hesitated to admit that civilian superiors have the same liability as that of commanders' liability.¹³⁷

Article 28 of the ICC Statute appears to include civilian superiors.¹³⁸ Considering the circumstances of civilian superiors, the ICC Statute takes a more reasonable approach, compared with the ICTY and ICTR.¹³⁹ Article 7(3) of the ICTY Statute and Article 6 of the ICTR Statute will impose liability on commanders or civilians when they 'knew or had reason to know' of the subordinate's crime and 'failed to take the necessary and reasonable measures' without showing any tolerance to civilian leaders. But the ICC Statute has a similar criteria the 'knew or owing to the circumstances should have known' standard, which is easy to be applied to military commanders but is not civilians. Article 28 (2) of the ICC Statute gives civilians a lenient standard, lowering the 'should have known' standard as follows: (a) 'The superior either knew, or consciously disregard information' about the crime; (b) the crime was 'within the effective responsibility and control of the superior'; (c) 'failed to take all necessary and reasonable measures'. This standard is based on a duty to be informed. Thus, a wilful disregard by a civilian superior against the duty noticed will be sufficient to establish the required *mens rea*. It is well established in recent times that civilians, also, have to take responsibility for their own actions and for the inaction against his duty if other circumstances are met. However it should be noted that the ICC Statute does not have a general provision on omission of individuals, the reason being that international consensus was not reached

¹³⁵ *Celebici* para. 354.

¹³⁶ Vetter n129 above 94.

¹³⁷ Prosecutor v. Delalic et al., Appeals Chamber Judgment, IT-96-21-A, February 20, 2001, para. 240.

¹³⁸ Article 28 the Statute of the International Criminal Court.

¹³⁹ See Vetter n129 above 95.

although it was discussed.¹⁴⁰ This means that there would be no intention of the ICC Statute to punish omissions of individuals at a civilian level, as a result the use of command responsibility to civilians superiors should strictly limited.

11. Discerning Command....Superior-Subordinate Relationship

Superiors are not liable for the crimes of the subordinates just because they are the commanders. Courts must put blame on superiors not for their position but for their blameworthy acts. Liability usually incurs as a result of illegal acts or negligence of superiors, though it can be argued that the doctrine of command responsibility is extended beyond the notion of negligence.

Regarding superior responsibility, it probably has become customary throughout international law, since World War II to assess three elements in order to convict a commander or a superior: (1) the existence of a superior-subordinate relationship; (2) the superior's *mens rea*; (3) failure to prevent or punish.¹⁴¹

Firstly, Article 28(1)(2) of the ICC Statute promulgates the definition of a superior-subordinate relationship and states:

[a] military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces...¹⁴²

The United States tribunal in the *Sadaiche* case addressed the definition of superior as

¹⁴⁰ Supra Triffterer, n 133, p.492.

¹⁴¹ *Kordic* (2001) para. 401.

¹⁴² Article 28(1)(2) of the ICC Statute.

follows:

superior means superior in capacity and power to force a certain act. It does not mean superiority only in rank [since] it could easily happen in an illegal enterprise that the captain guides the major, in which case the captain could not be heard to plead superior orders.¹⁴³

With regards to the definition of subordinate, it was properly defined in a commentary that '[a]ny person who has a superior who can direct his work or work related activities may be a subordinate to that superior',¹⁴⁴ which means that a person can be both a superior and a subordinate simultaneously.

The issue of superior-subordinate relationship is crucial in that (1) to differentiate direct responsibility from incitement; (2) to draw a distinction between indirect responsibility of superiors and omission of ordinary individual. As indicated, incitement is not punishable, as such, as long as the principal does not commit an act; so the superior-subordinate relationship becomes a condition to direct responsibility of superiors, which would be punishable under the ICC. In relation to omission, there is no general provision in the ICC Statute as to omission of individuals. It can be understood that omission is not an accepted act under the ICC Statute, but it can be said that only omission by superiors will be liable.

12. *De jure* command and *De fact* command

In order to apply the superior responsibility doctrine to a case, the superior must have relationships with subordinates. The essence of the relationship is recognized by the criterion of 'effective control', which is divided into the *de jure* or *de fact* authority over subordinates. A formal title is not prerequisite but merely a rank is not sufficient to prove

¹⁴³ Quoted in Bantekas n17 above 81.

¹⁴⁴ Triffterer, n 133, p.521.

the authority and it has to go further than that. The Trial Chamber of the *Celebici* case gave a guideline and held ‘responsibility may be imposed by virtue of a person’s *de facto*, as well as *de jure*, position as a commander’.¹⁴⁵

Thus, it is sufficient to identify two independent ways to determine the existence of a superior-subordinate relationship. The first approach is to assume the relationship against the fact that the superior delegated the power of command officially by a higher authority, which is called *de dure* command. However, as stated in the Appeals Chamber of the *Celebici* case, ‘the mere possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced’.¹⁴⁶

Secondly, a superior-subordinate relationship may also be established by actual control; putting restraint, punishing someone, controlling a person, or issuing direction over another person. In the *Celebici* case, the court noted that:

it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.¹⁴⁷

The *Celebici* case highlighted the principle that *de facto* command also incurs liability if he has ‘effective control’ over the subordinate. The idea of *de facto* control is risky in a sense that the criteria of it can be broad, as it does not require any official qualifications of superiors.

In the case of *Blaskic*, the accused claimed that he had no authority over the units.¹⁴⁸

The Chamber notes sufficient evidence of witnesses:

¹⁴⁵ *Celebici* para. 370.

¹⁴⁶ *Ibid.* para. 197.

¹⁴⁷ *Ibid.* para. 378.

¹⁴⁸ *Prosecutor v. Blaskic*, Judgment, No. IT-95-14-T, para. 451.

[a] number of witnesses moreover stated, that the accused had *de facto* authority over the Military Police Fourth Battalion...According to witness Baggesen, "the only one who had command over the Military Police was Mr. Blaskic".¹⁴⁹

And the Chamber found Blaskic had *de jure* command over the units due to his obligation as the report illustrates:

[a]ccording to his own statements, the accused had in parallel to contact the Chief -of-Staff, who was then to contact the person responsible in the Defence Department. That obligation on the accused to report any abuse committed to the competent authorities sufficed...to establish command responsibility.¹⁵⁰

In the *Kayishema* case of the ICTR, the Trial Chamber held that:

no legal or formal position of authority need exist between the accused and the perpetrators of the crimes. Rather, the influence that an individual exercises over the perpetrators of the crime may provide sufficient grounds for the imposition of command responsibility if it can be shown that such influence was used to order the commission of the crime or that, despite such *de facto* influence, the accused failed to prevent the crime.¹⁵¹

Kayishema was found guilty for the crimes committed by his *de jure* and *de facto* authority over the subordinates.¹⁵²

In summary, the superior-subordinate relationship is the first consideration. If there is no relationship between the issuer and the actor, the person who issue illegal orders may not

¹⁴⁹ Ibid, para. 463.

¹⁵⁰ Ibid. para. 464-465.

¹⁵¹ *Prosecutor v. KAYISHEMA*, Case No. ICTR-95-1-T, 21 May 1999, para. 491-492.

¹⁵² Quoted in *Ibid.* para. 506.

be charged with a crime, as incitement under the ICC is not punishable except for genocide. Incitement of genocide is punishable regardless of whether the order is committed or not as it is a heinous crime. Other than genocide, just a person just trying to encourage a crime is not punishable without the commission of the principal. It should be noted that generally incitement is not a crime itself under the ICC Statute. If the principal attempted or committed a crime after the order, then a person who encouraged the crime would be punished under Article 25(3) (b), which still contains less criminality than direct responsibility of superiors in that a person did not use his authority to persuade the principal to commit the crime. If there is no relationship, mere existence of a crime scene would be insufficient to call it a crime, as the person does not have any duty to act or stop. If he has the duty, then it would be a different case. As a result, the notions of *de jure* and *de facto* authority hold the key to punishment. *De jure* authority is easily recognizable, but is risky as it punishes anyone in that position, which might be close to vicarious liability. The idea of *de facto* authority supplements the disadvantage but may be used at the discretion of judges. The question is where to draw the line.

13. Failure to Act

It is not yet true to say that responsibility based on the omission of individuals is part of international criminal law. An example of indirect command responsibility may be raised and then argue that omission can be an act, which was probably established in the *Yamashita* case and the following war crime tribunals. The theory of indirect command responsibility has been accepted since the *Yamashita* case and later the Tokyo Trial, although application of this has been limited to military commanders or exceptionally high ranking government leaders. The application of omission for ordinary citizens would still be debatable, as they do not have obligation to control the subordinates outside of his authority, which usually does not include the duty to prevent the subordinates' illegal acts. In Rome the ICC Statute failed to

promulgate a provision on omission as a general principle as delegates could not reach a consensus.¹⁵³ To summarise, the notion of failure to act should be considered as a category of indirect command responsibility.

Article 86 of the First Protocol Additional to the Geneva Conventions in 1977 does hold a provision on failure to act.¹⁵⁴ Article 86 is based on the duty that superiors should report the relevant authorities as soon as they find out that a crime is committed under the area of his authority; punish the subordinate if he has the authority, and take all feasible measures within his power. However, Article 98 puts states under obligation, which does not mean they establish individual responsibility.

The ICTY Statute and the ICTR Statute seem to have identical standards to Article 86 of the First Protocol. Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR punish (1) failure to take necessary and reasonable measures, (2) failure to punish the perpetrators, both of which will be established by the ‘knew or had reason to know’ standard.¹⁵⁵ Apparently the types of crimes mentioned in both articles are different in comparison to direct responsibility. Those crimes fundamentally differ in that direct responsibility finishes its commission when an illegal order is issued, but the failure to punish or to take necessary or reasonable steps can be committed thereafter. Indeed, it is true that both of them differ, but punishing a superior who ordered illegal acts to be carried out, does not take the necessary steps as often the case is subordinates are punished. Due to this double responsibility is created within one act, an issue would be raised whether both of them are separated or exclusive. Neither the ICTY Statute nor the ICTR Statute address this question. The ICC Statute does not offer a provision on this concurrence, therefore only cases can help to indicate. Nevertheless, the cases of the ICTY and the ICTR do not seem to have a fixed

¹⁵³ In the process of making the ICC Statute, an issue whether the Statute should have a provision of omission was discussed at the Rome Conference but it was dropped. *Supra* Triffterer, n 133, p.532.

¹⁵⁴ Article 86 of Additional Protocol I.

¹⁵⁵ Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR.

approach, as their judgment are not officially bound to subsequent decisions.¹⁵⁶

14. Historical Development of the Doctrine of Command Responsibility

Although early examples of codification of laws with armed conflict was seen in the 19th century, the first command responsibility reference can be traced back to the time of Sun-Tzu in 500BC.¹⁵⁷ Sun-Tzu stressed upon the duty of the commander to control his subordinates but it cannot be known that he intended to implicate this as a legal basis in case of failure of control.¹⁵⁸ His motivation was solely political based on concern on the effectiveness of gaining a victory in wars.¹⁵⁹

An early document of the command responsibility doctrine from a law perspective would be a 1439 Ordinance issued by Charles VII of France, which provided:

that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company...If he fails to do so or covers up the misdeed or delays in taking action, or if, because of his negligence or otherwise, the offender escapes investigation or punishment, the captain shall be responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been.¹⁶⁰

The Ordinance legally confirmed commanders would have been responsible for the

¹⁵⁶ The *Kordic* case said that double convictions under Article 7(1) and 7(3) would be ‘not a question of cumulative convictions, but rather a question of concurrence between two models of responsibility’. *Kordic* (2004) para. 1030.

¹⁵⁷ Ching, Ann B., ‘*Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia*’, [1999] 25 N.C.J. INT’L L. & COM. REG. 176 (hereinafter “Ching”). ; Sun Tzu is considered to be the oldest military treatise in the world. See Parks n 93 above p.3.

¹⁵⁸ See Parks n 93 above, p. 4.

¹⁵⁹ McCormack describes that “Sun Tzu’s *The Art of War* does not mention law or legal processes”. McCormack, T. L. H. and G. J. Simpson (eds), *The Law of War Crimes*, National and International Approaches, Sijthoff, Leyden, 1997 p. 33.

¹⁶⁰ Quoted in Green, Leslie, ‘Command Responsibility in International Humanitarian Law’, [1995] 5 *Transnat’l L. & Contemp. Probs.* 321 (hereinafter “Green Command”).

subordinates' acts using the notion of negligence. Commanders' duty of punishment towards offenders was confirmed. The punishment of captain or lieutenant was based on the information received, it would have been impossible to try persons without actual knowledge.¹⁶¹

A similar concept on command responsibility can also be found in the Articles of War issued by Gustavus Adolphus of Sweden in 1621:

[n]o Colonell or Capitaine shall command his souldiers to doe any unlawful thing; which who so does, shall be punished according to the discretion of the Judges.¹⁶²

Articles of War did not specify a type of criminality but made sure that commanders or captains would have been liable for their misdeed. With regards to commanders' omission, the expression 'any unlawful thing' is not sufficient to conclude that Article of War recognized the indirect responsibility of commanders.

Grotius referred to the liability of states on omission:

[t]he State or the Superior Powers are accountable for the Crimes of their Subjects, if they know of them, and do not prevent them, when they can and ought to do so.¹⁶³

It is difficult to speculate what Grotius meant by 'the State or the Superior Powers' but the likelihood is it did not intend to mention individual responsibility. Grotius also declared that 'a community, or its rulers, may be held responsible for the crime of a subject if they knew it do not prevent it when they could and should prevent it'¹⁶⁴ but his statement seems to have been at the level of national responsibility rather than liability of military commanders.¹⁶⁵

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Quoted in See Parks n 93 above, p.4.

¹⁶⁵ See Ibid.p. 4.

Article 11 of the Massachusetts Articles of War was the first authoritative reference on the indirect responsibility of commanders.¹⁶⁶ In 1775 the Massachusetts Provisional Congress adopted:

[e]very Officer commanding... shall keep good order, and to the utmost of his power, redress all such abuses or disorder which may be committed by any Officer or a Soldier under his command; if upon complaint made to him...the said commander, who shall refuse or admit to see Justice done this offender, or offenders, and reparations made to the party or parties injured, as soon as the ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of.¹⁶⁷

Under Article 11 the duty of commanding officers was confirmed, one of which was to maintain good order. Omission also became punishable if he did not refuse or admitted disorder after he was made aware of it.

Article XII of the American Articles of War, enacted June 30, 1775, contained the same language.¹⁶⁸ Also, Section IX of the American Articles of War of 1776 on September 20, 1776, has the similar provision.¹⁶⁹ It is indicated that the duty and responsibility of each military commander was imposed from the beginning of the United States.¹⁷⁰

Modern codes are illustrated in Article 71 of the Lieber Code,¹⁷¹ under which American troops were governed during the Civil War, referred to the issue of command responsibility:

¹⁶⁶ Ibid. p. 5.

¹⁶⁷ Articles of War, Provisional Congress of Massachusetts Bay, April 5, 1775.

¹⁶⁸ Parks n 93 above, p. 5

¹⁶⁹ Ibid. p. 5

¹⁷⁰ Ibid. p. 5

¹⁷¹ Between 1870 and 1904, quite a number of countries enacted similar codes to the Lieber Codes. Green indicates that this may constitute the customary international law of armed conflict. See Green, L. C., *The Contemporary Law of Armed Conflict*, Manchester University Press, 2nd edi., 2000, p. 30.

[w]hoever intentionally inflicts additional wounds upon an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death.¹⁷²

Some elements of direct responsibility are found in the Lieber Code but it did not refer to the obligation of commander when he did not take action when he knew his subordinate would commit a crime.

In 1901, First Lieutenant N. Valencia was charged with issuing an illegal order for the murder of a non-combatant. He was convicted and sentenced to death.¹⁷³

The first international attempt to hold a superior officer liable for his acts committed during conflict was toward Napoleon.¹⁷⁴ Ironically, Napoleon was once asked about the responsibility of commanders and replied that '[t]here are no bad regiments; there are only bad colonels',¹⁷⁵ therefore he seems to have recognized heavy responsibility of superiors. Napoleon himself was accused of breaching the Elba agreement sending him into exile. It should be noted that the accusation was not on a crime against humanitarian law.

During the Kearney campaign into Mexico in 1846, Colonel David D. Mitchell had received illegal orders from his superior and passed those orders to his subordinate, who executed them. In 1851, the United States Supreme Court upheld a lower court's decision, in which Colonel Mitchell was fined \$90,806.44 for seizure of plaintiff's goods. The case was actually concerned civil than criminal but the court dealt with issues of the execution or passing on of a penalty illegal order, and the defence of superior orders.¹⁷⁶

¹⁷² Quoted in Green Command, n 160 above, p. 322.

¹⁷³ Burnett, Weston D., 'Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra', (1985) 107 Military Law Review, p.79.

¹⁷⁴ Green Command, n 160 above, p. 322.

¹⁷⁵ Heinl, Robert D., *Dictionary of Military and Naval Quotations*, 1956, p.56.

¹⁷⁶ *Mitchell v. Harmony*, 54 U.S (13 How.) 420 (1851), quoted in Parks n 93 above, pp. 6-7.

a. The First World War

Article 3 of the IV Hague Convention is the first treaty on the liability of higher authority for breaching humanitarian international law, Article 3 of which states that:

[a] belligerent party which violates the provisions of the said Regulations, shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.¹⁷⁷

Though this is the only article about the responsibility of superior authority, it does not refer to the cases of commanders or superior officers, as it seems to have dealt with state responsibility rather than individual responsibility using the terminology of '[a] belligerent party'. During this period, it was common for a state to ask compensation of a belligerent party, therefore this provision should not be seen as evidence of individual responsibility¹⁷⁸.

However, it has to be noted that Article 1 of the Regulations Respecting the Laws and Customs of War on Land¹⁷⁹, annexed to the said Hague Convention, reads that '[t]he laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions' and one of the conditions was 'to be commanded by a person responsible for his subordinates'. The article mentions the duty of commanders on the premise that a commander has to take responsibility for the conducts of his subordinates, however it did not specify the extent of superior responsibility.

Additionally, Article 19 of the Tenth Hague Convention of 1907, relating to bombardment by naval vessels established a duty of commanders and, promulgated that commanders of belligerent vessels 'must see that the above Articles are properly carried

¹⁷⁷ Article 3 of the IV Hague Convention.

¹⁷⁸ Major O'Brien states that 'the payment of compensation by the belligerent state is the only remedy available for a violation of the law of war. O'Brien Edward J., 149 (1995) Military Law Review, p. 282.

¹⁷⁹ Articles of Regulations Respecting the Laws and Customs of War on Land is available at <<http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm#art1>> visited on 1st March 2007.

out.¹⁸⁰ Commander's responsibility probably meant to contain the duty to make subordinates carry out orders properly.

In addition, Article 43 of the Annex of the Fourth Hague Convention¹⁸¹ further requires that the commander of a force occupying enemy territory, 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'¹⁸²

The principle stated in Article 43 of the IV Hague convention may be considered to have been evidence of customary international law on duties and responsibilities of commanders.¹⁸³

In addition to that, Article 54 of the 1916 Articles of War focused on the responsibility of commander and provided that a commander had a duty of insuring 'to the utmost of his power, redress of all abuses and disorders which may be committed by an officer or soldier under his command'.¹⁸⁴

Because of the ambiguity of the concept of command responsibility, World War I did not see any major war crime prosecutions of military commanders for violation of the laws of war.¹⁸⁵

The Commission on the responsibility of the Authors of the War and on Enforcement of Penalties established by the Allied and Associated Powers at the end of World War I. Although the Commission referred to the laws of humanity and customs of war, there is no reference to the liability of superior officers when those under their command commit a war crime.¹⁸⁶

¹⁸⁰ 4 Law Reports of Trials of War Criminals, the United Nations War Crimes Commission, 1948, p. 43.

¹⁸¹ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

¹⁸² 4 Law Reports of Trials of War Criminals, the United Nations War Crimes Commission, 1948, p. 43.

¹⁸³ Parks n 93 above, p.11.

¹⁸⁴ Quoted in Ibid.

¹⁸⁵ Ching n157 above, p. 177.

¹⁸⁶ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, (1920) 14 American Journal of International Law, p. 117; The United States' representative objected the conclusion of the commission that imposed criminal responsibility

In the Preliminary Peace Conference in 1919, ‘the International Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties recommended that a tribunal be established for the prosecution of, *inter alia*, all those who, ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war’.¹⁸⁷ The Commission also noted that an individual should be charged with violations of the law and customs of war and the laws of humanity regardless of whether he is a civilian or a military person.¹⁸⁸

Moreover, Article 227 of the Versailles Treaty¹⁸⁹ seems to have mentioned the individual responsibility of the German Emperor but did not generally refer to the responsibility of superior officers.

As seen in Chapter 2, no international military tribunal was established nor did the Allied Powers prosecute accused German military personnel before their military tribunals.¹⁹⁰ In the German Supreme Court in Leipzig,¹⁹¹ only a handful of secondary offenders were tried and sentenced by this Court.¹⁹² Though the Court saw some cases of the defence of superior orders and command responsibility,¹⁹³ the issues of command responsibility were not deliberately discussed here. Other than the Leipzig trials, very few war crime trials were held with regard to the First World War. Green introduces the two well-known German trials; the case of *Nursing Sister Edith Cavell*, who was charged with having harboured and assisted escaping allied personnel, and the *Captain Fryatt* case, where he was tried for ‘a

on all individuals without invoking the plea of head of state or superior orders. Malekian, Farhad, ‘International Criminal Responsibility’, *International Criminal Law*, Transnational Publishers, 2nd ed., Bassiouni ed., 1999, p. 163.

¹⁸⁷ Quoted in Celebici para.335. See also, (1920) 14 *American Journal of International Law*, p. 121.

¹⁸⁸ (1920) 14 *American Journal of International Law*, p. 121.

¹⁸⁹ Article 227 of the Versailles Treaty.

¹⁹⁰ Bassiouni Crimes n3 above 428.

¹⁹¹ Lippman, Matthew, (1996) 15 *Dick. J. Int’l L.*, p. 4

¹⁹² The Allied Powers made the list of 3000 offenders in the beginning. This number included over 80 high ranking civilian and military leaders. Finally, the Germans were permitted to prosecute 45 individuals, most of whom were lower-level combatants. Lippman, Matthew, (2000) 13 *Leiden Journal of International Law*, p.141.

¹⁹³ Bassiouni Crimes n3 above 428.

franc-tireur crime against armed German sea forces'.¹⁹⁴ However, none of these cases mentioned the liability of a superior.¹⁹⁵

b. The Nuremberg Trial

In 1942, the United Nations War Crime Commission was established by the Declaration of St James signed by the Allied powers¹⁹⁶ in order to conduct investigations and obtain evidence of war crimes.¹⁹⁷ The issue of command responsibility was discussed thoroughly but failed to reach a certain conclusion.¹⁹⁸ Though the information compiled by the Commission used by many governments in subsequent prosecutions of war criminals, it was not binding over the Nuremberg Trial and the Tokyo Trial.¹⁹⁹

One year later the Allied Forces issued the Declaration on German Atrocities in Occupied Europe, which provides.²⁰⁰ Although the Declaration placed emphasis on the responsibility of German officers and member of the Nazi Party, it did not refer to command responsibility.

Section 2 of Article II of Control Council Law No. 10, enacted for the purpose of establishing 'uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal',²⁰¹ referred to individual responsibility. Surprisingly, Control Council Law No. 10 mentioned leader responsibility of direct participation but no reference was made to indirect responsibility of failure to stop the acts of the subordinates, which should be evidence of lack

¹⁹⁴ Green Command, n 160 above. p. 325.

¹⁹⁵ See Ibid.

¹⁹⁶ Hendin, Stuart E, 'Command Responsibility and Superior Orders in the Twentieth Century- A Century of Evolution', (2003) 10 Murdoch University Electronic journal of Law, para. 38; <http://www.murdoch.edu.au/elaw/> (hereinafter "Hendin") ; The resolution of St. James Agreement; June 12, 1941 is Available at <<http://www.yale.edu/lawweb/avalon/imt/imtjames.htm>>

¹⁹⁷ Hendin n196 above, para. 38.

¹⁹⁸ Ibid.

¹⁹⁹ See Ibid.

²⁰⁰ Quoted in Douglass, John Jay, 'High Command Case: A Study in Staff and Command Responsibility', (1972) 6 International Lawyer, p. 687.

²⁰¹ Allied Control Council Law No. 10 (20 Dec. 1945)

of agreement on indirect responsibility of commanders during wartime.

It was not until World War II that the issues of leader responsibility were seriously debated. The issues of direct responsibility of commanders were discussed thoroughly in the Nuremberg Trial and the Tokyo Trial. However, the indirect responsibility of superiors seems to have been discarded in Nuremberg. Regarding immunity of Head of State, Article 7 of the Nuremberg Charter denied the immunity of a head of state completely.²⁰² Article 7 also denied the immunity of responsible officials. Also, it is very important to note that neither the Nuremberg Charter nor the Judgment of the Nuremberg Trial mentioned the responsibility for failure to act. Instead, Article 6 of the Charter provided that '[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the forgoing crimes are responsible for all acts performed by any persons in execution of such plan'.²⁰³ Apparently, Article 6 intended to punish individuals directly involved in the commission of the crimes.

The chief purpose of the Nuremberg Charter was to establish individual responsibility, and negate the superior order defence, and deny the immunity of Head of States. As seen by Article 6 of the Charter, the drafters apparently did not intend to charge individuals with indirect responsibility for failure to control subordinates or prevent their atrocities. In Nuremberg, as the defendants were high ranking politicians and military commanders and were actively involved in the formulation or execution of a common plan or conspiracy to commit heinous crimes, they were charged with direct responsibility of individuals or superiors. Therefore, the Nuremberg Trial did not have a chance to deal with indirect responsibility of commanders.

c. The *High Command* case

²⁰² Article 7 of the Nuremberg Charter.

²⁰³ Article 6 of the Nuremberg Charter. As seen, there is no mention of indirect responsibility for failure to act.

In the *High Command* case, one of the most important trials dealt with command responsibility, where thirteen higher ranking German officials were charged with committing offences; crimes against peace, war crimes, crimes against humanity, and conspiracy to commit the said crimes.²⁰⁴ General von Leeb claimed that he was not aware of the atrocities and that they were different from the given orders. He disagreed with the Commissar Order from the beginning, so asked von Brauchitsch to persuade Hitler to rescind it. As soon as he noticed the mass killings at Kowno, he immediately took steps to prevent their repetition.²⁰⁵ Indeed it is clear from the evidence that ‘the accused von Leeb had protested against the order in every way short of open and defiant refusal to obey it’.²⁰⁶ The tribunal referred to criminality of superiors and stated that ‘[c]riminality does not attach to every individual in this chain of command from that fact alone’.²⁰⁷

Relying on the ordinary notion of negligence, the tribunal does not seem to have agreed to the ‘should have known’ standard of the *Yamashita* case:

[t]here must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.²⁰⁸

A ‘personal dereliction’ implied two cases; one is where his direct act is traceable to him, and the other is personal neglect tantamount to acquiescence. In the case of ‘a personal neglect’, the tribunal held that the *mens rea* might be established without actual knowledge on the

²⁰⁴ See Parks n 93 above, pp.38-39.

²⁰⁵ Crowe, C. N., ‘Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution’, (1994) 29 University of Richmond Law Review, p. 213 (hereinafter “Crowe”).

²⁰⁶ Quoted in Ibid.

²⁰⁷ 12 Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, p. 76.

²⁰⁸ Ibid.

crime committed under his authority by ‘immoral disregard’ amounting to acquiescence.

However, as to the question of imputed knowledge, the tribunal clearly denied and stated:

it is apparent we can draw no general presumption as to their knowledge in this matter and must necessarily go to the evidence pertaining to the various defendants to make a determination of this question.²⁰⁹

General von Leeb was found guilty under Count III of war crimes and crime against humanity ‘in connection with the transmittal and application of the Barbarossa Jurisdiction Order’ and not guilty under Count II of war crimes.²¹⁰ The Tribunal seems to have elaborated the rational with referring to the notion of negligence accepted in most states. Bassioni erroneously observes the knowledge standard of the *High Command* case follows the *Yamahshita* case.²¹¹ However, the *High Command* case probably did not go beyond the notion of ordinary criminal negligence, which was apparently more lenient than the *Yamashita* case. Yamashita’s knowledge was established based on the widespread commission of the crime though he himself did not have actual knowledge of the commission.

d. The *Hostage* Case

In the *Hostage* case,²¹² the US Military Government created Military Tribunal in

²⁰⁹ 12 Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, p. 79.

²¹⁰ Ibid. p. 94; The accused were all high-ranking generals or Admiral of the German Wehrmacht and also members of the High Command of Nazi forces. The defendants were charged with having participated in or planned or facilitated the execution of the numerous atrocities committed in countries occupied (crime against peace, crime against humanity, war crimes, and participating and organizing the formulations and execution of a common plan and conspiracy to the above crimes).

²¹¹ Bassinouni, M. Cherif, *Crimes Against Humanity*, (2nd ed., Kluwer Law International), P.433.

²¹² *United States v. List* (The Hostage Case), Trial of the War Criminals before the Nuremberg Tribunal 1228, 1238 (1950) and United Nations War Crimes Commission, 8 Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, pp.66-79.

order to charge twelve German high ranking officers with murdering thousands of civilians from Greece, Yugoslavia, Norway, and Albania during the occupation of these countries.

In *Hostage*, the duty of commanders was specifically explained as follows:

it is the duty of the commanding general in occupied territory to maintain peace and order, punish crime and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well.²¹³

Regarding the responsibility for what happened for the crimes under his command, the tribunal held that:

[t]he duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence.²¹⁴

The tribunal also answered the question as to whether or not the commander can excuse himself from responsibility when he did not have actual knowledge:

[a]n army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein.²¹⁵

This statement considered the crime committed by the subordinates can be *prima facie* evidence of actual knowledge of the superiors, which suggests that knowledge of commanders may be presumed to have had if the crime is committed by his subordinates within the occupied territory.

²¹³ Ibid. p. 69.

²¹⁴ Ibid. p. 69-70.

²¹⁵ Ibid. p. 70.

[commander'] responsibility is coextensive with his area of command...If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced.²¹⁶

The Trial apparently extended the duty of commanders up to 'maintaining peace and order, punishing crime, and protecting lives and property within the area of his command'. As seen Control Council No. 10 does not have an omission provision, so it can be said that the duty recognized by the Tribunal is quite extensive. Compared with Article 86 of the First Protocol, the maintenance of peace and security and the protection of life and property within his area would not be within the scope of the Article 86 standard. The tribunal erroneously extended the duty of commanders to the extremes, and asked commanders what were impossible. The author would argue that a possibility of mitigation rather than a mere denial of defence is needed, when the superior noticed the commission of the crime by the subordinates and subsequently tried to stop it in vain in some cases.

e. The Tokyo Trial

In Tokyo, not only commanders but also political leaders were indicted, the ideas of which was new under international criminal law at that time. One of the unique aspects of criminal liability in Tokyo is that the notions of direct responsibility and indirect responsibility of superiors were clearly distinguished, and both of them were found to be an act of crime. Although the Nuremberg Trial dealt only with direct responsibility of superiors, the concept of indirect responsibility of superiors was suddenly affirmed in Tokyo. A peculiarity of the difference is that a number of prisoners of war were mistreated by Japanese

²¹⁶ *U.S.A. v. Wilhelm List et al.*, in *Trials of War Criminals*, Vol. XI, p. 1271.

soldiers without actual orders of superiors during war time, and the superiors in charge claimed that they did not issue orders to mistreat the prisoners of war.²¹⁷ Although there remains the question that indirect responsibility of superiors was established under international law at that time, the notion of indirect responsibility of superiors was accepted in subsequent trials concerning crimes committed during the Second World War.

In reality, the Tokyo Charter did not have a general provision on individual responsibility, but Article 5 promulgated that '[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan'.²¹⁸ Article 6 of the Charter negates the immunity of official positions and the plea of superior orders as a defence.²¹⁹ However, the Tokyo Charter as well as the Nuremberg Charter was silent on the issue of indirect responsibility of superiors caused by subordinates, which would have been evidence that drafters of the Charters did not intend to prosecute leaders and commanders based on indirect responsibility of superiors.

In consequence of the mistreatment of prisoners of war by Japanese soldiers, indirect responsibility of leaders was thoroughly discussed in Tokyo. At the outset, the tribunal confirmed responsibility resting on political leaders and the government in terms of responsibility to prisoners of war as follows:

[i]n the case of the duty of government to prisoners held by them in time of war those persons who constitute the government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.²²⁰

²¹⁷ Tojo answered his failure as follows: '[i]t is Japanese custom for a commander of an expeditionary army in the field to be given a mission in the performance of which he is not subject to specific orders from Tokyo, but has considerable autonomy'. Roling n94 above 402.

²¹⁸ Article 5 of the Tokyo Charter.

²¹⁹ Article 6 of the Tokyo Charter.

²²⁰ Roling n94 above pp.29-30.

Then, the court described the duty of these people as follows;

[i]t is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes.²²¹

The court may seem to have put responsibility based on the position of military or political leaders but in reality this assumption was apparently denied by the court as follows; ‘Departmental Officials having knowledge of ill-treatment of prisoners are not responsible by reason of their failure to resign’.²²² Thus, just a leader position would not have been sufficient to prosecute a person of authority with mistreatment of prisoners of war.

Regarding failure to act, the court stated that such persons would be responsible if ‘(1) [t]hey fail to establish such a system; (2) [i]f having established such a system, they fail to secure its continued and efficient working’.²²³ It was held that in order to charge a leader with a crime based on negligence there must be a dereliction of duty.

As to knowledge requirement, if they had actual knowledge of the crime, he would have been responsible. The court held as follows ‘[t]hey had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future’.²²⁴ In terms of ignorance, the court held a leader is responsible if ‘[t]hey are at fault in having failed to acquire such knowledge.’²²⁵ The Tribunal further introduced the ‘should have known’ standard as follows:

²²¹ Roling n94 above 30.

²²² Roling n94 above 31.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

[i]f crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes.²²⁶

Contrary to Nuremberg, the Tokyo trial dealt with cases of indirect responsibility of superiors. Some of them were similar to the notion of ordinary negligence of criminal law, but the ‘should have known’ standard seems to have gone beyond that level. It should be noted that the Tokyo Trial lasted from April 1946 until November 1948, which means that the *Yamashita* case was completed in 1946 before the Tokyo Trial delivered its judgment. The ‘should have known’ standard introduced in *Yamashita* was instantly affirmed in Tokyo. This was the reason why the Tokyo Trial accepted the ‘should have known’ standard, even though the Charter did not mention indirect responsibility of superiors. In Tokyo, the punishment of individuals based on inaction of leaders was thoroughly discussed and the court accepted it. However, the criteria to establish the knowledge of superiors had remained ambiguous until the ICTY specified them. Not just a knowledge standard but also a duty requirement should have been clarified together. In response to the demand of dealing with the mistreatment of the prisoners of war by Japanese soldiers, the idea of punishing political leaders and commanders based on inaction was instantly filled in. Probably the disorganized Japanese military society assisted the needs, where prosecutors have difficulty to prove actual knowledge of some superiors. It would have been strange for the accuseds to be punished by the notion that was not even promulgated in the Charter, but there is no doubt that the Tokyo Trial laid the foundation of the development of superior responsibility at the ICTY, the ICTR and the ICC. Problem of superior orders in Tokyo would be that it punished defendants with the notion of indirect responsibility, which was neither promulgated in the Charter nor the Control Council No. 10. Applying the same standard of command responsibility to political leaders was highly debatable during this

²²⁶ Tokyo Trial Official Transcript, p. 48,446.

period.

f. The *Yamashita* Case

One of the most controversial trials on command responsibility is the case of the Japanese General Tomoyuki Yamashita, commander of Japanese forces occupying the Philippines during World War II. It should be noted that General Yamashita was neither charged with approving nor ordering such atrocities. Yamashita was charged with ‘permitting’ troops under his command to commit atrocities against the civilians and prisoners of war.²²⁷ The case has been very controversial because the prosecution failed to prove the actual knowledge of Yamashita.

The defence argued that the general should not be punished just for his status, as the commander did not show any fault on his part as follows:

[t]he Accused is not charged with having done something or having failed to do something, but solely with having been something.²²⁸

In answering to the defence’s argument, Major Kerr made a rebuttal using the concept of affirmative indifference as follows:

[the atrocities] were so notorious and so flagrant and so enormous, both as to the scope of their operation and as to the inhumanity, the bestiality involved, that they must have been known to the Accused if he were making any effort whatever to meet

²²⁷ “[T]he additional specific charges involved the murder and mistreatment of over thirty-two thousand Filipino civilians and captured Americans, the rape of hundreds of Filipino women, and the arbitrary destruction of private property”. Lael, Richard L., *The Yamashita Precedent: War Crimes and Command Responsibility*, Scholarly Resources Inc., 1982, pp.81-82 (cited in this paper “Lael”)

²²⁸ AG 000.5 (9-24-45) JA Before the Military Commission Convened by the Commanding General United States Army Forces, Western Pacific: Yamashita, Tomoyuki, at 86-87.

the responsibilities of his command or his position; and that if he did not know of those acts, notorious, widespread, repeated, constant as they were, it was simply because he took affirmative action not to know.²²⁹

The trial was before a US Military Commission locating in the Philippines, composed of American officers.²³⁰ The Military Commission concludes that:

(1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) that during the period in question you failed to provide effective control of your troops as was required by the circumstances.²³¹

The Military Commission continued that:

[t]hese provisions [about international law] plainly impose on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.²³²

The Commission constructed Yamashita's knowledge by stating the lack of knowledge is

²²⁹ AG 000.5 (9-24-45) JA Before the Military Commission Convened by the Commanding General United States Army Forces, Western Pacific: Yamashita, Tomoyuki, at 100.

²³⁰ Bassiouni Crimes n3 above 427.

²³¹ Quoted in Ibid.

²³² *United States v. Yamashita*, 327 U.S 1, at 16 (1946)

‘simply incredulous’.

[t]he Japanese Commanders testified that they did not make personal inspections or independent checks during the Philippine campaign to determine for themselves the established procedures by which their subordinates accomplish their missions. Taken at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted.²³³

Following the argument of the Commission above, a staff judge advocate concluded:

[t]he evidence affirmatively shows a complete indifference on the part of the accused as a commanding officer either to restrain those practices or to punish their authors....The pattern of rape, murder, mass execution and destruction of property is widespread both in point of time and of area to the extent a reasonable person must logically conclude the program to have been the result of deliberate planning...From all the fact and circumstances of record, it is impossible to escape the conclusion that the accused knew or had the means to know of the widespread commission of atrocities by members and units of his command; his failure to inform himself through official means available to him of what was common knowledge throughout his command and throughout the civilian population can only be considered as a criminal dereliction of duty on his part.²³⁴

Yamashita was found guilty and convicted of a breach of the duty by ‘permitting’ his soldiers to commit the atrocities. In dissenting, Justice Murphy addressed:

²³³ Quoted in Burnett, Weston D., ‘Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra’, (1985) 107 Military Law Review, p.93.

²³⁴ Quoted in Parks n 93 above, pp. 32-33.

[h]e was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge.²³⁵

In addition, General Douglas MacArthur was the last authority to review and ratify Yamashita's sentence.²³⁶ General MacArthur approved the findings and sentence of the Commission and signed the order to execute the judgment upon the defendant.

The Supreme Court also confirmed that obligation is imposed on commanders to prevent their commanders from any violations of the laws of war whether they issued the illegal order or not.²³⁷ At this period the concept to charge a commander or superior who failed to act was not considered as customary international law, the idea of which was instantly showed up to deal with the widespread atrocities committed by Japanese soldiers without receiving orders. Probably it can be said that even the drafters of the Tokyo Charter and Control Council No.10 did not expect to punish the failure to act of superiors. Justice Murphy in his dissenting opinion meant the same by stating that '[t]he recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge'.

It is important to note that the United States disregarded the precedent of the *Yamashita* case as seen in the Mai Lai Massacre.²³⁸ Also, during 1977, the U.S. delegates

²³⁵ *United States v. Yamashita*, 327 U.S. 1, at 39 (1946)

²³⁶ The full text was quoted in Parks n 93 above, pp.36-37.

²³⁷ *Yamashita*, No 61, Misc., Supreme Court of the United States, 317 U.S. 1; 66 S. 340, 4 February 1946 (1946 U.S. LEXIS 3090 ; 90 L. Ed. 499).

²³⁸ See the *Calley* Case. *US v. Calley*, U.S. Court of Military Appeals (1973), 22 USCMA 534, 48 CMR 19.

proposed a different standard as to this issue; responsibility would be imposed if superior 'knew or should reasonably have known in the circumstances at the time that [a subordinate] was committing or was going to commit such a breach'. Probably, the punishment of General Yamashita was strongly motivated by the notorious Bataan Death March where 72,000 of the prisoners of war were forcibly transferred and beaten randomly, in consequence, 18,000 of them died. The leaders did not order this but widespread tragedy happened, so there was definitely need to punish someone. Yamashita was in a way scapegoat for this incident, it is said that he was not aware of this. Whether the tribunal knew or not, this standard became the leading case on omission under international criminal law.

g. the Toyoda Case

Another famous case of superior responsibility is the case of *Admiral Toyoda*, Toyoda was tried by a seven-member Allied Military Tribunal in Tokyo.²³⁹ The composition of the trial is very different from the *Yamashita* case, as the president was a Brigadier of the Australian Army and three out of seven members were from the Air force, three from the Army with one law member.²⁴⁰ The reason for this distinct composition was that General MacArthur tried to 'win the confidence and respect of the people'.²⁴¹

As to the elements of command responsibility, the tribunal held:

this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine

²³⁹ Records of the trial of accused war criminal Soemu Toyoda, tried by a military tribunal appointed by the Supreme Commander of the Allied Powers, Tokyo, Japan, 1948-49 : Record Group 331, records of the Allied Operational and Occupation Headquarters, World War II

²⁴⁰ Parks n 93 above, p.62.

²⁴¹ There was on-going flurry of concern over the Yamashita case. See Ibid.

which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.²⁴²

As for the criteria for ‘knew’ or ‘should have known’ standard, the courts held that:

[h]is guilt cannot be determined by whether he had operational command, administrative command, or both. If he knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties. Only the degree of his guilt would remain.²⁴³

Though the court did accept the view of ‘knew’ or ‘should have known’ standard, it confirmed that practical attention had to be done in its application. The court relied on an ordinary notion of negligence, which is dereliction of a duty. Regarding duty, the court held that a commander enjoys the duty (1) to control his troops; (2) to taken necessary steps to prevent subordinates’ acts, (3) and to punish offenders. The duty clarified was the same as the *Yamashita* case but it would have been insufficient to assume all the commanders and superiors had the same duty. The contents of duty should have differed according to its rank and position. For this reason, it would be inappropriate to apply the same standard to civilian superiors. It should be noted that that in order to establish the accused’s knowledge of the crime, the standard of a reasonable person was used. Rejecting the vicarious liability or strict liability theory, Toyoda was acquitted of all charges.

²⁴² Quoted in Parks n 93 above, p.72.

²⁴³ Ibid. pp.72-73.

h. The *Abbaye Ardenne* Case

In the Canadian Military Court, Commander Brigadefuhrer Kurt Meyer was charged with violations of the laws of war, committing war crimes by inciting and counselling his men under his command to deny quarter to Allied troops or by having ordered the killing of Canadian prisoners.²⁴⁴

The court was to be conducted according to the Canadian War Crimes Regulations.²⁴⁵ Article 10 erroneously imposed the burden of proof on the accused, under which the court may have taken it as *prima facie* evidence when a crime was committed in a group under the command of a commander or in the presence of a commander.²⁴⁶

In this case, the defence counsel argued that Meyer never gave any order that prisoners should not be taken and that if any such statement had been made no weight was placed on it by the men in his command.²⁴⁷

The judge advocate, whose opinion was accepted by the tribunal, stated:

[t]here is no evidence that anyone heard the words uttered by the accused which would constitute an order, but it is not essential that such evidence be adduced. The giving of the order may be proved circumstantially; that is to say, you may consider the facts you find to be proved bearing upon the question whether the alleged order was given, and if you find that the only reasonable inference is that an order the prisoner be killed was given by the accused at the time and place alleged, and that the necessary for you to be convinced that a particular or formal order was given, but you must be satisfied before you convict that words were uttered or some clear

²⁴⁴ IV *Law-Reports of Trials of War Criminals*, The United Nations War Crimes Commission, London, HMSO, 1948, p. 97, available at <<http://www.ess.uwe.ac.uk/WCC/meyer.htm>>

²⁴⁵ Bassiouni n1 above 360.

²⁴⁶ Ibid.

²⁴⁷ IV *Law-Reports of Trials of War Criminals*, The United Nations War Crimes Commission, London, HMSO, 1948, pp. 103-104, available at <<http://www.ess.uwe.ac.uk/WCC/meyer.htm>>

indication was given by the accused that prisoners were to be put to death...²⁴⁸

Meyer was found guilty and sentenced to death by shooting.

In the *Abbaye Ardenne* case, the court dealt with direct command responsibility though there was no direct evidence of his order but held, following the judge advocate instruction, that the giving of order was proved by circumstantial evidence.²⁴⁹ This case differs from *Yamashita* case in that the court of the *Yamashita* case failed to prove the direct evidence of Yamashita's knowledge on the atrocities.²⁵⁰ In *Abbaye Ardenne*, Meyer boasted that his unit never took prisoners and so it was not so difficult to assume that 'a particular or formal order was given'.²⁵¹ The international community has put focus on indirect responsibility of superiors rather than direct responsibility, the reason of which is that the idea of direct responsibility of superiors has been common so the issue has not been debatable. The issue was whether the evidence of direct order can be established by circumstantial evidence. Currently, to establish evidence of direct orders through circumstantial evidence is accepted under international criminal law, but when and how this approach was accepted was unknown. The problem is that putting the burden of proof on the accused on this issue was inappropriate. The court should not have accepted *prima facie* evidence just because the crime was committed under the command or in presence of a commander.

15. Command Responsibility after World War II

The Mai Lai Massacre

US soldiers slaughtered hundreds of civilians in May Lai, Vietnam during Vietnam

²⁴⁸ Quoted in Green Command, n 160 above, pp. 337-339.

²⁴⁹ See IV *Law-Reports of Trials of War Criminals*, The United Nations War Crimes Commission, London, HMSO, 1948, p.108, available at <<http://www.ess.uwe.ac.uk/WCC/meyer.htm>>

²⁵⁰ See Green Command, n 160 above, p.339.

²⁵¹ Ibid.

War.²⁵² In the *Calley* case,²⁵³ as seen in Chapter 2, Calley was charged with direct involvement in the atrocities in the village. In addition, United States Captain Ernest Medina, Calley's immediate superior, was charged with failure to control the subordinates. Medina was charged with responsibility for the massacre caused by his subordinates because he breached the duty to prevent the activities of his subordinates where the atrocities were happening.²⁵⁴

Medina denied his actual knowledge and argued that he was not aware of the atrocities committed by his subordinates and as soon as he became aware of the killings, he ordered an immediate cease fire.²⁵⁵

Colonel Kenneth Howard, presiding judge, gave the instruction as follows:

a military superior in command is responsible for and required...to make certain the proper performance by his subordinates of their duties as assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war.²⁵⁶

Judge Howard's instruction confirmed that superior commanders have a duty to control subordinates even after they have issued orders. Although Judge Howard stated that a commander would be responsible for failure to take necessary steps to make them observe the law of war, at this stage he did not address the possibility of punishment where the

²⁵² The Peers Report estimates the number of the victims was at least 175. Crowe n205 above, p. 222.

²⁵³ *US v. Calley*, U.S. Court of Military Appeals (1973), 22 USCMA 534, 48 CMR 19.

²⁵⁴ Crowe n205 above, p. 222.

²⁵⁵ *Ibid.*

²⁵⁶ Quoted in Green Command, n 160 above, p.353.

commander did not have actual knowledge.

Judge Howard dealt with the issue of knowledge requirement of failure to control subordinates as follows:

[t]hus mere presence at the scene without knowledge will not suffice...it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.²⁵⁷

Judge Howard erroneously disregarded the principles of the *Yamashita* case, in which knowledge of superiors could be established from circumstantial evidence. The *Medina* case is lenient in comparison to the *Yamashita* case in that Medina became aware of the atrocities in the middle of the commission of the crime but he was found not guilty though Yamashita did not have actual knowledge of it and found guilty by inferring his knowledge from circumstantial evidence. Howard completely deviated from the Yamashita's precedent and the US Army Manual.²⁵⁸ According to the U.S. Army manual, *The Law of Land Warfare* provided that the commander is responsible if he has should have knowledge and fails to take necessary and reasonable steps.²⁵⁹ Medina seems to have been treated with a different standard, as he is a U.S. soldier.²⁶⁰ It is pity to know that the Yamashita standard was made by a US court but was not applicable to a case to try own people. As stated by Telford Taylor, 'moral health will not be recovered until its leaders are willing to scrutinize their behavior by the same standards that their revered predecessors applied to Tomoyuki Yamashita'.²⁶¹

²⁵⁷ Quoted in Crowe n205 above, p. 223.

²⁵⁸ Lael n227 above p.132.

²⁵⁹ The Law of Land Warfare(FM-27-10) Quoted in Crowe n205 above, p. 224.

²⁶⁰ Ibid.

²⁶¹ Taylor, Telford, Nuremberg and Vietnam: an American Tragedy, 1970, p. 182.

16. Statutory Development of Command Responsibility

Surprisingly, the 1949 Geneva Conventions did not have superior responsibility provisions in spite of the development of the command responsibility doctrine. Because of the tension between the Soviet Union and the United States and probably the difficulties of civil wars, the use of the doctrine was much disturbed.²⁶²

In 1977, international delegates amended the 1949 Geneva Conventions of August 1949 and addressed directly the question of command responsibility.²⁶³ They gave a warning that military commanders must ‘do everything feasible’ to ensure all potential objectives involved military and not civilian targets.²⁶⁴

The international delegates made a progress on the command responsibility doctrine. Officers must not only ensure that their men are aware of the law of war but they also must prevent and/or suppress all violations of that law.²⁶⁵ Newly adopted Articles 86 and 87 of the 1977 protocol I to the 1949 Geneva Conventions represented ‘the latest trends in the field of codification of international law’.²⁶⁶ Article 86 held a provision on failure to act based on the standard ‘if they knew, or had information which should have enabled them to conclude in the circumstances at the time’.²⁶⁷ In addition, Article 87 confirmed the duty of commanders.²⁶⁸ The difference between Article 86 and 87 is that though Article 87 imposed duties ‘military commanders’, Article 86 seems to extend the definition to ‘superiors’, which may include civilian superiors.

Article II of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity referred to direct superior responsibility but no

²⁶² Bantekas n17 above 70.

²⁶³ Lael n227 above 134.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Sandoz, Y., et al., eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht, Martinus Nijhoff, 1987, p. 1007, para. 3527.

²⁶⁷ Article 86 of the 1977 Protocol I.

²⁶⁸ Article 87 of the 1977 Protocol I.

reference was made to indirect responsibility.²⁶⁹

Article 12 of the 1991 Draft Code of Crimes Against the Peace and Security of Mankind had the provision on the responsibility of superiors and provided:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was coming or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.²⁷⁰

Article 12 of the Draft is ‘a reproduction of Article 82(2) of Geneva Protocol I, 1977’.²⁷¹ The Commission’s Commentary states that the commander will incur liability even when ‘he examined the information available and has not drawn the obvious conclusion’.²⁷² As emphasized by Green, it would be extremely difficult in what circumstances he is to see ‘the obvious conclusion’ that his subordinate ‘is going to commit such a crime’.²⁷³

Article 4 to 7 of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, 1996, by the ILC, address the issues of command responsibility.

As regard to the responsibility of the superior, Article 6 of the 1996 Draft Code promulgates that:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was

²⁶⁹ Article II of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity

²⁷⁰ Article 12 of the 1991 Draft Code of Crimes Against the Peace and Security of Mankind.

²⁷¹ Commentaries on the International Law Commission’s 1991 Draft Code of Crimes Against the Peace and Security of Mankind (Bassiouni ed.), Association Internationale De Droit Penal, 1993, p.195.

²⁷² Ibid.

²⁷³ Ibid.

committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.²⁷⁴

In addition, Article 2 (3) of the 1996 Draft Code provides the direct responsibility and indirect responsibility of commanders as follows:

An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual: (a) intentionally commits such a crime; (b) orders the commission of such a crime which in fact occurs or is attempted; (c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6; (d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission; (e) directly participates in planning or conspiring to commit such a crime which in fact occurs; (f) directly and publicly incites another individual to commit such a crime which in fact occurs; (g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.²⁷⁵

The issue of individual responsibility was also mentioned in the 1996 Report of the General Assembly's Preparatory Committee on the Establishment of an International Criminal Court.

the concept of individual criminal responsibility for the crimes, including those acts of planning, instigating and assisting the person who actually committed the crime, was essential and should be stipulated in the Statute.²⁷⁶

²⁷⁴ Article 6 of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind

²⁷⁵ Article 2 (3) of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind.

²⁷⁶ 1996 PrepCom Report at Vol. II, p.44.

17. The ICTY

To deal with the atrocities in the former Yugoslavia, the United Nations Security Council²⁷⁷ created the International Criminal Tribunal for the Former Yugoslavia under the authority of Chapter VII of the United Nations Charter. The Statute of the International Criminal Tribunal for former Yugoslavia was promulgated, Article 7 of which provides:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.²⁷⁸

Refining the Yamashita 'knew or should have known' standard, it was accepted to hold commanders responsible for the acts of subordinates under some conditions.

The Secretary-General of the United Nations claimed that all individual who participate in the planning, preparation or execution of violations of the laws of war should be held liable.²⁷⁹ The Report of the Secretary-General which attached the draft Statute referred to the questions of command responsibility.

²⁷⁷ UN Doc. S/RES/808 (1993); UN Doc S/RES/827 (1993).

²⁷⁸ Article 7 of the ICTY Statute.

²⁷⁹ Report of the Secretary-General Pursuant to Paragraph 2 of Security Counsel Resolution 808 (1993), U.N.S.C. Doc. S/25704 (1993).

[a] person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinate were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.²⁸⁰

The U.S. proposed another interpretation on command responsibility, which was not adopted. The notable difference is that ‘through reports to the accused person or through other means’ was added to the US proposal. However, the US proposal was not finally adopted in Article 7 of the ICTY Statute.²⁸¹

The First Command Responsibility Case of the ICTY...The *Celebici* Case

The *Celebici* case is the first international case dealing with command responsibility since the World War II trials.²⁸² Esad Landzo (guard), Zdrako Mucic (commander), Hazim Delic (commander), and Zejnil Delalic (commander) were charged with humanitarian law violations.²⁸³

Regarding command responsibility the Trial Chamber quoted the Report of the Secretary-General stating that individuals who actually ‘participate in the planning,

²⁸⁰ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N.S.C. Doc. S/25704 (1993)

²⁸¹ Crowe n205 above, pp. 229-230.

²⁸² Mitchell n3 above 400.

²⁸³ As to the fact of the case, see Ibid, p.401; See also Rockoff, Jennifer M., “Prosecutor v. Zejnil Delalic (The Celebici Case), (2000) 166 Military Law Review pp. 172-176.

preparation or execution of serious violations of international humanitarian law' are liable.²⁸⁴

In relation to the responsibility of commanders who did not issue actually illegal orders, the Chamber held that:

[t]hat military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law....Thus, a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates.²⁸⁵

As to indirect command responsibility, the Chamber noted that three elements are required for the application of command responsibility; '(i) the existence of a superior-subordinate relationship; (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.'²⁸⁶

The Trial Chamber considered the concept of control, using two terms; *de jure* position and *de facto* position.²⁸⁷ The Chamber accepted the prosecution's argument that individuals in a position of authority, whether civilians or military officers, may incur criminal responsibility.²⁸⁸ It also held that the mere absence of formal authority should no longer be used for precluding criminal leader responsibility.²⁸⁹

The Chamber also noted that '[t]he doctrine of superior responsibility does not

²⁸⁴ Celebici para. 319.

²⁸⁵ Celebici para. 333.

²⁸⁶ Ibid. para. 346.

²⁸⁷ Ibid. para.354.

²⁸⁸ Ibid.

²⁸⁹ The Chamber held that "[t]he mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility". Celebici para. 354.

establish a standard of strict liability for superiors for failing to prevent or punish the crimes committed by their subordinates'.²⁹⁰ Following this principle, the Chamber addressed the *mens rea* requirement of superior responsibility, which is that:

(1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes...or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.²⁹¹

The Trial Chamber, however, did set limits to the scope of indirect command responsibility. The Chamber held that:

international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers...As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility.²⁹²

Applying these criteria, Mucic, the camp commander, was found guilty of violations of international humanitarian law based on command responsibility, as he possessed effective control over the subordinates.²⁹³ He was found responsible for having failed to take any necessary steps to prevent the atrocities. The Trial Chamber did not use the command

²⁹⁰ Ibid. para.383.

²⁹¹ Ibid.

²⁹² Ibid. para.395.

²⁹³ Ibid. para.775.

responsibility criteria for other two defendants as follows.²⁹⁴ Delalic was found not guilty of all accounts, as he did not have command authority over the camp. Delic was not considered to have been a superior for the purposes of imputation of criminal liability, but was found guilty and sentenced to twenty years imprisonment. Landzo was found guilty with the imprisonment of fifteen years.

The *Celebici* case is the first judgment since World War II, using the doctrine of command responsibility. The notion of indirect responsibility was devised in the Statute, as well. The case confirmed that a superior may be held liable for failing to take measures that are outside of his formal competence if he has material possibility of preventing the atrocities. It should be noted that the Trial Chamber extended the possibility of leader responsibility to civilians. However, the Chamber clearly denied the concept of strict liability stating that a commander should not to be held liable for the crime of the subordinates where it was materially impossible.

The *Blaskic* Case

In the *Blaskic* case, General Blaskic was charged with serious violations of international humanitarian law²⁹⁵ committed against Bosnian Muslims in Vitex, Busovaca, Kiseljak and Zenica in the Lasva Valley region of Central Bosnia from May 1992 to January 1994.²⁹⁶

The defence argued not only that he had not ordered the crimes but that he did not know of the crimes saying that Blaskic should not be held liable for the crimes by HVO soldiers in his area of authority simply because he was a commander in Central Bosnia.²⁹⁷

²⁹⁴ Prosecutor v. Delalic. No. IT-96-21-T., International Criminal Tribunal for the former Yugoslavia, Nov. 16, 1998 (1999) 93 American Journal of International Law, p. 517.

²⁹⁵ General Blaskic was charged with crimes against humanity, grave breaches and violation of the laws and customs of war.

²⁹⁶ See Sarooshi, Danesh, "Command Responsibility and the Blaskic case", (2001) 50 International and Comparative Quarterly, p. 453 (cited in this paper "Sarooshi")

²⁹⁷ Tinta, Monica Feria, 'Commanders on Trial: The Blaskic Case and the Doctrine of Command Responsibility under International Law', (2000) KLVII Netherlands International

General Blaskic was not prosecuted for having personally committed any of the alleged crimes but rather having planned, instigated, ordered, or otherwise aided and abetted in the planning, preparation, or execution of the crimes.²⁹⁸

As to his knowledge of the crimes, the Trial Chamber held that:

the accused had more than a constructive knowledge of the crimes. It is satisfied beyond all reasonable doubt that General Blaskic ordered attacks which targeted the Muslim civilian population and thereby incurred responsibility for crimes committed during these attacks or at least made himself an accomplice thereto and, as regards those crimes not ensuring from such orders, he failed in his duty to prevent them and did not take the necessary measures to punish their perpetrators after they had been committed.²⁹⁹

The Chamber examined the issue of lack of knowledge as follows:

the Trial Chamber finds that if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.³⁰⁰

In *Blaskic* liability was imposed on those who exercised both *de jure* authority and effective control over soldiers. *De facto* authority was found by a wide range of factors including the

Law Review, p. 295.

²⁹⁸ Sarooshi n291 above 459.

²⁹⁹ *Prosecutor v Blaskic*, Judgment, No IT-95-14-T, 3 March 2000, para. 789

³⁰⁰ *Ibid.* para. 332:

capacity to punish as a discipline. The court confirmed that a clear criminal intent was not necessary to prosecute a person with a crime, and ‘a commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over him’.³⁰¹ The *Blaskic* case is unique in that he actually ordered the attack leading to massacre, and did not take necessary steps to prevent it. It should be noted that he was charged with a crime committed by others on the basis of Article 7(1) of the Statute, even in the case of lacking knowledge of the crime his knowledge can be established by the notion of negligence.

The *Aleksovski* Case

In *Aleksovski*, Aleksovski was a prison warden and acted as *de facto* authority in the prison, was charged with a violation of the laws or customs of war and other crimes. The Chamber clearly stated that *de jure* authority is not necessary so *de facto* authority is sufficient to establish superior-subordinate relationship.³⁰²

As to his rank, the Chamber found that

The issue whether the guards came concurrently under another authority, such as the military police commander, in no way detracts from the fact that the accused was their superior within the confines of Kaonik prison, since it has been proved, as regards the activities within the prison, that the guards obeyed the accused’s instructions and were answerable to him for their acts.³⁰³

The Chamber stated that the accused that received orders from a higher authority does not deprive him of his criminality as a superior. Simultaneously, no evidence was actually found

³⁰¹ Ibid. para. 301.

³⁰² *Prosecutor v Aleksovski*, IT-95-14/1 , 25 June 1999, para. 103.

³⁰³ Ibid. para. 106.

by the Chamber that he issued orders to the HVO soldiers to transfer the detainees. With regards to the removal of the detainees caused by the HVO soldiers, the Chamber found that Aleksovski was not liable for failing to prevent or punish the acts of the HVO soldiers.³⁰⁴ As to the harsh treatment of the detainees, the Chamber found that ³⁰⁵ ‘the accused seems to have taken all the steps available to him...to improve conditions because of the state of health of some of the detainees’.³⁰⁶ Therefore, it was even found that he did not have the intent to cause harm.³⁰⁷ Without accepting these situations as a justification, the Chamber held that ‘the violence...appears to be a reprehensible infringement of international human rights which would be absolutely unacceptable in time of peace’.³⁰⁸ In the Appellate Chamber, it held that Aleksovski not merely tolerated the atrocities with the required knowledge but also aided and abetted the mistreatment of the detainees.³⁰⁹

The *Kordic* Case

In *Kodic*, Kodic was a civilian leader who had the positions of Vice-President of the separatist Croatian Republic of Herceg Bosna and President of the Croatian Democratic Union of Bosnia and Herzegovina, and the principal Bosnian Croat political party. He was charged with a crime of ethnic cleansing as a superior committed by the Croatian Defence Council. In *Kordic* the standard of *de jure* or *de facto* authority was confirmed stating that ‘no formal superior-subordinate relationship is required’³¹⁰ but a superior-subordinate relationship was needed. The Chamber used a higher standard of proof to civilians.³¹¹ In the Chamber, the availability of command responsibility to civilians was discussed in order to establish Kordic’s responsibility:

³⁰⁴ Ibid. para. 119.

³⁰⁵ Ibid. para. 219.

³⁰⁶ Ibid. para. 219.

³⁰⁷ Ibid. para. 219.

³⁰⁸ Ibid. para. 228.

³⁰⁹ Prosecutor v Aleksovski, IT-95-14/1-A , 24 March 2000, para. 175.

³¹⁰ *Kordic* (2001), para. 388.

³¹¹ Ibid. para. 428.

Although liability under Article 7(3) may attach to civilians as well as military personnel, once it is established that the requisite power to prevent or punish exists, the Chamber holds that great care must be taken in assessing the evidence to determine command responsibility in respect of civilians, lest an injustice is done. In the first place, it is established that substantial influence (such as Kordic had), by itself, is not indicative of a sufficient degree of control for liability under Article 7(3). Secondly, while liability under Article 7(3) may attach not only to persons in formal positions of command, but also to those who are effectively in command of more informal structures, the Chamber finds that Kordic lacked effective control, which the Appeals Chamber in the *Celebici* case defined as “a material ability to prevent or punish criminal conduct, however that control is exercised”.³¹²

The Chamber showed a cautious attitude toward civilians since Kordic lacked effective control over the HVO soldiers. A sufficient degree of control for liability was mentioned indicating the condition of ‘a material ability’ of a superior the *Celebici* case established. With regards to the atrocities caused by the HVO soldiers, he was found not guilty as he ‘was neither a commander nor a superior in respect of the HVO’ under Article 7(3) of the Statute.³¹³ Though he was found not guilty concerning the atrocities committed by the HVO soldiers, he, as a political leader, was found guilty of war crimes and crimes against humanity based on command responsibility. It should be noted that the Chamber established the rule that it is insufficient to prove that the accused had substantial influence, but the accused has to have ‘material control’. The terminology of ‘material control’ would probably mean that the accused issues orders then they have to be observed without any delay by the persons below in order to fulfil his duty to take measures to stop the atrocities or punish them. Using the criteria, the Chamber found that Kordic did not have ‘material control’.

The Halilovic Case

The *Halilovic* case was concerning indirect responsibility of a commander, according to which Halilovic

³¹² *Kordic* (2001), para. 840.

³¹³ *Ibid.* para. 841.

was acquitted in the Trial Chamber. Sefer Halilović had a position of a commander of the Territorial Defence, Supreme Commander, ABiH Commander, and General in the Army of the Republic of Bosnia and Herzegovina during the war in Bosnia and Herzegovina. Halilovic was charged with direct responsibility for a violation of the laws and customs of war, resulted from the massacre in Grabovica and Uzdol in 1993. However, the Chamber could not find any evidence of direct orders from Halilovic. The Trial Chamber held that ‘the evidence does not give a clear picture of Sefer Halilovic’ position, either *de jure* or *de facto*, within the structure of the Main Staff after the 18 July Decision’.³¹⁴ Rather his role was seen as ‘Team Leader of the Inspection Team’³¹⁵; therefore the Chamber found that Halilovic is not guilty on the ground that Halilovic did not have effective control over the members of the 9th Brigade and the units ABiH command. The *Halilovic* case is unique in that the court denied the effective authority of Halilovic over the ‘subordinates’ in the first place; therefore all of this superior responsibility was automatically failed to establish. The prosecutor seems to have intended to prosecute Halilovic with the crime of ordering illegal acts, which was failed accordingly.

18. The ICTR

In order to deal with the internal humanitarian chaos in Rwanda, the Security Council saw it as a threat to international peace and security, and promulgated the Statute of the International Criminal Tribunal for Rwanda, and established the International Criminal Tribunal for Rwanda. Article 6 of the ICTR provides:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of

³¹⁴ *Prosecutor v Halilovic*, IT-01-48-T, 16 November 2005, para.736.

³¹⁵ *Ibid.* para.742.

criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Article 6 of the ICTR statute and Article 7 of the ICTY statute are identical in the treatment of command responsibility. The provision is considered to be evidence of customary international law, by which the principles of command responsibility were established international humanitarian law by 1994, regardless of whether committed in international or non-international conflicts.

The *Akayesu* case is the first Rwanda case of genocide. Akayesu was elected to the position of ‘bourgmestre’ for the village of Taba in April 1993; therefore he was not a military person. He was found guilty of crime against humanity and genocide. The Trial Chamber held:

[t]he Chamber therefore finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in Article 6(3), to civilians remains contentious. Against his background, the Chamber holds that it is appropriate to assess on a case-by-case basis that power of authority, actually developed upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.³¹⁶

The *Akayesu* case is interesting as the Chamber did not show the fixed approach of indirect

³¹⁶ *Akayesu*, para.491.

responsibility of civilian superior crimes. The Chamber recommended the case-by-case approach. The Chamber then established the knowledge of Akayesu or that he had reason to have known the criminal acts of his subordinates. However, the Chamber did not attach criminal responsibility based on the indirect responsibility of superiors, but he was charged with direct roles in the aiding and abetting under Article 6(1) of the ICTR Statute.

In *Kayshema*, he was appointed as the ‘prefect’ of the Kibue area, so he was not a military person. He was charged with genocide and found guilty. The Trial Chamber confirmed that civilians who exert authority incur criminal responsibility.³¹⁷ The Chamber extended the responsibility to civilian leaders and politicians in possession of authority.³¹⁸ The Chamber seems to have disagreed with the idea that superior responsibility is imposed to those who have legal authority. Considering the difference between *de jure* or *de fact* authority, the Chamber appropriately showed a different standard to those civilian superiors and political leaders. The Chamber followed the ICC approach and held that ‘the distinction between military commanders and other superiors embodied in the Rome Statute an instructive one’.³¹⁹ So, the Chamber used the ‘knew or, owing to the circumstances at the time, should have known’ standard to military commanders, and ‘must have [known], or consciously disregarded information’ standard to other superiors.

In *Bagilishema*, Bagilishema was a bourgmestre of the town of Mabanza, so he was not a military personnel. The Trial Chamber dealt with superior responsibility cautiously and acquitted Bagilishema. The Chamber was very hesitant to apply the doctrine of superior responsibility to non-military personnel citing that command responsibility ‘extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders’. The Trial Chamber stated that:

³¹⁷ *Prosecutor v Kayshema*, ICTR 951-T, 21 May 1999, para. 213.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.* para. 227.

According to the Trial Chamber in *Celebici*, for a civilian superior's degree of control to be "similar to" that of a military commander, the control over subordinates must be "effective", and the superior must, have the "material ability" to prevent and punish any offences. Furthermore, the exercise of *de facto* authority must be accompanied by "the trappings of the exercise of *de jure* authority". The present Chamber concurs. The Chamber is of the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence.³²⁰

In *Bagilishema* the Trial Chamber seems to have believed that a civilian superior should have the same authority over the subordinates in order to apply the doctrine of superior responsibility. However, this standard is almost the same as the military one. Considering that the ICC Statute is applying different standards to these cases, the ICTR approach was too simplistic.

19. The International Criminal Court

The UN efforts to make an international criminal court dates back to the 1950s immediately after the end of the war. The International Law Commission asked a rapporteur to draft a statute for an international criminal court in March 1950. The first official document on an international criminal court would be the 1951 Draft Statute for an International Criminal Court, which merely stated the structure of an international criminal court, for this reason the principles of individual responsibility were not mentioned. The Revised Draft Statute for an International Criminal Court was issued in 1953, which also did not refer to issues of

³²⁰ *Prosecutor v Bagilishema*, ICTR-95-1A-T, 7 June 2001, para.43.

individual responsibility. Focusing on the system of enforcement and jurisdiction, the 1994 draft of the International Criminal Court was promulgated but did not refer to individual responsibility issues.

In 1996, the Preparatory Committee gave its report to the General Assembly after discussions in ‘a friendly but not always cooperative atmosphere’.³²¹ In the 1996 report, it was suggested that official capacity of the accused should not free him from responsibility, and direct responsibility of individuals was discussed, in which three proposals were made.³²² With regards to command responsibility, Article C of the 1996 report provided that a superior takes responsibility for failure to exercise proper control where ‘(a) The [commander][superior] either knew or [owing to the widespread commission of the offences should have known][should have known] that the [forces][subordinates[s]] were committing or intending to commit such crimes; and (b) The [commander][superior] failed to take all necessary [and reasonable] measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof]’.³²³ It can be seen that there was no agreement as to whether command responsibility should be applicable to civilians at this stage. Although the possibilities of the ‘should have known’ standard was discussed, whether or not civilian superiors have to take responsibility for subordinates’ act was not fixed yet.

The Decision was made by the Preparatory Committee held in February 1997. In the process of making the ICC Statute in the Committee, all modes of individual participation were discussed. Establishing responsibility of legal entity was also discussed but failed to include a provision on legal entities because of the fact that a number of states do not provide responsibility of legal entity. One of the difficult issues was whether the ICC Statute should include the provision on responsibility of civilian superiors.³²⁴ Interestingly, most delegations were for the idea applying the command responsibility doctrine to civilian

³²¹ Lee, Roy S., *The International Criminal Court...The Making of the Rome Statute Issues, Negotiations, Result* (Kluwer Law International 1999), p. 192 (cited in this paper “Lee”).

³²² Bassiouni, M. Cherif, *The Statute of the International Criminal Court: A Documentary History*, (Transnational Publishers, Inc., 1998), p. 482.

³²³ *Ibid.* pp. 484-485

³²⁴ Lee n321 above p.194.

superiors though China and a few other states opposed.³²⁵ Thus, it was still debatable if the Statute should use the same standard to civilian superiors. Though the Preparatory committee could not reach an agreement as to this point, the ICC Statute finally uses a different mental requirement to civilians.

The ICC Statute was promulgated in 1998 and individual responsibility was promulgated in Article 25, and superior responsibility is promulgated under Article 28. Under Article 28 (1) (a) and (2) (a), the ‘should have known’ standard is given to military commanders but ‘consciously disregarded information which clearly indicated’.

With regards to responsibility of commanders and superiors, Article 28 of the ICC Statute finally promulgated as follows;

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective

³²⁵ Ibid, pp. 202-20

authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.³²⁶

The ICC Statute was finally promulgated forty seven years after the first draft in 1951. The main difficulty lies in the establishment of an international court as such; therefore the international community spent many years just to discuss structural issues of the court. The international delegates put emphasis on issues on the principles of international criminal law in the latter half of the 1990s. The reality was that a number of states had different views on so it was a difficult task to get together all the proposals in order to get unanimous approval. It is not difficult to assume that there was pressure for the delegates to succeed to the Nuremberg Principles and the rules and principles of the on-going international criminal courts located in the Hague. For this reason, the idea to establish the responsibility of legal entities into the ICC Statute was abandoned,³²⁷ and the focus was only on individual responsibility. A relatively easy task was to insert a provision on irrelevance of official capacity,³²⁸ which was a core principle established at Nuremberg, Tokyo, and subsequent international trials. The issues of individual responsibility split the delegations but the difficulty was how to put the notion into the Statute, the reason of which was caused by the fact that each state has a different view holding on to its own legal position. With regards to

³²⁶ Article 28 of the ICC Statute.

³²⁷ See n321 above 199.

³²⁸ Mexico and Spain had some objections. See *Ibid.* p. 202.

the idea of inserting a provision on command responsibility, it was agreed to put a provision on command responsibility at an early stage. The issue was whether it should extend its application to civilians, and whether civilians leaders also should be imposed the same standard as military commanders. Though the provision on the ICC Statute as such is probably accepted as customary international law, some debatable issues left unsettled. By creating indirect responsibility, the international legal system creates complicated situation he will be guilty for issuing the illegal order and for not preventing the atrocities. The relation of the two concepts is still not determined under the ICC.

20. Conclusion

Historically, it has been accepted that the commander takes responsibility for the acts of his subordinates when he issued illegal orders. Under the influence of Professor Oppenheim, the doctrine of *respondeat superior* was accepted before the Second World War, under which only the superior takes responsibility in the case of illegal orders. When the superior does not issue illegal orders but a subordinate kills civilians against the orders of the superior, it can be said that the superior did not need to take responsibility under the doctrine. The subordinates who disobeyed the order of the superior and killed civilians accordingly may be liable for the disobedience by military laws.

The international community feeling remorseful for not preventing the atrocities, the trend of the doctrine of *respondeat superior* has changed completely with World War II as a turning point. The Nuremberg Trial did not accept superior orders as a defence, and punished both the superiors who issued illegal orders and subordinates who followed the orders, the doctrine of which is called the doctrine of *absolute liability*. Under the doctrine, both of them are liable, which became part of the Nuremberg Principles subsequently by the work of the ILC. But one thing that we should notice is that the Nuremberg Trial did not

deal with indirect responsibility of superiors as the accuseds are direct participants. It can be said that the responsibility of individuals of Nazis was based on what the accuseds knew; therefore the knowledge was never imputed at the Nuremberg Trial. On the contrary, following the *Yamashita* case, the Tokyo Trial discussed indirect responsibility of commanders and civilians leaders in order to deal with the mistreatment of the prisoners of war by Japanese soldiers and other atrocities caused by subordinates without any authorization of superiors.

The notion of omission under international criminal law was established in the Tokyo Trial adopting the Yamashita standard. Omission means a dereliction of a duty of control of subordinates, take necessary measures to stop the illegal acts of subordinates, and punish them, all of which seems to be accepted under current international law but applying the same standard to various kinds of officials and political leaders might cause trouble as not all of them share the same duty.

Herein comes an idea of establishing a knowledge requirement without having actual knowledge. The ‘had or should have known’ standard, originated in Yamashita, which imposes a commander liability even where he does not issue illegal orders. The creation of the ‘should have known’ doctrine was unexpected as proved by the fact that neither the Nuremberg Charter nor the Tokyo Charter mentioned indirect responsibility of superiors. The advent of the new doctrine surprised scholars and jurists as there is a possibility that the doctrine would produce strict liability or vicarious liability. However, neither of the concepts has been avoided by international courts. The new standard has survived the era of the Cold War, and it became ‘knew or had reason to know’ standard at the ICTY Statute and the ICTR Statute, the terminology of which was probably taken from Article 86(2) of the 1977 Protocol I. According to Celebici, ‘reason to know’ means that ‘commanders who are in possession of sufficient information to be on notice of subordinate criminal activity’,³²⁹ cannot escape liability, the idea of which is accepted subsequent cases of the ICTY and the

³²⁹ Celebici, para. 387.

ICTR.

There were serious discussions as to whether the ICC Statute would include the principles of indirect responsibility of commanders and superiors, but the delegates seems to have already agreed to insert a provision on indirect command responsibility but the problem was rather whether the provision should have civilian liability of omission and whether it should apply the same standard to them. The relevant provision on the ICC Statute provides 'knew or, owing to the circumstances at the time, should have known' standard. The ICTY and ICTR adopted the similar standard called 'had reason to know' standard, which seems clearer than 'should have known' one.

In the process of negotiating the ICC Statute, delegates discussed thoroughly the issues of command responsibility, but the main issue was a civilian superior and its standard. It can be said that the insertion of the provision as such was not an issue, which will prove that not just direct responsibility of superiors but indirect responsibility of superiors was accepted. One of the notable differences of the ICTY and ICTR statutes is that indirect command responsibility is no longer for commanders but also for a civilian superior where he has effective control over his subordinates, which is also upheld in the ICC statute. Under Article 28(2) of the ICC Statute, civilian superiors are subject to a different standard of the 'knew or consciously disregarded information', which would be more lenient than the 'knew or should have known' standard. However, one should not forget that both 'should have known' standard and 'had reason to know' standard by definition have a tendency to be applied discriminately, as proved by the *Yamashita* case, where Yamashita was charged even where he did not know the atrocities and took some steps to prevent it. It is hoped that these criteria will be refined and established so that any reasonable person could understand. As was well stated by Bassiouni and Manikas, 'there is no deterrent effect if individuals are unable to prevent the conduct which the criminal law seeks to avert'.³³⁰ International criminal law should not expect what is impossible, therefore the application of the 'should

³³⁰ Bassiouni n1 above 351.

have known' standard or 'had reason to know' standard, should be limited.

Chapter IV Command Responsibility and the Defence of Superior Orders

1. Introduction

It has been accepted that the concepts of superior orders and superior responsibility are fundamentally different. The former deals with subordinates' possibilities of relieving responsibility when they followed illegal superior orders, and the latter deals with superior officers' responsibility when they actually issued illegal orders or when they did not take necessary steps to prevent subordinates' crimes even when they did not do anything without the knowledge of the commission.

However, both of the concepts are categorized into individual responsibility, and seem to have emerged simultaneously after World War II. It is not surprising to hear the two notions in one case. Sometimes a commander who actually issued an illegal order may raise a superior order defence. The reason of this complication would be that either of them is focusing on one aspect of individual responsibility. There is no fixed answer to this question; are the two concepts inter-related or inter-dependent?

Suppose a commander issued an illegal order and his subordinates followed accordingly, who will take responsibility? The commander probably will be liable for issuing the illegal order as he is considered a perpetrator, and the subordinates, too, are responsible for the execution. The subordinate might be held liable for carrying out the illegal order if the order was manifestly illegal. Following the Nuremberg principles and current international criminal law, both would probably be held liable. It creates a strange situation punishing two people for one crime, the consequence of which would have been completely different¹ before World War II.

It has been accepted that superiors who actually issued an illegal order would be held

¹ Prior to World War II, only the superior took responsibility for unlawful orders whether they were executed or not, which is called the *respondeat superior* doctrine.

liable as it is direct participation of the superiors. The fact that superiors take responsibility for the own acts has not been changed since pre-war times. The direct responsibility of superiors is not questionable. Before World War II during the time that the doctrine of *respondeat superior* was accepted, the soldier who followed the order was automatically exculpated whether the order as such was illegal under international law. However, when the order as such was not executed, it would be another issue. When the illegal order was not executed by subordinates, the subordinates who did not execute the order would be acclaimed under current international criminal law, and the superior who gave the illegal order would be held liable but might be mitigated as it did not cause a consequence although cases have shown that unexecuted orders as such are punishable. It seems that the concept of responsibility of superiors is somehow relevant to the subordinates' acts.

With regards to indirect responsibility of superiors, it is debatable to what extent the superiors have to take responsibility for the subordinates' acts when they did not say anything without the knowledge of the subordinates' crimes. Applying the newly introduced 'knew or had reason to know' standard or the 'knew or had reason to know' standard, even the superior who did not issue any orders might be liable if his ignorance is tantamount to negligence or gross negligence. If this is the case, both of the superior and subordinates would take responsibility, which is also a distinctive feature of the post-war status of international criminal law. Here comes a question as to how the two concepts are related and whether or not it is rational to charge two persons for just one crime.

In addition to that, current international law creates another complicated situation where the superior might be held liable both for issuing an illegal order and not for preventing the subordinates' acts. If the superior is ignorant of the subordinates' crimes or he knows but is negligent of his obligation to stop it, the superior also might be liable for failure to control the subordinates, which happens a lot when he actually issued illegal orders as he actually means the crime to happen. Whether the one act of the superior is absorbed into the other or is committing two crimes is a complicated issue.

This chapter explores how the two distinct notions of superior responsibility and superior orders are related each other from the perspective of current international criminal law.

2. Are they Interrelated or Interdependent Concepts?

It is debatable whether or not the concepts of superior orders and superior responsibility are correlated. Both of the concepts have developed with World War II as a turning point in order to prosecute individuals involved with the atrocities regardless of their rank. At Nuremberg and Tokyo superior orders were considered in mitigation but not a matter of defence. Codifications of superior order defences were seen in most of countries even before World War II, but the Nuremberg and Tokyo Trials were the first to deal with individual responsibility from the perspective of international criminal law.² Though all of the defendants were charged with direct participation at the Nuremberg Trial, many of them also were charged with actually issuing illegal acts or negligently disregarding the subordinates' illegal acts in Tokyo.³ Since the trials of World War II, it can be said that the denial of superior order defence and the broad application of superior responsibility doctrine have been established at the same time, the principles of which were originated at Nuremberg and Tokyo.⁴

Both of the concepts seem to be related issues at a glance. Since the defence superior orders can be raised by someone who belongs to subordinates' position, they are likely to raise it as long as they are charged with a crime pursuant to an order of the superior. Direct responsibility of issuing illegal orders can be imposed on someone who has a

² Article 6, 7, and 8 of the Nuremberg Charter and Article 5 and 6 of the Tokyo Charter.

³ In Nuremberg, all of the defendants were charged with direct participation of a crime. Judgment of the International Military Tribunal for the Trial of German Major War Criminals, His Majesty's Stationery Office (1946), pp.81-131.

⁴ IV of the Nuremberg Principles provided that defence of superior orders is not available if moral choice was possible. However, the principles did not mention superior responsibility issues. See Paust (ed.), *International Criminal Law Documents* Supplement, Caroline Academic Press, 2000, pp. 154-155 (cited in this paper "Paust").

superior-subordinate relationship; therefore issuing illegal acts of ordinary person may not be an offence without the acts of the principal.⁵ In addition, indirect responsibility of commanders and superiors who have *de jure* or *de facto* authority over a person also seem to belong to certain people, under which only a superior who has a formal or informal relationship with the subordinate can be charged with dereliction of a duty. Put precisely, international criminal law seems to establish that the superior has to take a responsibility for what happens within his authority. If he fails to prevent the illegal acts of the subordinates, to take necessary steps, or to punish them, the superior might be charged with omission. This concept also seems to belong to the position. In other words, if they do not have the position or similar situations, issues may not arise.

With regards to position issues, however, that is only a surface impression. International courts have never imposed liability just because of its position. In addition, the position of subordinates has never been a defence. To charge someone with a crime, blameworthiness always has attached to his acts. With regards to the crimes of issuing illegal orders, he actually has to issue illegal acts with the required *mens rea*, otherwise he cannot be convicted with ordering illegal crimes. As to indirect responsibility, courts never said that a superior is liable for all of the subordinates' crimes without his fault; therefore there has to be a fault on the superior's side. Regarding superior order defences, not all of subordinates can successfully raise the defence, there has to be excusable conditions under currently international criminal law. Thus, criminality and defence do not attach to the positions.

Various issues have to be discussed to answer how superior order pleas are connected with command responsibility. Professor D'Amato interestingly clarified issues with an incorrect analysis. Hypothetical cases will be examined thereafter in order to delve into the issues of superiors' illegal acts and subordinates' acts.

⁵ A person who issues illegal orders without *de jure* or *de facto* authority would be considered an incitement. Incitement usually requires the commission or attempt of the principal. See Article 25(3)(b) of the ICC Statute.

3. Split-Responsibility Solution

D'Amato introduced two approaches to relationship between command responsibility and subordinates' defence.⁶ The one is a split-responsibility solution, and the other is a dualist solution.

Under the split-responsibility solution the amount of responsibility shifts from person to person. If a person who executes the order takes half of the responsibility, then the other who issued the order will take the rest. Simply put, the more one person get responsibility the less the other gets it.

For example, A, a military commander, issued a manifestly illegal order to his subordinate B, and B executed it. According to the Nuremberg Principles or the ICC principles, obedience to manifestly illegal orders is not a defence, so B's acts would be unlawful. But A who issued the order will have to take responsibility as he is directly involved in this crime by issuing the order. So, A will be liable for issuing the illegal orders, too. Here comes a question: do they influence each other?

There may not be many supporters of this view, as it is contrary to the Nuremberg Principles. Using the legacy of Nuremberg, military commander A would definitely be held liable for issuing the illegal orders, and the subordinate who executed it may not get a defence of superior orders as it was apparently illegal. In this case both of them would be held liable but their criminality would not be reduced into 50%. If the circumstances allow under Article 33(1)⁷ of the ICC Statute, the subordinate might get mitigation, which is not the case here.

Surprisingly, this approach is worth evaluating as it points out that the notions of superior order defence and command responsibility are co-related. As to the responsibility

⁶ D'Amato, Anthony, 'Superior Orders VS. Command Responsibility', [1986] 604 American Journal of International Law, pp.604-608 (cited in this paper "D'Amato").

⁷ Article 33 (1) does not apply here as the order is manifestly illegal. Actually there is no possibility of the defence but maybe of mitigation only.

of subordinates who executed following the superior's illegal order, the criminality of the subordinate would remain as it is. The responsibility of the subordinate will not be changed by the fact that the superior got punished. His criminality might be reduced based on his situation where he received the illegal order.

However, it is unfair not to punish the issuer of the illegal order but punish those who followed it. The situation would be similar to the *Medina* case, where Captain Medina was found not guilty but Calley was charged but mitigated because he raised a superior order plea. The *Medina* case has been strongly criticized as the person who issued illegal orders, though he himself did not admit it, was cleared. There should be balance of issuer and executioner. In this respect, both of issuer and executioner are related. There is a tendency that the subordinates usually get less sentence.

Another interesting point pointed by D'Amato is that two persons' punishment based on one crime.⁸ D'Amato states that:

I submit that this is the reason why the so-called defence of superior orders is not a defence at all; although it may be pleaded in mitigation of punishment, it does not go to the determination of guilt. Hence, we should not confuse its use in mitigation of punishment with any notion that it requires the splitting of responsibility. Rather B remains 100 percent responsible for the commission of the war crime...[a]s a result, the paradox remains: why are both A and B responsible for the crime?⁹

D'Amato's argument on the split-responsibility solution is outdated in that the defence of superior orders can be a defence under the ICC Statute now. So, the fact that B remains 100 percent responsible may not happen under the current international criminal law. The ICC Statute will allow superior order defence based on the *manifest illegality* doctrine. D'Amato's argument is inappropriate as it does not focus on the responsibility of superior's

⁸ D'Amato n4 above 605.

⁹ Ibid.

issuing the illegal order when the order was executed. D'Amato mistakenly believes that when the order was executed criminality rests with the principal. The responsibility of superior's participation by ordering is a mode of individual responsibility, therefore accusing the superior after convicting the subordinate who actually commit the crime is not irrational at all, and the issuer of the illegal order is the participant intends to use his authority to achieve his goal; therefore, he has to be punished.

4. Individual Approach

D'Amato uses the dualist approach to theorize the 'contradiction' of co-existence between the doctrine of command responsibility and the negation of superior order defences. The 'contradiction' that D'Amato relies on is that when subordinate B's superior order plea was denied, as superior A's order was illegal, the responsibility of the criminality for the act would be entirely B's, so no additional responsibility should be attributed to superior A.¹⁰ D'Amato's assumption that superior A is innocent would be inappropriate in that the responsibility of A issuing an illegal order is ignored.

Under the individual approach solution, the amount of responsibility does not shift from person to person. Sometimes A will get 100 percent punishment, simultaneously B can get 100 percent punishment, allocation of which does not matter. They will be dealt with individually, so even when a superior is liable the subordinate may not be liable for the same crime. If superior A issued an illegal order, and subordinate B executed it, both of them may be liable. The criminality of them does not affect each other. So, if the amount of maximum criminality is 100, both of them can be 100 percent liable. Sometimes only subordinates get mitigated under the Nuremberg Principles or the ICTR and ICTY legal systems, in this case his criminality does not change but get a less sentence. Or the subordinate gets a defence or gets mitigated under the ICC legal system, so criminality of the

¹⁰ Ibid.p. 604.

subordinate may be reduced.

This individual approach is probably established under the Nuremberg Principles, dealing with individual crimes separately. In other words, whether other persons get punished or not does not matter. The idea was exquisitely described in the *High Command* case as follows:

[u]nder general principles of law, an accused does not exculpate himself from a crime by showing that another committed a similar crime, either before or after the alleged commission of the crime by the accused.¹¹

The Trial Chamber of the ICTY in *Kupreskic* stated that:

[i]t should be first of all be pointed out that although *tu quoque* was raised as a defence in war crimes trials following the Second World War, it was universally rejected...In deed, there is in fact no support either in State practice or in the opinions of publicists for the validity of such a defence.¹²

The statement of ‘you also’ has been rejected universally. Criminality will not be affected by the fact that similar offenders are equally charged or not. On the contrary, neither strict liability nor vicarious liability has been accepted so it has to be noted that an individual can be liable only because of his own criminal act or omission.¹³ Probably not many scholars and jurists support the statement of ‘you also’, but the author takes the view that punishing someone with one standard and not applying it to other cases is definitely unfair. The

¹¹ U.S. Dep’t of Army, II International Law 238 (1962)

¹² *Prosecutor v Kupreskic*, IT-95-16-T, 14 January 2000, para. 516.

¹³ The *High Command* case has the same holding as follows: ‘[t]he authority...of a commander and his criminality are related but by no means coextensive...Criminality does not attach to every individual in this chain of command from that fact alone’. United States v Von Leeb, 11 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council No. 10 (1951) 543-544.

statement of ‘you also’ may not get rid of their criminality, but will question the legality and credibility of the case in itself. But the author has to conclude that the statement of ‘you also’ will not change the legal status of the accused even if it is convincing. Therefore, the individual approach is the accepted view. Since Nuremberg, the international society has focused on individuals as a main subject of international criminal law.

In principle, the author does agree to the individual approach, but it cannot be denied that superior responsibility will be affected by the subordinates’ acts in the case of unexecuted orders. When the superior issues an illegal order, his issuance of the illegal order would be punishable even without the commission of the principal. Though the ICC Statute does say the direct responsibility of issuing orders needs the attempt or commission of the principal,¹⁴ issues of which remain debatable. In addition, superior responsibility might be imposed when the superior failed to take measures to prevent the commission of the atrocities, submit the matter to the relevant authorities, or punish them, the idea of which is indirect responsibility of superiors established in the *Yamashita* case. Most jurist and scholars would say that the indirect responsibility of superiors will be punished because of his dereliction of the duty not solely by the acts of subordinates. The opinion does not explain the reason why the responsibility of the superior is shifted on him again after he finishes his illegal act by issuing the order. Thus, superior responsibility and superior order cases would not be 100 percent independent.

5. A superior issued an illegal order and the subordinate executed it pursuant to the order.

A case where a superior actually issued illegal orders is considered. Under the *respondeat superior* doctrine, the responsibility of illegal orders rests with the commanders unless the subordinate knows it is illegal. There seems to be a shift of responsibility from

¹⁴ Article 25 (3)(c) of the ICC Statute.

subordinates to commanders. Under this doctrine, as long as he executes the order, he is entitled to be acquitted. In the case of subordinate's knowledge of illegality of orders, it depends on a military code whether he will also be punished together with the superior. Some Western military codes¹⁵ may allow you to have a defence even if it is against international law but currently you cannot have a defence of superior orders if you know it is illegal under military codes of most states.

Under the *absolute liability* concept, the superior issued illegal orders will definitely be punished and the subordinates who executed it will also be liable. If the subordinates execute the illegal one, they will no doubt be liable for the crime they commit, however, the circumstances might be considered as a reason for mitigation. Even under the strict Nuremberg rules, superior orders can be a mitigating factor.¹⁶ If the subordinates do not execute it, they did the right thing, so they will not be liable for disobeying the order under international law.

However, it should be noted that this criterion of illegality is based on the standard of international criminal law, so some military codes¹⁷ will not permit disobedience even if the order as such is illegal. Therefore, in some rare cases, those who disobey illegal orders, will be prosecuted for the disobedience under a domestic military code, though disobedience is the right thing in international law. Instead, the superior who issued the illegal order will be prosecuted, as he is a perpetrator by the act of ordering. The position of the superior will not be changed as he is treated as an independent person. The same thing can be said to the subordinate who actually obeyed it. He will be treated as a perpetrator but the circumstances

¹⁵ See the 1914 US Rules of Land Warfare of the Field Manual 27-10. Under this rule, subordinates will be relieved of responsibility when they follow superior orders without any exception. However, the 1956 US Rules of Land Warfare of the Field Manual 27-10 put the exception 'unless he did not know'.

¹⁶ Article 8 of the Nuremberg Charter stated that superior orders 'may be considered in mitigation of punishment'. Article 6 of the Tokyo Charter promulgated that superior orders 'may be considered in mitigation of punishment'. However, Article 4 of the Nuremberg Principles did not refer to mitigation. See Paust n2 above pp.154-155.

¹⁷ For example, the Law of the Self-Defence Forces of Japan does have a provision of the defence of superior orders but it merely states the obligation to follow orders. Article 119 of the Law of the Self-Defence Forces of Japan.

may be considered in mitigation. Even if the order he received is not manifestly illegal he will not get a defence, as the criminality of the subordinate is dealt with independently under the *absolute liability* doctrine.

Under the ICC principles, which means the *manifest illegality* principle, the superior who actually issue the illegal order will be punished. As to direct responsibility of superiors issuing illegal orders, there is no discussion. In the case of subordinates' executing the illegal orders, they might successfully raise a defence, if the order is not manifestly illegal and he did not notice the illegality. If the order is manifestly illegal, ordering to commit an act of genocide, this will not be a defence. The ICC Statute gives an advantage to subordinates that they may get a defence unlike the Nuremberg Principles.

In summary, issuing illegal orders with having the *mens rea* will be punished if there is a superior-subordinate relationship among the issuer and the principal. Otherwise, it will be considered as incitement, which as such is not punishable unless the act is attempted or committed. In this case, as the subordinates executed it, whether the subordinates get a defence or not depends on which principle, the court relies on. Under the ICTY and ICTR Statute, superior orders are not a defence but a mitigation factor. But the ICC Statute gives a chance of defence based on the *manifest illegality* doctrine, so his future is based on whether the circumstances meet the requirement of Article 33(2) of the ICC Statute. As one of the conditions of the defence is that the order is not manifestly illegal, the subordinates' future is up to the contents of the order. In addition to that, the author thinks that the superior who issued not so illegal orders should get mitigated. As it will deter future atrocities by the subordinates acts caused by own orders. However, as to the mitigation of superior officers, no provision can be found under current international criminal law.

6. Subordinate's Independence

The issues of the defence of superior order are on possibilities of defence or

mitigation based on the fact that the accused followed orders as it was his duty to do so. Under the ICC rules¹⁸ if the order was manifestly illegal, the person might successfully raise a defence under certain conditions, which may turn out that the person is not guilty. If the order as such is not manifestly illegal unlike the cases of genocide or crime against humanity, it would be considered as a matter of mitigation, which means the person is guilty but it may be sentenced lightly but the criminality remains as it is. For subordinates the execution of superior orders is not a crime *per se* but a means to delete or reduce the criminality. It is used when the person in question committed a crime where he was ordered by the superior and he truly believed that. When the subordinate is not ordered anything, he will not be entitled to raise a defence since mere position is not sufficient to raise a superior order defence. If he acts beyond the control of the superior without authorization, the subordinate would be a perpetrator and cannot blame the superior because of that. Put precisely, in some cases his superior might be prosecuted based on indirect responsibility of superiors if the superior knew or had reason to know this subordinate's act and did not take the necessary steps to prevent it. Even if that happens to the superior, the subordinate's criminality would not be diminished. Put differently, the subordinates' responsibility is solely based on the situation where they receive orders so will not be undermined by other circumstances.

A big issue is whether it is acceptable to prosecute two people based on one subordinate's crime where they do not share anything. As stated, the subordinate's position remains as the principal where he did not get any order, but the superior might be punished based on the new 'had reason to know' standard. In *Naletilic* of the ICTY notes that 'there can be several perpetrators regarding the same crime as long as each of them fulfils the requisite elements of the crime'.¹⁹ The Trial Chamber also confirmed that it is possible to hold two superiors responsible for the same crime committed by one subordinate.²⁰ The existence of more than one perpetrator based on one crime is not surprising, which would also

¹⁸ See Article 33 of the ICC Statute.

¹⁹ Prosecutor v Naletilic, IT-98-34-T, 31 March 2003, para62.

²⁰ Ibid. para69.

correspond with general principles of criminal law. At the ICTR and ICTY, a superior order is a mitigation cause²¹ but will not affect their criminality, which corresponds with the Nuremberg Principles. But the ICC is an intermediate position, which will allow you to have a defence of superior orders if the order is manifestly illegal and you are under a duty to follow and you do not know the order is illegal.²²

Based on these criteria, the court will decide whether or not he or she is entitled to raise a defence or to be mitigated. The court will judge the individual situation based on the criteria. Applying these current principles of international criminal law, the result will not be affected even if the commander who issued the illegal order was caught and tried. Article 33(1) (b) of the ICC Statute has a condition that the subordinate did not know it was illegal, which is based on the subordinate's subjective criteria not objective one. If the accused knew it was illegal, there is no doubt that he would not get any reduction of criminality or mitigation. If he did not know it was illegal, he will still have a chance to free himself from the punishment under the conditions of Article 33(1). As a result, the future of subordinates would not be changed by the superior's punishment. It is true to say that a subordinate has become an independent person who must judge whether the order given is illegal or not with his rational mind.

7. Superior Responsibility

Superior responsibility is an extensive concept that is differentiated into two categories; one is direct responsibility and the other is indirect responsibility.

There may not be many issues as to direct responsibility of superiors because a superior who issued an illegal order as such is the perpetrator.²³ The required *mens rea* is to

²¹ Article 7(4) of the ICRY Statute and Article 6(4) of the ICTR Statute.

²² Article 33 (1) of the ICC Statute.

²³ Cassese notes that the person who issued illegal orders would be considered *co-perpetrator* of the crime. Cassese, Antonio, *International Criminal Law*, Oxford University Press, p. 194 (Cited in this paper "Cassese").

‘have the crime committed’.²⁴ The order means to instruct someone to commit a specific crime, and the order has to be specific although any form of order is allowed.²⁵

Probably, before World War II, this was not a serious issue since commanders were considered as the persons in charge on the battlefield and the legality of the order was not an issue for the subordinates unless they knew that the order in question was illegal. Even if the subordinates had executed illegal orders, they would have been acquitted. This approach is the doctrine of *respondeat superior* aiming at pursuing national interests, which was actually the predominant view in the early 20th century.

Under the *absolute liability* principle or *manifest illegality* principle, who else would be liable when a superior delivers an illegal order? Suppose that when a commander issued a manifestly illegal order, and his subordinate executed it knowing that the order would be illegal or without knowing it was manifestly illegal, there is no doubt that the subordinate who followed it would be liable as he violates the laws of war or current international criminal law. At this stage, there may not be a complicated situation as the responsibility of the superior is on direct responsibility caused by delivering the illegal order.

However, the legacy of World War II created the new doctrine of ‘knew or had reason to know’ doctrine or ‘should have known’ doctrine, imposing criminal liability on commanders even when they do not have the required *mens rea*, application of which can be highly unpredictable. Superiors and commanders have to know what is legal and illegal of the instruction, which would be rationally expected as they have *de jure* and *de facto* authority. Simultaneously, superiors and commanders are expected to control the subordinates even when they are not aware of that. So, superiors and commanders will be punished where 1) they knew the subordinates’ act and did not do anything to stop it, 2) they did not know but the culpability of the negligence would amount to wilful disregard, or 3) they did not know but had reason to know the subordinates’ acts. Although the last doctrine would be debatable it can be said that the position of superior officers and commanders have become

²⁴ Ibid.

²⁵ Ibid.

highly vulnerable in terms of a possibility of prosecution when the superior issues illegal orders or loses control of the subordinates.

8. Concurrent Application of Direct Responsibility and Indirect Responsibility

If a commander issues manifestly illegal orders, and his subordinate executed them knowing that the orders were illegal, it is debatable if the commander has to take responsibility both for issuing illegal orders and not for preventing the subordinates' offences. There is no doubt that the commander would be prosecuted for issuing illegal orders as the act is considered a direct participation. As superiors have a duty to give proper orders, not many people will disagree to this. However, it should be clarified that the person who issues orders has to have authority over a person who are supposed to execute orders. The reason for this is that without authority an issuer will be nothing more than a person, therefore, that will be considered as incitement, which is as such unfortunately legitimate until the principal offender commits or attempts.

In addition to that, the executed subordinates' responsibility might be imputed to the superior who 'knew or had reason to know' or 'should have known' the atrocity by the subordinate as the superior himself ordered so it is not difficult to prove his actual knowledge of the subordinate's crime. The issue here is whether or not the situation will cause double responsibility caused by one action of the illegal order. Double responsibility seems to be strange in that superiors or commanders who issue illegal orders usually notice the illegality of it, so it would be very possible to punish the superior twice based on one action. Under current international criminal law, the superior issuing illegal orders must also be liable for not failing to prevent atrocities by the subordinate.

There seems to be no accepted answer for this. In *Kordic*, the Trial Chamber held that 'superior responsibility is an indirect form of responsibility because it is not the answer to a direct involvement of a superior in the commission of a crime but to his failure to prevent or

punish such crimes'.²⁶ Therefore, the application of 7(1) of the ICTY Statute concerning direct responsibility is more appropriate.

In *Krnojelac*, the Trial Chamber held that 'it is inappropriate to convict under both heads of responsibility for the same conduct, the Trial Chamber has the discretion to choose which is the most appropriate one'.²⁷

On the contrary, the Trial Chamber of the *Blaskic* case approved of concurrent application. It is held that 'failure to punish past crimes can not only be subject of superior's responsibility under Article 7(3) of the Statute but can also be the basis for the liability under Article 7(1) of the Statute for either "aiding and abetting" or "instigating" the commission of further crimes'.

In *Naletilic*, the Trial Chamber showed an interesting solution that the court should choose a form of responsibility whether it is direct or indirect, and the other mode of responsibility would be considered as aggravating circumstances.²⁸

The author takes the view that court should choose a direct responsibility provision²⁹ to deal with this situation as the concept of direct responsibility also contains the responsibility of indirect responsibility. It is accepted that superiors and commanders are answerable for their own acts, which is a commission of a crime. Also, superiors and commanders may be liable for the subordinates' crime, which does not mean vicariously liable but liability is caused by his failure of controlling the subordinates. Therefore, comparing the situations would help to distinguish the elements of responsibility. It is very unreasonable to punish him for not preventing the atrocity caused by the subordinate after convicting him of direct participation or ordering. Usually, those who instigate, plan, aid and abet intend to achieve that result, so it is natural to let it happen when they see the crime is being committed. Punishing the issuer with the crime in dereliction of duty to stop is contradictory. In theory, direct responsibility includes the notion of indirect responsibility,

²⁶ Neletilic, 31 March 2003, IT-98-34-T, para78.

²⁷ Ibid,para79.

²⁸ Ibid.

²⁹ Direct responsibility of superiors is similar to principal's responsibility towards accessories.

for the person who issues illegal order always knows the order as such is illegal and the *actus reus* of indirect responsibility probably should be absorbed into direct order.

9. Unexecuted Illegal Orders

Studying a situation of unexecuted orders would give hints to the question of superior-subordinate issues. If the commander issues an illegal order but the subordinates just ignore it, would his sentence be mitigated or he be acquitted? If superior responsibility is an independent notion, then probably unexecuted orders would not be affected by the fact that the order was committed or not, for his commission of crime is completed when he issued the illegal order. Or if the doctrine of superior responsibility is interdependent, probably an unexecuted order would produce the result the same as an executed order.

Theoretically, the commander finishes his unlawful acts by just issuing illegal orders. His blameworthy act is to order a particular crime to his subordinates with the required *mens rea*. By issuing illegal orders to the subordinate, the crime is apparently completed and so there is nothing else he wants to do.

Contemporary criminal law usually imposes liability even when illegal orders were not committed by his subordinates.³⁰ Under English law, a manifestly illegal order which was not carried out can be punished as an incitement.³¹

In 1902, a US Court Martial found General Jacob H. Smith guilty of “ordering that no quarter should be given to the enemy in the Philippines, even though in fact his troops did not comply with this order”.

In the *Hostage* case, the tribunal held the view that passing on a criminal order could constitute a crime though it showed the possibility of mitigation:

³⁰ See Bantekas, Ilias, *Principles of Direct and Superior Responsibility in International Humanitarian Law*, Manchester University Press, 2002, p. 51.

³¹ Bantekas, Ilias, *Principles of Direct and Superior Responsibility in International Humanitarian Law*, Manchester University Press, 2002, p. 52. note 71.

[i]n dealing with the Prosecution's allegation that the accused Rendulic passed on to troops subordinate to him the " Commissar Order " of 6th June, 1941, the Tribunal made the following remark: " The order was clearly unlawful and so recognised by the defendant. He contends, however, that no captured Commissars were shot by troops under his command. This is, of course, a mitigating circumstance but it does not free him of the crime of knowingly and intentionally passing on a criminal order." This constitutes recognition that the mere passing on of an illegal order, even if it is not obeyed, may constitute a crime under International Law; and a rule which applies to an order passed on by a defendant would certainly apply to an order originating with him. This question receives further treatment at other points in these volumes.³²

As to the transmission of orders, the tribunal stated that:

Transmittal through the chain of command constitutes an implementation of an order. Such orders carry the authoritative weight of the superior who issues them and of the subordinate commanders who pass them on for compliance. The mere intermediate administrative function of transmitting an order directed by a superior authority to subordinate units, however, is not considered to amount to such implementation by the commander through whose headquarters such order pass. Such transmittal is a routine function which in many instances would be handled by the staff of the command without being called to his attention. The commander is not in a position to screen orders so transmitted. His headquarters, as an implementing agency, has been bypassed by the superior command.³³

As to unexecuted orders, Cassese states that:

³² 8 Law Reports of Trials of War Criminals. Volume, United Nations War Crimes Commission, 1949. p.90.

³³ *XI Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10* (1998) at 510.

it is not necessary for the order to be executed. An officer or any other higher authority issuing a criminal order may be found guilty even if the order is not carried out by the subordinates, if the superior intended the order to be executed and knew that the order was illegal, or else the order was manifestly illegal.³⁴

It is very true to say that unexecuted order may be found guilty as the *actus reus* of the crime is to order a certain crime to his subordinates. As long as the *mens rea* requirement meets, he would be punished according to international criminal law. The rationale for unexecuted orders is well described by Judge D. Levin in his concurring opinion of the *Tzofan and others v. IDF Advocate and others*. Judge Levin stated that “[t]he higher the rank of the commanding officer and the more comprehensive and more decisive his authority, the greater the responsibility incumbent upon him to examine and determine the justification and legality of the order”.³⁵

Before we answer the question that the act of ordering can be a crime without the commission of the ordered act by the subordinates, it is necessary to compare other modes of direct responsibility. Article 25 of the ICC Statute provides that orders, solicits, or induces the commission of a crime as such is not an offence without the commission or attempt of the crime.³⁶ Though the ICTY Statute and the ICTR Statute are silent on this issue, an ICTY case provided that, with regards to instigation, there should be ‘causal relationship between the instigation and the physical perpetration of the crime’.³⁷

Comparing with other modes of direct participations, the responsibility of superiors or commanders of ordering a commission of a crime is apparently too harsh in that ordering can be an offence without the principal’s commission or attempt. The justification of a court

³⁴ Cassese n20 above 194.

³⁵ Quoted in Ibid.

³⁶ Article 25 of the International Criminal Court.

³⁷ *Prosecutor v Blaskic*, IT95-14, 3 March 2000, para.280.

is that superiors ‘must assume a measure of responsibility for its illegal application’.³⁸ So, the court seems to have relied on the influence of superior or commander authority to increase the criminality of ordering a crime of his superiors and commanders. The author takes the view that superiors should get a chance of mitigation when the crime was not actually attempted or completed following other modes of direct participation. This idea will deter further atrocities even after he has issued an illegal order. The superior who actively tried to stop the atrocities should get mitigated. The said cases showed that a commander has special responsibility in terms of influence therefore his issuance of illegal orders as such is illegitimate. The author does not deny this point. However, currently ‘superior’ or ‘commander’ may include civilians based on *de jure* or *de facto* authority, for this reason the application of this rule to civilian leaders without a title, would be extreme.

10. Issuing Orders and Attempt

International criminal law was hesitant to criminalize an attempt except for cases of genocide. The rationale of the principle was that the notion of attempt should be ‘of only limited application’³⁹ as it is very difficult to differentiate an attempt, commencement of execution of an act, and the act itself. It is observed that neither the Nuremberg Charter nor the Tokyo Charter included a provision on attempt. The Principles of the Nuremberg Charter and Judgment also did not mention the concept of an attempt.⁴⁰ The fact is that Principle VI(a)(i) stated that ‘[p]lanning, preparation, initiation or waging of a war of aggression or war in violation of international treaties, agreements or assurances’ and ‘participation in a common plan or conspiracy’ are punishable but it would have been difficult to differentiate these

³⁸ *XI Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10* (1998) at 557-558.

³⁹ Report of the ILC Special Rapporteur on the Draft Code of Crimes Against the Peace and Security of Mankind, Yearbook of the ILC, ii (1991), pt. II, at. 16 (cited in this paper “the ILC report”)

⁴⁰ Principle VI (a) and (c). Principles of the Nuremberg Charter and Judgment , Paust n2 above 154.

notions with the terminology of attempt. However, it should be noted that the 1991 Draft Code of Crimes against the Peace and Security of Mankind defined that '[a]ttempt is any commencement of execution of a crime',⁴¹ but it was not a good guidance to differentiate preparation and attempt. Under the Draft, the ILC special Rapporteur considered that attempt was applicable to '[m]ost crimes against humanity, such as genocide and apartheid'.⁴²

With regards to international documents, the 1948 Genocide Convention did have a provision on attempt, Article 3 of which provided that '[a]ttempt to commit genocide' shall be punishable. Similarly, attempt to commit genocide is punishable under Article 4 of the ICTY Statute and Article 2 of the ICTR Statute. Both of the Statutes seem to have followed the principle of the Genocide Convention.

Article 25(3)(f) of the ICC Statute is a provision on attempt, which seems to punish an attempt of any of the listed crimes in the ICC Statute. The drafting process of this provision was difficult especially in the Preparatory Committee. Japan made a proposal to include a provision on voluntary proposal, which was accepted accordingly.⁴³ In order to deter likely atrocities by a person who attempted, Article 25(3)(f) gives an opportunity to relieve of responsibility with a view to preventing the completion of the crime.

11. If a commander issues a legitimate order, and the subordinates misunderstood and committed a crime?

When commander issues legal orders with clarity, it seems that there would be nothing wrong with the commander's acts at this stage. But when the subordinates make mistakes and start executing civilians assuming that that was the order, the situation becomes different. Who is going to take responsibility? As to the commander, one might say that he

⁴¹ Bassiouni, M. Cherif (ed), Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind, (1993, Association Internationale De Droit Penal) p.113.

⁴² The ILC report n36 above 16.

⁴³ Lee, Roy S., the International Criminal Court, the Making of the Rome Statute Issues, Negotiations, Results, Kluwer Law International, 1999, p.200.

cannot be blamed since he did not issue illegal orders at a glance.

However, it is possible to argue that the commander may be liable for the subordinates' crime based on indirect responsibility of commanders, which means the commander knew or should have known the subordinates act under their mistaken belief and did not take necessary steps to prevent the crime to happen. Currently it is rational to assume that the commander has the duty to prevent illegal acts of his subordinates. The assumption of the should have known standard will be carefully examined based on the objective standard established at *Celebici*. So, just one piece of an illegal act of his subordinates would not be sufficient to assume the commander's knowledge. It has to be widespread illegal activities tantamount to a war crime, crime against humanity or genocide under currently international criminal law.

Regardless of the result of the indictment of the subordinates, the superior in charge might be liable as long as he fulfils the knowledge requirement and the omission, the criteria of Article 28 of the ICC Statute. However, in order to charge a person under the ICC Statute, the jurisdiction is limited to a war crime, crime against humanity, or genocide, one of which has to be committed. In this case, a major issue is whether the superior's criminal intent can be established. As to his intent, if he knew, which means he had actual knowledge of the commission by the subordinate's mistake, the superior's actual knowledge may be established. But presumption of knowledge is strictly prohibited under current international law.⁴⁴ When a superior officer witnesses an offence, the actual knowledge of the crime is established.⁴⁵ Or wilful disregard can be knowledge, too. His knowledge requirement is difficult to prove as his order was legitimate, so the only option is to use the 'should have known' *mens rea*. This type of *mens rea* can be inferred from circumstantial evidence, so his indirect knowledge might be imputed objectively. If the subordinates' deviant acts are not heinous, probably the commander or superior would not be charged as it is difficult to assume the 'should have

⁴⁴ *Prosecutor v Delalic*, Judgment, No IT-96-21-T, 16 November 1998, para. 384.

⁴⁵ *USA v Toyoda* (United States v. Toyoda (unreported), Transcript of the Record of Trial, pp.5005-5006.

known' requirement based on a small crime. Thus, commanders get always unfair deals, even if he issues proper orders he might get liable by the subordinates' mistake. Dinstein expresses this point as follows: 'the commander cannot enjoy any similar advantage'.

As to the subordinate, whether the person can be acquitted or not depends on the situation. An issue here would be if he can use the superior order as a defence. The given case is this; the order was apparently legal, but the subordinate misunderstood it, and executed in the wrong way. He may not be able to use the situation as a defence of superior orders, as he mistakenly did not follow the order. International criminal law does not punish a crime of disobedience, which is solely a matter of domestic issues. In this case, the subordinate who made a mistake and executed the wrong way, might be liable under his own military law.

With regards to the subordinate's responsibility, he may raise the mistake of fact or mistake of law defence. Although it is widely accepted that the ignorance of law should not be a defence, the ICC Statute does give a chance in both situations. The ICC's position is that if it negates the required mental element, it could be a ground for excluding culpability.⁴⁶

12. If a superior issues an illegal order after he was told to do so by his superior?

When superior A issues an illegal order to his subordinate B, but superior A was actually ordered to do so by higher superior C, who will be liable? This case will be possible as a military society is very hierarchical and there is always a person higher than the accused. As to the responsibility issuing the illegal order, one might say that A and C will be responsible for issuing the illegal orders. It is indeed a crime to issue illegal orders under Article 25 (3) (b) of the ICC Statute. It is indisputable that C is liable as C is the person who issued the illegal orders, the punishment of which has been accepted since prewar times.

As to superior A, he just passed the illegal orders to his subordinate, which will be considered as a criminal act. In Nuremberg, Raeder was charged with a crime passed

⁴⁶ Article 32(2) of the ICC Statutes.

Hitler's order to his subordinates.⁴⁷ Raeder was found guilty as he 'participated in the planning and waging of aggressive war' once the decision was made he stopped trying to dissuade Hitler from embarking upon the invasion of the U.S.S.R.

However, the fact is that he was ordered to do so, therefore he merely did his duty. So, whether he is entitled to raise a superior order defence is an issue. Applying the *absolute liability* standard established at the ICTY and the ICTR standard, he must take responsibility and the situation will be just a mitigation factor. Applying the ICC standard of Article 33 (2) of the ICC Statute, he might successfully raise a defence under strict conditions. However, cases show that high ranking officials and commanders are less likely to be acquitted. The reason behind this would be that high ranking officials and high ranking commanders have power to question the legality of the order and the duty to pass out legal orders only. Therefore, the possibility of superior order defence of superior A is highly unlikely.

Whether he has an aggravating factor as a superior should be answered. In *Plavsic*, the Trial Chamber held that the position of a leadership is an aggravating factor.⁴⁸ In *Krstic* the Trial Chamber was cautious about the idea to deal with superior position as an aggravating factor and held that '[a] high rank in the military or political field does not, in itself, lead to a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence than an individual acting on his or her own'.⁴⁹ In *Stakic*, the Appeals Chamber also held that 'superior position itself does not constitute an aggravating factor. Rather it is the abuse of such position which may be considered an aggravating factor'.⁵⁰ These arguments do not make any difference in reality, for the influence of power will be attached to its acts in the case of superiors' crime anyway. The author thinks that imposing a harsh sentence on a superior just because he is a superior should not be applied at least to the case of indirect responsibility caused by superiors. It seems that the Courts have avoided justifying the

⁴⁷ *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, No.12, (London His Majesty's Stationery Office, 1946) ,pp.111-112.

⁴⁸ Prosecutor v Plavsic, IT-00-39&40/1-S, 27 February 2003, para.57.

⁴⁹ Prosecutor v Krstic, IT-98-33-T, 02 August 2001, para. 709.

⁵⁰ Prosecutor v Staloc, 22 March 2006, IT-97-24-A, para.411.

liability of position, but it should be noted that any deviant behaviour may be considered as ‘abuse of power’, which would produce the same result. The rationale of the *Kristic* and *Stakic* cases should not be applicable to omission cases of superiors.

Whether he is a subordinate or a superior has to be examined. Cases show that a mid-rank commander or superior has to take responsibility for issuing illegal orders or for his failure to act. In *Aleksovski*, it was held that ‘[t]he issue whether the guards came concurrently under another authority, such as the military police commander, in no way detracts from the fact that the accused was their superior within the confines of Kaonik prison, since it has been proved, as regards the activities within the prison, that the guards obeyed the accused’s instructions and were answerable to him for their acts’.⁵¹ Also the fact that he himself received orders from a higher authority cannot be denied. So, his position as a subordinate and as a superior can co-exist. Probably, his subordinate position in order to get mitigated will be set off, as he also enjoyed higher status simultaneously, which could have been an aggravating fact. As to the higher superior C, he will take the responsibility for ordering the illegal act. No one denies that those who issue illegal order will be liable. Under the ICC legal systems, ordering is a mode of individual responsibility, therefore superior C is liable. Probably, whether superior A or B is liable or not does not matter to C’s criminality, but in my view if the order is not attempted or committed, the circumstances should be a mitigation factor, though there is no provision mentioning this possibility. Rationale of this view is the fairness of ordering crimes and other modes of participation under Article 25(3) of the ICC Statute.

13. Subordinates’ Exceeding Acts

When superior A issued a legitimate order but the subordinates intentionally ignored it and killed a number of civilians, who would take responsibility? As to the superior, he himself

⁵¹ *Prosecutor v. Aleksovski*, 25 June 1999, No. IT-95-14/1-T, Para.106.

did not do anything illegitimate at the time of issuing orders. However, when his subordinate started to killing civilians the duty to control him emerged. At this stage, it is difficult to conclude that the superior is responsible for the subordinate's acts, as his knowledge has to be established by the principles of international criminal law. Probably, this superior would not have prosecuted before Nuremberg as he issued no illegal order. However, current international law puts a harsh burden on superiors. As provided by the Yamashita case and other subsequent international tribunals, it is accepted that superiors have a duty to control their subordinates, prevent illegal acts from happening, and punish the offenders. They are the ones who enjoy the authority over the subordinates, so special responsibility rests with them. Under currently international criminal law, superiors also have a duty to control the subordinates even after superiors have issued orders. Although it is not known how long this duty lasts, it seems that there is a duty to control subordinates, to prevent atrocities with his area in charge, or to punish the offenders will be his duty. The criteria are well shown in *Celebici*, according to which the superior who knew or had reason to know the atrocities by the subordinates might be liable. With regards to this subordinate who exceeded the contents of the order, he will be liable for disobedience under his own military code and/or committing a war crime against international law. Though he is a subordinate under the superior, the superior did not order illegally so the acts of the subordinate is considered an act by an individual, for this reason, the subordinate cannot claim a superior order plea.

14. Insufficient Order and superior order defence

When a superior officer issued a broad order, saying that you can hurt anyone trying to attack you, is the superior officer responsible for his insufficient order? This hypothetical case is similar to the Medina case of the My Lai incident, where Medina instructed his troops that

you cannot kill women and children but ‘if they have a weapon and are trying to engage you, then you can shoot back, but you must use common sense’.⁵² It seems that nothing is wrong with the instruction as everybody has the right of self-defence but the expression that ‘use common sense’ would not be appropriate for it was too broad to understand on the battlefield. In these cases, he breaches the duty of issuing proper instruction. Ignorance of law would not be applied here as he is a commander who is supposed to know the law of wars and military law better than ordinary people. Putting aside domestic law, international criminal law will not be applied to this case until the act is recognized as orders, solicits, or inducement.⁵³ Up to this stage, nothing is wrong with the superior though this commander is not probably qualified. However, when the subordinates misunderstood the term of ‘common sense’ and started to shoot women and children, then who will take responsibility?

With regards to the subordinate, he may be able to say that he received the order. But he has to prove that killing women and children was the order or he thought ‘common sense’ meant that he could kill women and children. Applying the ICC doctrine, he might get a defence, if he can prove that the order was not manifestly illegal and he did not know it.⁵⁴ If he fails to prove it, he will get punished but may be mitigated. The absolute liability doctrine used at the ICTY and the ICTR would not give him a defence, as the subordinate would be considered as an individual who has to judge the legality of the order. In addition to that, if he can successfully prove that it was mistake of fact or law negating his criminal intent, he will be acquitted.⁵⁵

As to the commander, he himself did not commit a crime by issuing the insufficient order. One might say that he indirectly created the situation and caused the subordinates’ crime. However, he cannot be prosecuted as an aider or abetter unless he gives ‘practical

⁵² United States v Calley, 22 U.S.C.M.A. 534. December 21, 1973. available at <<http://www.law.umkc.edu/faculty/projects/ftrials/mylai/mylai.htm>> visited on 31 April 2007.

⁵³ See Article 25 of the ICC Statute. In order to establish individual responsibility, it is necessary to fall under the listed acts with intention.

⁵⁴ Article 33 (2) of the ICC Statute.

⁵⁵ Article 32 of the ICC Statute provides conditions of mistake of fact and law defences.

assistance, encouragement or moral support to the principal offender of the crime'.⁵⁶ There is one possibility of punishment left to the commander; indirect responsibility of commanders. Whether he created the situation or not, commanders have duty to prevent atrocities by the subordinates. So, as soon as he found out the fact that the subordinate misunderstood the meaning of his order, he has to stop. If not, the commander will be liable. In the case of the commander's ignorance of the crime, if this ignorance is tantamount to acquiescence, or he should have known the acts of the subordinate, owing to the circumstances, then the commander will be criminally responsible.

15. If a superior issued an illegal order, and the subordinate noticed that the order was illegal but executed it.

As seen, a superior who issued an illegal order with the required *mens rea* will be punished accordingly. Whether the court relies on the Nuremberg Principles, the ICTY Statute, ICTR Statute, or the ICC, he will be liable for issuing the illegal order. In order to prosecute the superior for ordering a crime, there has to be a relationship between the issuer and the subordinate. The superior has to have a *de jure* or *de fact* authority over the subordinate who received the order. Otherwise, the order will be just an incitement, which is not punishable as such under international criminal law.

When the subordinate executed it knowing that it was illegal, it is accepted that he will not have a defence. Even under the *respondeat superior* doctrine, it was sometimes not allowed under some military codes. For example, the 1956 United States Department of the Army Field Manual clearly excluded a possibility of defence when the subordinates knew the order was illegal.⁵⁷ Under the ICTY or ICTR legal systems, whether the accused knew it was illegitimate or not does not count, for their legal systems do not allow superior order defences under any circumstances. Under the ICC legal system, based on the *manifest*

⁵⁶ *Prosecutor v Limaj*, IT-03-66-T, 30 November 2005, para.518.

⁵⁷ 1956 UNITED STATES DEPT OF THE ARMY, FIELD MANUAL § 509

illegality doctrine, if the subordinate knew that the order was illegal, there is no chance of a defence.

The argument does not end here. With regards to the relationship with the superior's responsibility, he might be liable for another crime, not preventing the crime of the subordinate. Whether the superior issued illegal order or not, superiors have a duty to control subordinates, or take necessary steps to prevent crimes by the subordinates, or punish them. For this reason, the fact that the subordinate knew the illegality of the order does not matter, as the superior's duty is still a factor.

D'Amato erroneously states that 'A can contend that the order was concededly illegal, that it should not have been carried out and that the situation is thus equivalent to there having been no order at all.'⁵⁸ However, D'Amato disregarded the responsibility of the superior who made the risky situation where his order might be executed by his subordinates. This is never equivalent to the fact of 'no order at all'.

⁵⁸ D'Amato n4 above 604.

Chapter V Conclusion

Chapter II introduced the defence of superior orders and touched upon the various issues that surround it. Chapter II examined three main approaches to deal with these issues. To summarise the findings the *respondeat superior* doctrine was well accepted in most states in pre-war times, under which only superiors who issued illegal orders were responsible. The commander who issued the illegal order could have been punished only by the hands of enemy; therefore it is assumed that home countries would not have prosecuted the ‘offenders’. The experience of World War II made the international society aware of the need to punish individuals of the Axis countries. Influenced by the atrocities committed by the Axis states, the need to punish individuals was thoroughly discussed and the international society undertook the Nuremberg Trial and the Tokyo Trial. One of the Nuremberg Principles denied the possibility of superior order defences and the *respondeat superior* doctrine was superseded, the position of which was called the *absolute liability* doctrine and was universally accepted thereafter. Chapter II examined the issues of duress, mistake, and necessity, which are sometimes raised with superior order defences. Although they are fundamentally different notions, the duress defence is often raised together with superior orders at the ICTY. It should be remembered the ICTY Statute and the ICTR Statute are silent with regards to duress issues. ICTY cases showed that the defence of duress and guilty pleas are well raised rather than superior order pleas, but the *Erdemovic* case confirmed that duress cannot be used as a defence but rather as mitigating circumstances. The courts do not seem to address unfairness between acceptance of guilty pleas or duress as mitigation and superior order pleas for mitigation. In reality, the accused will not raise a superior order as it is not a defence at the ICTY or the ICTR, but will raise a guilty plea or a duress plea in order to get the least sentence.

Chapter II also focused the development of the superior order codifications from the

perspective of domestic law and found that before World War II superior orders were accepted as a defence in most states, a number of states put provisions of negation of superior orders. With regards to international documents, the international society tried to codify but the tension of the Cold War interrupted the development of the principles of the *absolute liability* doctrine.

Chapter II dealt with superior order issues at the ICTY, the ICTR, and the ICC. It was discovered that the number of superior order cases is very low, as the accused were relatively high ranking commanders and superiors therefore they were charged with direct involvement of a crime. The chapter concluded that the ICC approach is finally part of customary international law discarding the *absolute liability* doctrine made at Nuremberg. It should be noted that the *absolute liability* doctrine may not be part of customary international law superseded by the provision on the ICC Statute, Article 33 (2) of which was a result of a large compromise. The *manifest illegality* principle, created by Article 33 (2) was based on the idea that soldiers followed not manifestly illegal without knowing that the order was illegal would be freed. The idea is surprising as it did not follow the Nuremberg Principles. Under the ICC legal system, defendants will raise both superior orders and duress, as both can be used as a defence, simultaneously under certain circumstances.

In Chapter III, the notion of superior responsibility was explained, distinguishing the difference between direct responsibility of his own acts and indirect responsibility caused by subordinates' acts. Domestic codes were used to examine how the doctrine of superior responsibility was comparatively developed. It was found that most of the states have held provisions on direct responsibility for a long period of time. Before World War II, direct responsibility of commanders and superiors concerning abusing authority or destroying the unity of the Armed Forces, therefore the provisions were promulgated in order to protect national security not due to the fear of human rights violation. In the beginning of the 20th Century, the publication of Professor Oppenheim created the *respondeat superior* and gave impetus to the trend of direct responsibility of superiors since war was part of a national

policy. After experiencing two world wars, the international legal system started to change. In addition to direct responsibility of superiors, the advent of the idea of indirect responsibility has changed international criminal law, and the application of which is expanded to civilian leaders. The idea was never devised before World War II, and neither the Nuremberg Charter nor the Tokyo Charter mentioned indirect responsibility. In *Yamashita*, Yamashita was charged with a crime that he was not even aware of and was declared guilty. This was a land-mark case for coining the notion of indirect responsibility caused by the subordinates.

Chapter III analysed the Nuremberg Trial and the Tokyo Trial, focusing upon the new notion of indirect responsibility of superiors. Surprisingly, the Nuremberg Trial did not deal with the indirect superior responsibility as most of them were direct participants; however, a number of defendants were charged with indirect responsibility in Tokyo, the reason of which was because of the mistreatment of the prisoners of war by Japanese soldiers without any order. Subsequently, the US and the UK adopted the Yamashita standard in their own legal systems, but other countries seem to have dealt with the notion of ordinary negligence in military law or criminal law. In the case of omission, it is inconclusive whether omission includes ignorance of subordinates' actions, as the Yamashita standard is far more complex than simply an omission case.

Both of the concepts were examined. They have been inserted or revised into major statutes of international courts. It was found that direct superior responsibility has been accepted since pre-war periods, but indirect responsibility was developed since the *Yamashita* case and the Tokyo Trial. Chapter III also followed how the notion of indirect responsibility has been developed since the *Yamashita* case. Unlike the codification process of the defence of superior orders, most of the principles of indirect responsibility have survived despite disturbance of the Cold War, although there are slight differences among these provisions. Since the *Yamashita* case, there has been no disagreement as to the establishment for direct

responsibility of commanders in the US military rules.¹ The British Manual of Military Law has a similar provision.² It can be said that the Yamashita standard is well recognized in the US or the UK. As an international document, Article 86 of the First protocol of the Geneva Conventions has a similar standard to the *Yamashita* case. The ICTY and the ICTR seem to reflect the legacy of Nuremberg and give precise criteria of the doctrine of indirect responsibility. Chapter III examined whether the ICC Statute concerning direct responsibility and indirect responsibility of superiors are in conformity with the rules and principles established at Nuremberg, and it was found that the ICC adopted similar provisions concerning indirect responsibility of superiors. In the process of drawing up the ICC Statute, one of the major issues was whether the rules and principles of indirect responsibility were applicable to civilians, which finally accepted thought the standard is different under the ICC Statute.

Chapter IV dealt with complex issues on the related concepts of superior responsibility and superior orders. Throughout the former two chapters, the two notions of superior order pleas and superior responsibility were carefully examined individually. Before Nuremberg, the international community was not concerned about the need for discussing these issues. The defence of superior orders was allowed in most legal systems, therefore only the issuer of the illegal order was punishable under the doctrine of *respondeat superior*. Before World War II the superior's duty was to issue orders and control his subordinates. In some cases, commanders had the right to punish subordinates, the reason being to punish disobedience from the perspective of national interests. Due to this, superior responsibility was not discussed from the perspective of international law. As long as the illegal order was properly executed regardless of illegality, only superiors were responsible under the military codes.

At the Nuremberg Trial and the Tokyo Trial, both trials used the individual approach, which implied that the amount of responsibility does not shift from person to person. For

¹ Paragraph 501 of the US Army's Field Manual 27-10 (1956).

² Paragraph 631 of the British Manual of Military Law (1958).

example if superior A issued an illegal order to subordinate B, whether superior A is punished or not is irrelevant to subordinate B's punishment. One of the well raised defences at Nuremberg was based on the concept of *tu tuoque* 'you also', which has been completely denied since Nuremberg. Simultaneously, international courts have never attached responsibility just because of its position, and the blameworthiness of the accused has always been required; therefore neither vicarious liability nor collective responsibility has been accepted under international criminal law. It has been widely accepted that criminality attaches to conduct that is blameworthy.

D'Amato introduced the split-responsibility solution, under which the amount of responsibility shifts from person to person. If a person who executes the order takes half of the responsibility, then the other issued will take the rest. Not many people agreed with this, as this approach goes against the Nuremberg Principles. Under current international criminal law, the individual approach is accepted, however, it was found that sometimes superior responsibility is affected by the subordinates' acts. D'Amato's perspective is effective to analyse the criminality of the superior subordinate relationship.

Several hypothetical cases were examined in Chapter IV. A case where a superior issued an illegal order and the subordinates executed it pursuant to the order was examined. It is rarely denied that issuing illegal orders with having the *mens rea* will be punished if there is a superior-subordinate relationship between the issuer and the principal. If not, the act of ordering by the superior will be seen as incitement, which is not punishable as such under international criminal law. The prosecution needs to prove the attempt or commission of the crime by the subordinate. The superior cannot escape the responsibility by saying that the order was illegal 'you should have rejected it', as he used the authority to pursue his wrong goal creating the dangerous situation. In this case, as the subordinates executed it, whether the subordinates get a defence or not depends on the principles of international criminal law. Under the ICTY and the ICTR Statutes, superior orders are not a defence but a mitigating factor. Although the ICC Statute does not dismiss the defence, so his future is based on

whether the circumstances meet the requirement of Article 33(2) of the ICC Statute. Therefore, for the subordinate if the order was to carry out a petty crime, he should not worry about what he will be charged with, as he will get a defence under the ICC legal system on condition that he was not aware of the illegality. Perhaps it can be said that the subordinates' future is up to the contents of the order. In addition, it is possible that the subordinate who issued the order will be punished both for ordering and not preventing the atrocities. In the case of concurrent application, there is no provision dealing with this situation, and court judgments vary. The *Kordic* case expressed a negative view and the *Blaskic* case showed a positive opinion. The author thinks that the superior who issued not apparently illegal orders should get mitigated when the order was not manifestly illegal, as it will deter future atrocities by the subordinates acts caused by own orders. The superior's situation is highly influenced by the subordinate's acts, once it is noted that other forms of direct participation need the attempt or commission of the principal.

Unexecuted orders were examined in Chapter IV with a view to evaluate whether the superior's situation is affected by other circumstances. Studying a situation of unexecuted orders would give a clue to the question of superior-subordinate issues. If the commander issues an illegal order but the subordinates just ignore it, what would happen to the superior's responsibility? It is rarely denied that the issuer of the illegal order is the one who intends to commit a crime, so the fact that he tries to complete the order with the required *mens rea* is not surprising. According to the ICC legal system, he would be punished according to international criminal law regardless of the fact that his subordinate completes the order. The reason for this strict criminality is that the superior enjoys the authority and used it intentionally, therefore a great amount of responsibility is imposed on him. However, the author believes that it is necessary to compare other modes of direct responsibility. Article 25 of the ICC Statute provides that one who orders, solicits, or induces the commission of a crime as such does not commit an offence without the commission or attempt of the crime.³

³ Article 25 of the International Criminal Court.

Although the ICTY Statute and the ICTR Statute are silent on this issue, an ICTY case provided that, with regards to instigation, there should be ‘causal relationship between the instigation and the physical perpetration of the crime’.⁴ For this reason, the responsibility of superiors for ordering the commission of a crime is apparently too harsh, in that ordering can be an offence without the principal’s commission or attempt. The author takes the view that superiors should get a chance of mitigation when the crime was not actually attempted or completed following other modes of direct participation. This idea will deter further atrocities even after he issued an illegal order. If this approach is taken, the superior’s status after issuing illegal orders, will be aggravated by the subordinate’s commission or attempt under Article 25 of the ICC Statute.

It can therefore be concluded that it would be wrong to endorse the current approach to superior responsibility and the defence of superior orders established at the ICTY, the ICTR, and the ICC. International courts do not deal with the problems of the concurrence between superior responsibility and the defence of superior orders. The current individual approach disregards the balance between superiors and subordinates. International criminal law puts a heavy burden on superiors but subordinates can enjoy an advantage under certain circumstances. Ignorance can be used as a defence or a mitigating factor for subordinates, but it will not be an obstacle to the punishment of superiors. Much stress and responsibility are put on commanders on the field, which will undermine their judgment and efficacy of the unit.

Therefore, the balanced approach should be adopted. Firstly, when superior issued illegal orders, the superior should be considered as the principal. There will be no disagreement as to this point, as he used his authority to make the crime committed. In this case, he will not be charged with failure to control due to the fact that this concept of indirect responsibility is contained by the act of ordering. Suppose the order was carried out, the subordinates who executed the illegal order will be punished but the criminality of the

⁴ Prosecutor v Blaskic, IT95-14, 3 March 2000, para.280.

subordinate will always be less than that of the superior.

Secondly, when Superior A issued an illegal order and subordinate B executed it. Superior A was present at the time of commission but did not do anything. This would be the case of concurrence between indirect superior responsibility and subordinate's responsibility. The relation between direct responsibility and indirect responsibility of superiors should be similar to that of principal and aider and abetter. Therefore, if a superior is charged with direct participation of issuing illegal orders, there is no punishing the superior for aiding and abetting the crime of the subordinates. To neglect this relation is to neglect the principle of international criminal law. International criminal law should not charge a superior more than necessary. A court says that it is rational to charge a superior with two crimes based on one action, however the fact that a person is not only a principal but also aider or abetter is unacceptable.⁵ As it is impossible to be a principal and aider or abetter simultaneously, either of them should be applied. Here comes a balance issue. The criminality of a superior's order is more severe than the criminality of indirect responsibility.

Therefore, a number of post-war trials erred in dealing with indirect responsibility of superiors as an independent crime without considering direct responsibility of the accused. Superiors failed to take the necessary measures should be seen as an accessory, as the actual principals do exist and commit a crime independently. Therefore, it is impossible to regard indirect responsibility as direct superior responsibility.

Therefore, the possibility of superiors' mitigating factors should be presented. Superiors are vulnerable under the principles of international criminal law. Before Nuremberg the duty of commanders was merely to control the subordinates but it currently contains the duties to punish, issue legal orders, control the subordinates, and take preventive measures. Superiors nowadays do not enjoy much power in comparison to superiors in pre-war periods, but superior responsibility apparently become harsher. Case law distinguishes that the notions of the direct responsibility of superiors and the indirect

⁵ 'The aider and abettor is always an accessory to a crime perpetrated by another person, the principal'. *Tadic* Judgment, para. 674.

responsibility, and imposes an irrational obligation on superiors. Taking the notions at face value, a superior who issues an illegal order will be liable regardless of the fact that the order is executed or not, and he also will be liable if he fails to stop the acts of the subordinates. Moreover, when the court successfully establishes the imputed knowledge of a superior, it puts wilful disregard and ignorance in the same class.

Superiors should have opportunities to be mitigated under certain circumstances. This idea would be necessary to contribute the balance approach. The possible conditions would be summarised as follows; 1) Superior issued an illegal order but the order was not manifestly illegal and the order did not cause a serious result, 2) Superior issued an illegal order but the order was not committed or attempted by the subordinates, 3) Superior issued an illegal order but he believed it to be legal, 4) Superior issued no order but the subordinates committed a crime but the superior did not have actual knowledge, 5) Superior issued no order but mistakenly believed the subordinates were following orders when they were committing crimes, 6) Superior issued no order but realized that the subordinates were committing crimes and took the measures that does not amount to all necessary and reasonable measures, 7) a superior issued an illegal order and the subordinates attempted to do it but successfully stopped the acts.

You may ask if Article 78 of the ICC Statute is sufficient to deal with superiors' crimes. It is true that Article 78 states that the Court will 'take into account such factors as the gravity of the crime and the individual circumstances of the convicted person'.⁶ However, Article 78 does not always applicable to superiors' crimes, as it deals with individual circumstances generally and that the element of superiors is usually treated as an aggravating circumstance. The rules and principles of commander mitigation are not fixed or at least it is not mentioned; therefore, inserting a provision of mitigation of superiors would be meaningful.

Superiors need to have the possibility of mitigation in the same way as subordinates.

⁶ Article 78 of the ICC Statute.

A problem of punishing superiors where they do not have any knowledge of the crime of the subordinates lies in the fact that the application of this principle seems to be unfair, in that the subordinates committed a crime may be entitled to have a defence under certain conditions of Article 33(2) of the ICC Statute but those who did not know what is happening will be punished if the crime is committed within the area of his authority. It can be said that the mental requirement of the 'had reason to know' standard is extremely low and will be easily established. Compared with superior order defences, the notion of superior responsibility has surprisingly taken root since *Yamashita*.

Mitigation of superior officers would help superiors who might be charged with a crime of a harsh sentence. It will deter future atrocities or help them to stay in control even after they issue illegal orders. In addition, it will promise detailed legal options.

On the contrary, the plea of superior orders is seen as an independent concept at a glance. However, it is a defence or mitigating factor, therefore there should be a balance between the issuer of the order and the subordinate who executed it. Superior A issued an illegal order and subordinate B executed it, it is usually assumed that A should be punished severely. The reason of this assumption could be that a superior order was and is a defence factor, so subordinates enjoy an advantage unlike superiors. This assumption can also be proof that the subordinates' responsibility is relevant to the superior's responsibility. Infamous examples are the *Calley* case and the *Medina* case. In *Calley*, Calley was charged with direct involvement in the atrocities in the village. Though Calley raised a superior order plea, it was not accepted, United States Captain Ernest Medina, Calley's immediate superior, was charged with failure to control the subordinates. Medina was charged with responsibility for the massacre caused by his subordinates because he breached the duty to prevent the activities of his subordinates where the atrocities were happening but Medina was acquitted.⁷ The two cases show that there was a lack of balance between the issuer and the executioner, in that the issuer should be punished harsher.

⁷ Crowe, C.N., 'Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution', (1994) 29 University of Richmond Law Review, p. 222.

Additionally, Superior A issued no order but Subordinate B committed a crime. B will be held liable for committing a crime and he is the principal. The position of Superior A is debatable but Superior A should be considered as an accessory to this case if the court can establish his knowledge based on 'the had or should have known' standard. As Superior A is mere an accessory, his criminality will not exceed that of the executioner. There have been a number of cases facing a similar situation, but courts have erroneously disregarded the balance issue between the executioner and the superior. It should be remembered that the criminality of indirect superior responsibility does not exceed the criminality of the subordinate. Appropriate mitigation should be available to the Superior A if he shows willingness to stop his subordinates' crime. Effective mitigation will rectify the gap between superiors' disadvantage and subordinates' advantage.

There remains a question why a superior issued an illegal order must be prosecuted for assisting the crime happen. The Statutes of the ICTY, the ICTR, and the ICC do not mention the concurrence issues between superior responsibility and superior orders, as the promulgation process showed that even inheriting the legacy of the Nuremberg Trial was a difficult task. Therefore, the concurrence issues of superior orders and superior responsibility have not been examined.

International criminal law needs no absolute approach. A better view would be the individual approach in principle but consideration has to be given to superior's situation at the time of the commission and the criminality of the executioner. International criminal law does not help the superior who issued an illegal order but was successfully able to stop the acts. It will give an opportunity for them to reconsider or take the necessary steps to prevent it.

Not many people would agree to the fact that if a superior who did not take the measures to stop the atrocities of the subordinate is sentenced to death and the subordinates who committed a crime without any order get 10 years of imprisonment. International courts have to find out a solution to this inequality. The reason for this inequality is that the

superior order who did not order is an accessory; therefore it is expected that the superior will get a lenient sentence in comparison to the principal.

Before Nuremberg, superiors were the persons who had to take responsibility for the crimes caused by their illegal orders. In a way, there was no complexity during that time, as the superior was the person who has to take responsibility in the end. It can be observed that the criminality stayed with the commanders during pre-war periods. Since Nuremberg, the international legal system has used the individual approach, which means that a superior's responsibility does not affect subordinates' responsibility. However, international criminal law has always claimed that responsibility is attached to a person's blameworthiness; therefore vicarious responsibility and collective responsibility were never allowed. However, it was found that sometimes a superior's responsibility is relevant to his subordinate's acts, when the superior is liable for issuing illegal acts. The reason for this complication is that the *Yamashita* case and other subsequent war crime tribunals created the doctrine of indirect responsibility of commanders, which imposed another duty to control subordinates, or prevent the atrocities in his area, or punish the offenders. Today, the position of superiors has become vulnerable, which will be easily punished by other uncontrollable factors like a crime by the subordinates that he did not order.

In pre-war periods, subordinates' responsibility did not exist as long as they followed orders, as the superiors are the ones who must take responsibility, therefore subordinates were treated as automata protected under the umbrella of superior authority. Since Nuremberg, subordinates became an independent entity, who must judge the legality of superior orders. On the surface, it seems that subordinates' responsibility is independent from superiors' punishment under the Nuremberg Principles, the ICTY or the ICTR Statute. However, the ICC Statute is based on the *manifest illegality* principle, it can be argued that subordinates' future is based on the manifest illegality of superior orders.

The author's view is that the individual approach is appropriate in principle, but attention should be paid to the fact that superior responsibility and superior orders are

correlated. Therefore, the extreme notion of the individual approach cannot be supported. As seen, the uniqueness of superior responsibility is that the person who has authority and used that influence to cause a crime to be committed, therefore he receives punishment harsher than other direct forms of participation like incitement, solicitation, or inducement. According to the ICC Statute, those direct modes of participation are considered less serious than principals, therefore the condition of 'in fact occurs or is attempted' was attached. For this reason, it can be said that direct order crimes of superiors seems to be harsh in comparison to other modes of crimes.

One might say that the defence of superior orders is available to anyone, therefore there is no need to create another provision on mitigating factors for superiors. However, considering that political leaders and military commanders tend to have rejected their defence of superior orders, promulgating a mitigation clause for superiors has special importance for them. The idea of the mitigation clause to superiors would develop the efficacy and unity of the chain of command. The actual situation of superiors may vary; therefore merely imposing a harsh sentence on superiors would not help to prevent atrocities. The current individual approach does not reflect reality of the military society but also may cause harmful result.

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