Befehl ist Befehl

THE ‘SUPERIOR ORDERS’ DEFENCE

Masterproef van de opleiding:

‘Master in de rechten’

Ingediend door

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1. INTRODUCTION

The principle of superior orders is a defence one may use while on trial for war crimes. It is a defence constructed for the human dilemma, which is created by the existence of both national and international law. The fact that while one tries to execute his national law, one may be infringing international law. This could be because of ignorance, fear, discipline, but also of criminal behaviour or even hate. A suspicious order puts a soldier facing a dilemma. When he refuses to obey and the order turns out to be lawful, he might be convicted. This happened in 2010 to a few officers who laid down a complaint about their superior. It was not accepted and they were punished for undermining authority.¹ But on the other hand, when a subordinate does carry out an illegal order, he might also be convicted. It is a juridical principle, but while browsing through the different cases it seems also to be an ethical problem. A soldier is rarely supposed to be an expert on the law.² Should it be expected of everyone involved in an armed conflict to be perfectly informed of international law, to obtain a critical attitude towards his or her superiors? Is it required of soldiers to inform themselves about the specifics of the order? Do they have to check the lawfulness of it? This critical attitude seems to be very contradictory against the importance of discipline, which is so tightly bound with the military institutions and war. It is not possible for a state or military service to work properly when all of their subjects keep refusing or questioning given orders. The principle of superior orders can be seen as an essential defence to guarantee the working of those institutes.³

The superior orders defence can be found in the Art. 33 of the Rome Statute of the International Criminal Court.⁴ Though this is only dated in 1998, its purpose and structure can be brought back to several cases through the last few decades. A few of those cases are quite common, The Nuremberg Trials and the Eichmann case concerning the responsibility for the holocaust. There is also the Tokyo Tribunal, after the Second World War and the International Criminal Tribunals of Rwanda and Yugoslavia. In all of those the superior orders defence is only accepted as a mitigation of punishment. Only in the Art. 33 of the Rome

¹ “Peleton klaagt commandant aan wegens gedrag in Uruzgan.” 2010, consulted at: <
² GREEN L.C. Superior orders in national and international law, Sijthoff, p. 296.
³ IBIDEM, p. 287.
Statute a person may be relieved of criminal responsibility. There are three cumulative conditions that are to be fulfilled. There has to be a legal obligation, one should not be aware of the illegality of the orders and the order should not be manifestly unlawful. Only when all three of these conditions are fulfilled the principle of supreme orders is to be seen as a valid defence. This Art. 33 can be seen as ‘a dissonant note’ in the use and acceptance of this principle over the last century.

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5 Dinstein Y. *The Defence of ‘Obedience to Superior Orders’ in International Law.* Oxford 2012, p. XX

6 *Ibidem,* p. XXI
2. RESEARCH QUESTION

The last century there has been a whole evolution in the superior orders principle, however not that much has changed. There is no real practical difference between the Art. 8 in the Charter of the Nuremberg Trials, concerning the responsibility for the Holocaust, and the Art. 33 in the 1998 Statute of Rome. Nevertheless much has changed since the leaders of the nazi organization have been put to trial after the Second World War.

The way we wage war has changed. An industrialized country has no technical difficulty to obliterate a complete nation. Ingenious technical tools emerged during the Holocaust and in Vietnam, isolated villages stood no change against bombing and machine fire combined with a 'no prisoners' policy. Occasionally we discover an article about some soldiers confusing war with videogames in our morning newspaper.

Such evolution goes hand in hand with an awareness of society. After the Second World War an enthusiastic chorus of ‘never again’ filled the streets of Europe and the United States. The shocking realization of what mankind was capable of seeped in with the public in the decades after the Second World War. The Eichmann process in 1961 played an important role in the understanding of what repulsive crimes had happened in Europe.

The public wanted a guarantee such crimes should never happen again. Education was seen as an important factor and both Europe and the United States pledged an oath never to forget, in honour of the victims but most importantly to prevent repetition. Education has only been one factor. Rules and guidelines were founded; an International Criminal Court was installed. Prisoners and civilians were protected during wartime. However there is a sad little footnote on this whole hopeful enterprise. The United States Supreme Court dismissed criticism about ‘victor’s justice’ during the Tokyo Tribunal and Nuremberg Tribunal with the engagement that the rules they installed created a new standard they were bound to as well. Nevertheless twenty years later in the Vietnam War, various crimes against humanity were

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8 De Cock J. Ze spelen Playstation. In: De Standaard 07/04/2010
covered up.\textsuperscript{11} The most famous one, the massacre of the village of My Lai, was brought before Court eventually. Nevertheless president Nixon waived convicted lieutenant Calley’s punishment.\textsuperscript{12}

Especially the defence of superior orders raises difficult ethical questions, linked with victors’ justice. A comparison between cases and between the background of the Tribunals administering justice may show whether or not the application of the superior orders defence has a link with who judges who.

War crimes have been developed and made enforceable by a variety of domestic Courts, war tribunals and even an International Criminal Court. But however as Taylor has already pointed out in the seventies, the law must also be enforceable. The biggest problem of the superior orders defence is the rising of a personal responsibility.\textsuperscript{13} During the Eichmann process in the sixties, political analyst Hannah Arendt formed her theory \textit{the banality of evil}. She pointed out one did not have to be thoroughly evil to be able to perform crimes against humanity. At his process, which she reported for the New Yorker, Eichmann turned out to be a mundane, living next door, accountant. The horns, dark smoke and psychotic elements everyone expected were left out. Shocked by his normality, Hannah Arendt discovered the key to evil. Eichmann \textit{‘did not think’}.\textsuperscript{14} This idea, the danger of a lack of critical behaviour has spread intensely through our society. In the seventies the widespread book and film \textit{‘the Wave’} told about the experiences of high school teacher Ron Jones who imitated the Nazi propaganda with his pupils. As this university honours, people should have learned the dangers when they do not \textit{‘dare to think’}.

With the increased effort put into sensitization, education and raised awareness of the public more and more people \textit{‘ought to know’} which orders are lawful and which orders no one should obey. The spread of the Internet plays an important role in this. There are hardly any isolated societies left and it remains very hard to maintain one did not know an action was illegal. The more people are convicted because of such crimes, the more information gets

\begin{flushleft}
\textsuperscript{12} \textsc{Evans C. “William Calley Court-material: 1970” in: Great American trials. Detroit, 1994, p. 601}
\textsuperscript{14} \textsc{De Ceulaer J. Is het kwaad nog altijd zo banaal? In: De Standaard 23/04/2013.}
\end{flushleft}
spread.\textsuperscript{15} This combined with the huge effort nations and NGO’s put into prevention and sensitization by education of the International Law, leads to a possible end of the defence of superior orders according to the Art. 33 of the Rome Statute. Since not knowing that the order was unlawful is a condition to be able to use the superior orders defence.

However also very important in this debate are some famous psychological and sociological experiments investigating human’s nature to obey and the influence of peer pressure. Hannah Arendt already pointed out evil lurks in every human being, and she is supported by a large base of experiments considering behavioural determinism. When those experiments show a majority is likely to follow any order or peer pressure, is it still fair to charge soldiers with this huge personal responsibility? Should a judge consider those characteristics? Is it already taken into account? Perhaps the responsibility of a crime should shift more often to the framework and organization of a war. The defence of superior orders is linked to the principle of command responsibility. At the Second World War Tokyo Tribunal Yamashita, the commander of the Japanese forces in the Pacific, was held responsible for the crimes of his troops, even when the communication lines had been cut by the American Army. Is it possible one day an United States president will be responsible for a soldier committing crimes, due to a lack of psychological support and framework in the army?

Last but not least, there are still some technical problems. One of the conditions of the Art. 33 of the statute of Rome refers to a ‘legal obligation’. Both the definition of an obligation and what is to be considered legal remain vague. In Nazi Germany, every order of the Fuhrer was considered law. And what happens with a soldier following orders in a rebel army fighting the official government?

In my thesis I want to investigate the fate of the principle of superior orders. The increase of worldwide awareness of International Criminal Law makes it very difficult to fulfill the Art 33 of the Statute of Rome condition: ‘the person did not know that the order was unlawful’. Nevertheless scientific research shows people are likely to commit war crimes because of ‘behavioral determinism’. Should such research have a place at Court? There remains also the important link with command responsibility. If an individual soldier is not responsible for his crimes, someone else should be.

\textsuperscript{15} BOHRER Z. \textit{Is the prosecution of war crimes just and effective? Rethinking the lessons from sociology and psychology} IN: Michigan Journal of International Law, Vol. 33, summer 2012, p. 789.
All of those questions are answerable with an analysis of a variety of cases and institutions. The way institutions are organized and founded may have an impact on the way they decided to allow a defence of superior orders or not.

The comparison of cases should differ by institution and nation. But most of all differ by time. As pointed out above, the wage of war has changed. Time and money is invested in the education of soldiers. By both NGO’s and national governments. Does this mean the standard has truly changed?

The main purpose of this thesis is to place the defence of superior orders in a historical context. While paying attention to diverse historical, legal and psychological circumstances I want to create an overview how superior orders has been handled in some of the mayor conflicts of this century. Based upon this result I an answer can be composed upon the discussed questions and perhaps a suggestion for the future formulated.
3. HISTORY AND DEBATE

The debate concerning superior orders has been especially alive since the Second World War. Nevertheless one should also consider a few cases before the Second World War to fully frame the decision to not allow superior orders at the Nuremberg trials and the Tokyo Tribunal. The war in Vietnam provides an interesting case that shows the importance of education and conditions of the soldiers. Post-Vietnam, we will also discuss the importance of the International Criminal Tribunal of Yugoslavia and Rwanda. Even more recently, deserters of the United States Army have used the principle of superior orders, pleading the Afghanistan and Iraq wars are illegal.

International law and the ways humans wage war are subject to constant change. To fully understand the way the law deals, or fails to deal, with war criminals, it is important to hold in mind the broader context of those wages of war. An illiterate soldier in the trenches of the First World War has not received the same training as a modern Belgian soldier in Afghanistan. Neither is he subject to the same rules, expectations or even goals.

We will analyse the most important cases concerning the superior orders defence of the last century, introduced by an overview of the state of international law at that time, any legal doctrine concerning superior orders and the legal position of members of the armed forces.
1. 1. The First World War

1.1.1. General Overview
Prior to the First World War, in 1474, Peter von Hagenbach was defendant in what is claimed by some to be the first ‘international’ trial, where he pleaded the superior orders defence for the first time in recorded history. Since his atrocities during a battle for the Austrian city of Breisach had offended the ‘Laws of God’ he was found guilty and executed. Every war since the sacking of Breisach has had its own criminals. Some of those were criticized, some prosecuted or even lynched. Many other cases followed, some using this argument successfully, some not. But their historic legal importance is negligible.

We will start our overview of international law with one of the most known symbols of humankind. In 1863, the International Committee of the Red Cross was founded by Henri Dunant, who was shocked by the many victims of the battle of Solferino. After a first convention in 1863 the Swiss government took the initiative for a diplomatic meeting between 16 countries in Geneva, which resulted in the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The treaty was limited to 10 articles protecting the wounded and guaranteeing the neutrality and inviolability of medical staff and equipment. Four years later, in 1868, articles were added to extend this convention to sea warfare, however those were never ratified by any country.

In 1899 the first conference of The Hague took place to establish some rules concerning the ways of land warfare. This convention was updated in 1907 with 27 state parties signing on 18 October 1907. In the convention most attention was paid to the treatment of prisoners, sick and wounded. It also set out some rules concerning means of injuring the enemy in Art 23, the use of poison and poisoned weapons, or the unnecessary destruction of property. Agreements were also made on the behaviour in the territory of a hostile state when military authority is established. In 1907 the previous attempt of 1868 to install some rules

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concerning sea warfare was resumed with the Convention X, which protected hospital ships, shipwrecked and wounded on warships.  

Apart from international law there was of course the internal national law and many states possessed a manual of military law that arranged the workings of its armed forces. Those manuals set forward rules concerning the living circumstances, morality and discipline of the soldiers. They provide an insight in the lives of soldiers and the possibilities offered to them to know and behave according to international law.

In the British Military Act, ‘disobedience to a lawful command’ can be found under section 9. This requires that the order is lawful, which means justified by military law, and that it must be given by the superior in person within the execution of his office and the disobedience should arise from ‘a wilful defiance of his superior officers’ authority’. The British Manual of Military Law also explicitly provides the fact that one is ‘justified in questioning, or even in refusing it, as, for instance, if he were ordered to fire on a peaceable and unoffending bystander. This exception does not refer to international law, only to the law of the land and the ‘well-known and established customs of the army’. The sentence for disobedience to a command was death or penal servitude.

The base of the 1097 Manual of Military Law correspondent with the ‘absolute liability’ approach to the superior orders defence, which goes back to Hugo Grotius, among others, who already in the 17th century had stated ‘if the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out’. He based himself upon the law of nature and religion. The ‘absolute liability approach’ holds the individual responsible for his own acts. Soldiers are only obliged obedience to legal
orders and when an illegal order occurs the soldier is not bound by it. If he does oblige with the order he will be responsible.\(^27\)

The British and U.S. Courts followed the idea stated in the 1907 manual that a soldier could and should question suspicious orders of his superior. By example in the Scottish Ensign Maxwell case, which dates from 1813, the superior orders defence was rejected to an officer who followed orders to kill a French prisoner in his cell: ‘every officer has a discretion to disobey orders against the known laws of the land.’\(^28\) In the Keightly v. Bell case stated judge Willis that no one should be prosecuted when they were following an order unless that order was manifestly unlawful. Judge Willis expanded his statement during an 1900 case considering the Boer war.\(^29\) ‘In the case before me that order to eliminate the deceased was given by an officer of an illegal regime, his orders therefore are necessarily unlawful and obedience to them involves a violation of the law.’\(^30\)

However, in the 1914 edition of the British Manual of Military Law an art 443 was added: ‘Members 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.’\(^31\) This was also added to the United States Army Rules of Land Warfare, also published in 1914.\(^32\)

With these provisions Military Law agrees with international law writer Oppenheim\(^33\) his ‘respondeat superior’ theory which has probably influenced the change in Military Law Manuals. His theory considered superior orders as a full defence, in contradiction to the

opinions of the Courts of both the U.K. and the U.S.\textsuperscript{34} This means that not the individual soldier is responsible, but solely the commander responsible for giving the order. Kelsen put a similar theory forward. His ‘act of state’ argues individuals are not accountable for actions in the capacity as organs of the State.\textsuperscript{35} This change of Military Law Manuals is not as important as it may seem. According to Milner, these are only administrative regulations, which would not be adopted by the U.K. Courts and this change is ‘\textit{not believed to represent a sound principle of the law of war, and is in no sense binding upon Great Britain in the International sphere.}’\textsuperscript{36}

Art 47 of the German Military Penal Code, applicable during the First World War, seems to be a compromise between these two theories concerning superior orders: the ‘\textit{absolute liability}’ approach and the ‘\textit{respondeat superior}’ approach. ‘A subordinate is only criminally responsible under such circumstances when he knows that his orders involve an act which is a civil or military crime.’\textsuperscript{67} The soldier can only be free of responsibility when he did not know the order was unlawful. This leaves more possibilities for punishment compared to its British counterpart, however it is more considerate towards the soldier than the absolute liability principle. Gaeta calls this approach ‘\textit{conditional liability}’ as there is only liability when certain conditions have been fulfilled.\textsuperscript{38}

The opinion of the French jurists cannot be traced. Superior orders were not mentioned in Military Law and the acceptance of the defence was subject to internal debate.\textsuperscript{39}

\textsuperscript{34} After the Civil War, Dr. Francis Lieber composed the Lieber Code, rules of warfare for the United States Army. He did not mention superior orders, but according to Wilner he supposed the rules set by the Courts would be followed. \textsc{Wilner A.M.} Superior Orders as a defence to violations of international criminal law. In: \textit{Maryland Law Review}, vol. XXVI, 1966, p. 129-131.

\textsuperscript{35} \textsc{Dinstein Y} \textit{The Defence of ‘Obedience to Superior Orders’ in International Law}. Sijthoff-Leyden, 1965, p. 48. Kelsen states the superior orders problem is a problem of national criminal law, the exclusion of individual responsibility as an act of state is a problem of international law. Dinstein does not agree with this theory and considers both theories essentially similar. Jackson, judge at the US Supreme Court during the World War, saw the ‘Act of State’ theory by Kelsen apply to superiors, while the ‘superior orders’ principle applies to subordinates. The two principles working together resulted in the fact that no one involved in war crimes could be punished. \textsc{Robertson QC G.} \textit{Crimes Against Humanity. The Struggle for Global Justice}. Penguin books, 2012, 4\textsuperscript{th} edition, p. 314.

\textsuperscript{36} \textsc{Wilner A.M.} Superior Orders as a defence to violations of international criminal law. In: \textit{Maryland Law Review}, vol. XXVI, 1966, p. 132.

\textsuperscript{37} \textsc{Dinstein Y.} \textit{The Defence of ‘Obedience to Superior Orders’ in International Law}. Oxford 2012, p.46-47.

\textsuperscript{38} \textsc{Gaeta P.} \textit{The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law}. In: \textit{EJIL}, 1999, p. 175.

\textsuperscript{39} \textsc{Wilner A.M.} Superior Orders as a defence to violations of international criminal law. In: \textit{Maryland Law Review}, vol. XXVI, 1966, p. 133.
So in theory, most Military Law at the beginning of the 20th century seems to have agreed with the ‘respondeat superior’ theory. However, according to the military manuals soldiers were also immune to punishment when they disobeyed an unlawful command. Nevertheless, although all of this was thoroughly explained in those manuals, the question remains how many of the soldiers, during the First World War, had actually read this Manual or the Army Act. How was the theory implemented in the education of soldiers? According to the *Infantry Training Manual 1914* training should include instructing the soldier about a ‘soldiery spirit’ but also instruction in ‘barrack and camp duties, cleanliness, care of feet, smartness, orders and such regulations that immediately affect the soldier’. The manual also suggests lectures not longer than half an hour to keep the interest. Besides barrack room duties and the treatment of blisters the range of subjects also included information about good name of the regiment and the army, manner of making a complaint, general conduct while in the army, co-operation, comradeship, disregard of self and their importance in war. Except for these vague suggestions, of which the implementation is dependent upon the training officer, there is nothing in the manual that suggests any education towards British soldiers on international law. The book seems to be reserved for drilling and marching exercises. It even clearly prohibits any enunciations by training officers other than those concerning principles from the manual. In the other handbook for officers, the *Field Service Regulations* of 1909, the words international law are nowhere to be found, it is a mere technical book that instructs how to best fight in a wood and make an efficient camp.

Different is the German *Felddienst Ordnung* (Field Services Regulations), of 1908. Just as its British counterpart it stresses the importance of discipline in a training. ‘The efficiency of a soldier depends not only upon his physical and military training but upon his discipline and morale. To develop these qualities is the object of military education.’ However in the training of officers, not of soldiers, it is suggested lectures are followed by discussions so everyone can share his opinion. It is also stressed that ‘it is no less important to educate the soldier to think and act for himself. His self-reliance and sense of honour will then induce

41 IBIDEM, p. 242-243.
42 IBIDEM, p. 2.
44 IBIDEM, p. 19.
45 IBIDDEM, p. 22.
him to do his duty even when he is no longer under the eye of his commanding officer." In practice however, in the trenches less attention was paid to the discipline and moral of the soldiers. When the war started in 1914 Germany believed in a quick, just war. Reality proved otherwise and one year later the moral and discipline sunk. In 1917, new installed General Ludendorft tried to turn things around with his Aufklärungsdienst campaign and a few months later the Vaterländischer Unterricht. Those were meant to explain the events of the war to the soldiers and their home, and make sure they did not lose hope and increase patriotic feelings. Conviction, duty, obedience, resolution and leadership were again seen as key words to victory. It worked just long enough for the spring offensive of 1918, but the economic reality and poor circumstances in the trenches could not be solved by nice words alone. The lack of results of the last offensive created a moral downfall.

The difference in organisation and discipline between the British and German armies can be seen in the rate of disciplinary executions. In the British army the sentence for disobedience to a command was death or penal servitude. Only six British soldiers were executed during the First World War for disobedience. The total number of soldiers convicted to death was 3080, for crimes as murder, plunder or delivering up a garrison to the enemy. Only 346 of those were indeed executed. In Germany a total of 150 soldiers were sentenced to death, however only 48 of them were executed. It is not known how many of those were convicted for not following orders but the difference with the previously given British statistic is huge.

1.1.2. The First International Tribunal
After the First World War the 1919 Commission of Responsibilities was created by fifteen nations among whom the United States, Japan, France and Belgium. Germany was no part of

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46 Field Service Regulations (Felddienst Ordnung, 1908) of the German Army, translated by the General Staff, War Office, London, 1908. Consulted at: https://ia600200.us.archive.org/1/items/fieldserviceregu00prusrich/fieldserviceregu00prusrich.pdf date 29/03/14. p. 23.
48 Ibidem, p.325-327.
50 Disobeying in such a manner as to show a willful defiance of authority, a lawful command given personally by his superior officer.
51 Disobeying a lawful command given by his superior officer.
the Commission. One of their goals was to research ‘breaches of the laws and customs of war committed by the forces of the German empire and their allies, on land, on sea and in the air,’ but also to find out the officials responsible, ‘however highly placed’ and to install an international tribunal that could process all the acquired information. On the defence of superior orders the Commission concluded ‘civil 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.’ The consensus of the Allied Powers was not to allow superior orders as an absolute defence, but to leave the acceptance of it to the specific circumstances of the case.

1.1.3. The Leipzig Trials

Germany was ordered by the Allied forces to hand over their ‘war criminals’ according to Art 228-230 of the Treaty of Versailles, which ended the First World War. They obliged at first, by handing over a list consisting 896 accused war criminals, to be tried by an international Tribunal that was yet to be installed. This caused indignation among the German people since most of those ‘war criminals’ were considered ‘war heroes’ in their home country. Germany proposed to try its war criminals itself at the German Supreme Court, which was accepted by the Allied forces. So the International Tribunal was never created. A commission of Allied jurists was installed to follow the proceedings and a much smaller list of 45 accused war criminals was composed out of the original 896. Those trials went into history as the Leipzig Trials. About nine cases passed the German Supreme Court, none of them resulting in severe punishment, which led to protest by the Allied nations. Following these events, the commission of Allied Jurists left the trials. The German Supreme Court continued and brought forward a total of 901 cases, of which most didn’t even contain a public hearing.

55 Ibidem, p. 38.
Only 13 cases ended up with a conviction, which was never applied. Four cases are briefly discussed here for their importance for the superior orders debate and, although there were before a national Court, international law.

**Robert Neumann’s case**

Private. Robert Neumann was tried for ill-treatment of British prisoners, in Violation of Art 4, 6 en 7 of The Hague Treaty (IV) 1907. There was only one specific accusation in which he was ordered to hit a prisoner for refusing to work. He was not found guilty on this specific act because of Art 47 of the German Military Penal Code: A subordinate is only criminally responsible under such circumstances when he knows that his orders involve an act which is a civil or military crime. The judge also stated that ‘all civilized nations recognize the principle that a subordinate is covered by the orders of his superiors.’

**Dover Castle case**

Karl Neumann was tried and not found guilty for the torpedoing of a British hospital ship, the Dover castle, in the Tyrrhennian Sea, which caused the death of six men. He was fully aware of the fact that he was about to torpedo a hospital ship called the Dover Castle, and of the fact that such a ship was protected by the Hague Convention No X of 1907. He argued that he only acted upon the orders of the German Admiralty, which had sent out a few memoranda in the spring of 1917, limiting and eventually prohibiting the presence of hospital ships in the Mediterranean Sea. Those decisions had been made because of the belief that those ships were also used for military purposes, as prohibited in Art 4 of the Hague Convention No X. According to Art 8, when these ships are employed to injure the enemy they lose their special protection. The fact that he did not know the torpedoing was unlawful acquitted him on based on the same Art 47 of the Germany Military penal code.

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61 Low-ranked soldier.
The Llandovery castle case
In a case similar to the Dover castle one, another British hospital ship was torpedoed. The Llandovery castle was sailing in the Atlantic Ocean, which did not make it a target according to the spring memoranda of 1917. The commander of the ship was fully aware of the fact he was disobeying international law. He was not following any orders (and his disappearance made it impossible to bring him to justice) so this case was brought against two of his officers, Dithmar and Boldt, who helped the commander not only to sink the hospital ship but also to shoot the ship-wrecked survivors to get rid of the witnesses of the first crime. Their actions were in violation of Art 14 of the Hague Convention X. They were both condemned according to Art 47 of the German Military penal code which states that superior orders only absolve a subordinate from guilt when he did not know it was unlawful. The order in this case was, ‘universally known to anybody, including also the accused, to be without any doubt whatever against the law.’ The personal knowledge of the accused did not matter since the crime was supposed to be manifestly unlawful. However, there were both only convicted to four years of prison, which would be the longest sentence given at the Leipzich Trials. As stated by the British Times in July 1921, the German press headlined ‘four years for U-boat heroes’ and both escaped prison with the help of German officers, to the joy of the German public.

The judgement of the case is called by Gaeta an example of the ‘conditional liability’ approach. As discussed above, it only acquits one from responsibility when certain conditions are fulfilled. There are different standards or interpretations towards these conditions. The first one was set at a 1915 Austro-Hungarian Military Court and is based on

whether or not the order was manifestly illegal. The other interpretation of conditional liability is whether or not one knew or should have known the order was illegal.72

**Stenger and Crusius case**
This complicated case involved Stenger, a commanding General who was accused of giving an order to execute French prisoners, and his subordinate Crusius, who followed the order and actually shot the prisoners. Nevertheless Stenger claimed he never gave such an order and testified Crusius must have misinterpreted his strong language.73 However Crusius remained under the false assumption he had received such an order. He was also not aware of the fact that this order would have been illegal. According to Art 47 of the German Military penal code, the not knowing of Crusius should acquit him, However the Court called it a ‘monstrous war measure, in no way to be justified’74 and convicted him. In doing so, the Court continued the idea that started with the Llandovery castle case of manifestly unlawful crimes as an auxiliary test to estimate the subjective knowledge of the defendant. Although convicted of a war crime, only a very mild sentence of two years was assigned.75

1.1.4. **THE FRYATT TRIAL**
The 1916 Fryatt trial took place in occupied Bruges, at a German Court. The defendant, Charles Fryatt, was the captain of a British vessel, the Brussels. In 1915 Fryatt attempted to ram a German submarine when signalled to stop by it, although the Brussels was no combatant member.76 The German Court considered the act illegal and it stated in an official statement it considered Fryatt on orders of the British admiralty, which he supposedly confessed to. There was much protest against the conviction, both by the governments of the United Kingdom and the United States.77 In an official statement the British Government argued that Captain Fryatt was not even a member of the army, acted purely out of self-defence, and that he was only executed by Germany because they considered him a franc-

75 Ibidem, p.28.
77 “The Fryatt trial, British and American protests.” 1916, consulted at: <http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=PBH19190403.2.65.3> date 31/03/14.
Germany agreed he was executed as a *franc-tireur* however they stressed he was following orders of the British Admiralty.79

Dinstein notes Germany uses the absolute liability approach in its judgement of a foreign war criminal, however abandons this approach when it judges its own soldiers during the Leipzich trials. It seems Germany did not apply Art 47 of the German Military Penal Code which rules: ‘a *subordinate* is only criminally responsible under such circumstances when he *knows* that his *orders* involve an act which is a *civil or military crime*.80 Nevertheless the question remains it should apply German military law to a civilian, even if he followed orders from the British Admiralty. Art 443, added in 1914, of the British Manual of Military Law also could not protect Captain Fryatt ‘*Members 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.*'81 Again Captain Fryatt is not a member of the armed forces and it is not clear why Germany should trouble itself with British Military Law.

1.1.5. CONCLUSION

The indignation of the German public with the few, though lenient, convictions shows that there is still a large polarisation between Germany and the Allied forces during the years after the First World War. This polarisation made it difficult to point out certain acts as war crimes when the people saw those as acts by war heroes. The German Supreme Court applied the Art 47 of the German Military Penal code and even added an auxiliary test. Nevertheless the pressure of press and public made it impossible to sanction these atrocities with an equivalent punishment. The Allied forces were divided after the war and not motivated enough to keep pressing for the fulfilment of the Treaty of Versailles. It is said the world was

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not Nevertheless ‘internationally mature’\textsuperscript{82} enough to understand the consequences that had.

\textsuperscript{82} The History of the United Nations War Crimes Commission’ consulted at: <http://www.unwcc.org/un-wartime-history-for-the-future/> date 30/03/14, p. 52.
1.2. THE SECOND WORLD WAR

1.2.1. GENERAL OVERVIEW

During the interbellum intentions arose to prevent war by settling differences in an impartial international Court of Justice. Also the rules of war were also expanded. To continue the Hague Declaration (IV, 2) of 1889 and the Treaty of Versailles of 1919, a Geneva Protocol in 1925 concerning asphyxiating, poisonous or other gases and bacteriological methods of warfare were agreed upon. Other rules of warfare were established with a convention to protect artistic and scientific institutions (1935) and a treaty upon submarine warfare (1936).\(^{83}\)

For many reasons the German defeat of the First World War paved the road for the Second World War. Germany was left with an economical headache and attempts to political stability with the instalment the Weimar Republic, a parliamentary democracy, failed. After the stock market crash of 1929 the economic crisis had a huge impact on Germany followed by electoral victory in 1932 of the Nationalsozialistische Deutsche Arbeiterpartei with Hitler and Goebbels among its leading members.\(^{84}\)

The low number of convictions and executions during the Great War mentioned before was linked to the downfall of morality in 1918. Military Authorities, including Hitler, remained bitter and tried to learn something from the ‘mistakes’ that had been made.\(^{85}\) New rules were established which would guarantee the soldier’s will to fight.\(^{86}\) This was not limited to military law only. Hitler, as chancellor of Germany, wanted to create ‘a new unity of ideology, mind, and will’ to unify the defeated Germans with a sense of national pride and belonging. Military officers were educationally incorporated in the national socialist party and politics to improve this idea of cohesion. The army was Hitlers second pillar and after two years the army was no longer apolitical but national-socialistic, Hitlers political party. Every officer, every soldier

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\(^{83}\) ‘Treaties and state parties to such treaties’ Counseled at: <http://www.icrc.org/ihl/INTRO/120?OpenDocument> date 06/03/14.


was to share the same ideology and, after the Nuremberg laws,\(^{87}\) the same exclusive superior race.\(^{88}\)

The National Socialist Army triumphed in Poland, the Balkan and even France. The German Army seemed immortal. Operation Barbarossa was launched against the *Jewish Bolshevism*.\(^{89}\) It was a clash of ideologies, between civilisations. The goal was extermination of an ideology considered inferior.\(^{90}\) Every soldier was expected to fulfil his share in this battle. To make sure they did, all was explained by a two hour-long speech by Hitler in the Reich chancellery on 30 March 1941. The speech itself was no mass speech, as we know from Leni Riefenstahls films, but was addressed to a variety of commanders. Its contents are lost in history, Nevertheless personal notes from different commanders remain present. One of them was chief of the General Staf, colonel general Halder, another was one colonel general Hoth, who made notes to use when instructing his officers on how to *strenghten the soldier’s healthy feeling of hatheed towards ‘the same Jewish class of people’ in Russia*…\(^{91}\)

‘We must forget the comradesship between soldiers. A communist is no comrade before or after the battle. This is a fight of annihilation … Commissars and GPU man are criminals and must be dealt with as such. This need not mean that the troops should get out of hand. Rather, the commander must give orders which express the common feelings of his man. *Commanders must make the sacrifice of overcoming their personal scruples.*’ Fragments of notes of Halder.\(^{92}\)

‘Russia a constant hotbed of social misfits… Military justice too humane. Always catches the same criminals. Protects them instead of killing them… Crimes of Russian commissars everywhere… they behaved in an Asiatic way. They are not to be spared. No case for military Courts but to be eliminated immediately by the troops.’ Fragments of notes of Hoth.\(^{93}\)

In the speech there was also a reference to an incident in the Jewish village Blonic were fifty prisoners had been shot, without reason, in 1939 by an SS drum-major. The German army

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\(^{87}\) The anti-Semitic Nuremberg Laws divided the population of Germany in different racial groups. Once could be considered a ‘true German’ or a ‘Jew’, based upon ones parentage which could go back four generations.


\(^{89}\) IBIDEM, p.328.

\(^{90}\) IBIDEM, p.403-405.

\(^{91}\) IBIDEM, p.67.

\(^{92}\) IBIDEM, p.72.

\(^{93}\) IBIDEM, p.70-75.
arrested him. Nevertheless Hitler prevented punishment by granting the SS a special jurisdiction.  

From the above notes it seems clear that the established ideology towards Russia, combined with the rumours of acts of Russian commissars and partisans created a justification for war crimes, which were previously not accepted, as the arrest of the Blonic drum-major suggests.

In 1941 communications were distributed among the German army with, as Förster states, ‘a deliberate fusion of military and ideological, punitive and preventive elements …which contributed to a considerable degree, to the concealment of their unlawful nature.’ There were limitations though, and in the notes cited above the importance of the commands of superiors were stressed.. But, as declared on another officer's conference in 1941, superiors should preserve discipline at all times and prevent atrocities of individual soldiers. Otto Ohlendorf, an officer of one of the Einsatzgruppen, small military units ordered to shoot Jews and Partisans testified at his process: ‘If they had not executed the orders which they were given, they would have been ordered by me to execute them. If they had refused to execute the orders they would have had to be called to account for it by me. There could be no doubt about it. Whoever refused anything in the front lines would have met immediate death.’ It is clear discipline was taken very seriously in the German army and critical soldiers could lose their life.

At the end of the Second World War, in contrast to the 150 convictions during 1914-1918, there were 50,000 soldiers sentenced, 33,000 executed. 18,000 of those had been found guilty to desertion. On top of that, 23,000 German soldiers killed themselves. This huge gap between the two wars can be explained by the policy of German war doctors who ignored psychological symptoms and blamed breakdowns to a lack of morality and discipline. This combined with a new wartime military code which made execution possible for the crimes of treason, mutiny, desertion, striking a superior officer, or undermining the fighting power.

95 IBIDEM, p.64.
96 IBIDEM, p. 64-65.
There was also a special rule issued called Zersetsung der Wehrkraft or undermining military morale. It was published as § 5 of a Kriegssonderstrafrechtsverordnung –KSSVO- of 11 August 1938.\(^9^9\)

<table>
<thead>
<tr>
<th>Zersetsung der Wehrkraft - Undermining military morale</th>
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<td>(1) Due to decomposition of the armed force shall be punished with death:</td>
</tr>
<tr>
<td>1. If anybody openly challenges or incites others to refuse to fulfill their duty of service in the German armed forces or their allies, or otherwise openly tries to self-assertively paralyze or subvert the will of the German people or their allies.</td>
</tr>
<tr>
<td>2. Who undertakes to convince a soldier or enlisted reserve to disobedience, resistance, reduction, attack against a supervisor, desertion, unauthorized removal or otherwise undermines the discipline in the German armed forces or their allies.</td>
</tr>
<tr>
<td>3. Who tries on himself or another, by self mutilation, by a calculated deception or otherwise, to escape the fulfilment of military service fully or partially.</td>
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<tr>
<td>(2) In less serious cases can be detected in a penitentiary or prison.</td>
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<td>(3) In addition to the death and the imprisonment, the confiscation of possessions is allowed.</td>
</tr>
<tr>
<td>(4) Any person who makes false or frivolous incomplete information which is destined to himself or another person will be exempt from the fulfillment of military service in full, partially or temporarily punished by imprisonment.</td>
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As we may expect from a paragraph in a statute called ‘undermining military moral’ it’s text remains quite vague and leaves a lot of room for interpretation. This means that any kind of criticism, including questioning or disobeying orders from a superior, could be punished by death.

There were exceptions, of course. Raoul Wallenberg used his position in the German army to save Hungarian Jews. In 1945 he sent an illustrious message to a fellow commander ‘I will

\(^9^9\) Kriegssonderstrafrechtsverordnung, 11/08/1938. Consulted at: <https://www.google.be/search?q=KSSVO&oq=KSSVO&aqs=chrome..69i57j0i3.1228j0j7&sourceid=chrome&espv=210&es_sm=91&ie=UTF-8#> date 12/03/14.
see that you will be charged and hanged as a war criminal if you follow Adolf Eichmann’s order and direct the massacre of the over 60,000 Jews remaining in the Budapest Central Ghetto.” General Schmidthuber, to who this message was addressed, considered Wallenbergs words and did not carry out Eichmans orders.

Any German (soldier) was expected to obey orders, Nevertheless from who? The legal system Hitler installed was organised around his own person. After the Nazi Reichstag passed a law that granted Hitler the power of both president and chancellor, the German army swore an oath of ‘unconditional obedience to the Leader of the German Reich and people, Adolf Hitler, the supreme commander of the armed forces.’ From that day on as Minow states, any order from Hitler could be considered as ‘the supreme law of the land’ and became known as the Führerprinzip.

Not only soldiers were expected to obey any command. The National Socialistic party used the poor political and economical situation in Germany to spread his ideas about superior and inferior races. But even within the superior group some were better suited to lead and others to follow any command that has been given. When in September 1939 a national euthanasia program was installed to murder disabled persons, nurses all over the country participated without protest and would explain after the war they had been given a command and simply carried it out. By no means did they consider themselves a criminal.

1.2.2. THE NUREMBERG TRIALS
The huge amount of unimaginable atrocities of the Second World War, besides all the good intentions of the first Hague conventions, brought the awareness that military and political leaders should be prosecutable for their actions. After the First World War one had settled with the soft, national, Leipzig Trials. The fact that top admirals were set free at the Leipzig Trials, based upon the superior orders defence created a debate among international law

101 Ibidem, p. 3.
102 Ibidem, p. 4.
103 Ibidem, p. 4.
scholars.\textsuperscript{107} During the Second World War the allied forces wanted a bigger statement. Two declarations were made, the declaration of St James of 1942 and of Moscow in 1943 to announce that war criminals, even lower ranking officers, would be punished. In 1943 the United Nations Commission for the Investigation of War Crimes started to look into the possibilities of such a Court.\textsuperscript{108} In this context the defence of superior orders was intensively discussed. Both the United States, the Soviet Union and some Commissions of the United Nations each put forward their own proposition. The Oppenheim theory of ‘\textit{respondeat superior}’, which was incorporated in the Military Law of most of the Allied forces, was abandoned. The Soviet Unions proposition resembled the absolute liability approach. They insisted the defence of superior orders could never be the reason to relieve a defendant of responsibility. This in contrast to the United States who left some space for that defence ‘\textit{when justice so requires}’. The absolute liability approach of the Soviet Union was decided upon.\textsuperscript{109} This approach largely resembles the way captured allied pilots were tried in 1944 by the Third Reich. Their defence of superior orders was also rejected.\textsuperscript{110} As stated in the Nazi Press ‘The pilots cannot validly claim that as soldiers they obeyed orders. No law of war provides that a soldier will remain unpunished for a hateful crime by referring to the orders of his superiors, if their orders are in striking opposition of all human ethics, to all international customs in the conduct of war.’\textsuperscript{111} The defence of superior orders was also denied to the German soldiers who participated in an attempt to murder Hitler in July 1944.\textsuperscript{112}

The fact that there is no auxiliary test, as seen in the Llandovery Castle case, does not mean the criminal liability is expanded towards obedience of all orders. The London Charter is meant to deal with manifestly illegal crimes, which are indicated in the Charter itself.\textsuperscript{113}

Another point of contention in the preparation of the London Charter was the possibility of mitigation of punishment. The Soviet Union didn’t even put it in their suggestion, the United


\textsuperscript{108} BANTEKAS I. \textit{Principles of direct and superior responsibility in international humanitarian law}. Melland Schill studies in International Law, Manchester University Press, 1998, p. 11.


\textsuperscript{111} DINSTEIN Y The Defence of ‘Obiedience to Superior Orders’ in International Law. Sijthoff-Leyden, 1965, p. 113-116.

\textsuperscript{112} IBIDEM, p. 139.

\textsuperscript{113} IBIDEM, p. 127-129.
States insisted upon it. Finally the Soviet Union agreed to put it in the Charter after it was clarified the mitigation of punishment was not meant for the ‘major war criminals’ and only met for those who ‘If he wasn’t too important, the Tribunal might let him off with his life.’\footnote{Dinstein Y The Defence of ‘Obiedience to Superior Orders’ in International Law. Sijthoff-Leyden, 1965, p. 113-116.}

The decision had been made and after the Second World War, the London Charter of the International Military Tribunal installed a criminal Court at Nuremberg. The defence of superior orders was dealt with in Art. 8:

\begin{quote}
‘The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.’\footnote{Charter of the International Military Tribunal, consulted at: <http://avalon.law.yale.edu/imt/imtconst.asp> date: 19/12/2012.}
\end{quote}

Dinstein, and with him many other in the legal doctrine, does not agree with the final formulation of Art 8 and would have preferred the suggestions of the United States which more strictly defined a border of criminal responsibility.\footnote{Dinstein Y The Defence of ‘Obiedience to Superior Orders’ in International Law. Sijthoff-Leyden, 1965, p. 117-119.}

The final art 8 does not follow the absolute liability approach as close as it may seem, though. It may have been impossible to let someone off from any criminal responsibility, even when one was only following an order, but the Court remained the possibility to mitigate the punishment. The imposed penalty is also an important part of how justice deals with a certain crime. As discussed both in the First World War Senger and Crusius case and in the Llandovery castle case there had been a criminal responsibility of the accused, Nevertheless there had been no severe punishment to equal the ‘monstrous war measure, in no way to be justified.’\footnote{Ibidem, p.28.} The decision of guilt may be theoretically important, Nevertheless for the defendant, and perception of the crime, the possibility of mitigation of punishment can be equally essential. Secondly, as seen in the preparations of Art 8, even the Soviet Union, who was never in favour of the mitigation addition, did not have the intention to exclude lower ranking soldiers of the possibility of mitigation of punishment ‘when justice so requires’. The Soviet reluctance was meant towards the principal leaders of the Nazi Regime, not with the individual low ranked soldiers. The Nuremberg Court seems to follow this belief. In the
judgement of Funk, who was Minister of Economics and President of the Reichsbank, the Court states ‘in spite of the fact that he occupied important official positions, Funk was never a dominant figure in the various programmes in which he participated’. The Court saw his unimportance as a mitigating factor Nevertheless he still was convicted to life imprisonment.\textsuperscript{118}

Some of the defendants used the superior orders defence as a way to receive mitigation of punishment. One of them was Keitel of who the Court stated ‘Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification’\textsuperscript{119} Any mitigation was also denied to Jodl, chief of the Operations Staff who tried to defend himself by stating he didn’t ‘see how they can fail to recognize a soldier’s obligation to obey orders. That’s the code I’ve live by all my life.’\textsuperscript{120} He was told by the Court not to ‘shield himself behind a mythical requirement of soldierly obedience at all costs.’\textsuperscript{121}

As explained above, the legal situation in Hitlers third Reich made it very dangerous to refuse orders. A lot of defendants at the Nuremberg trials tried to plead compulsion, which was also not allowed.\textsuperscript{122} Also the above discussed Führerprinzip was offered as a defence and many stated it could not be seen as a regular order and was not subject to Art. 8. Which was countered very effectively by the prosecution who stated that all of this had been known to the creators of the Charter ‘what orders then issued by who and in what country are meant by the Charter of the Tribunal?’\textsuperscript{123} Less theoretical was the statement ‘These men destroyed free government in Germany and now plead to be excuses from responsibility because they became slaves.’\textsuperscript{124} It should be stressed out these quotes are concerning the top of the Nazi organisation, high ranked officers and politicians, not ordinary soldiers.\textsuperscript{125}

\textsuperscript{118} ‘Funk Judgement’ consulted at: <http://avalon.law.yale.edu/imt/judfunk.asp> 20/03/14.
\textsuperscript{119} ‘Keitel Judgement’ consulted at: <http://avalon.law.yale.edu/imt/judkeite.asp> 20/03/14.
\textsuperscript{121} ‘Jodl Judgement’ consulted at: <http://avalon.law.yale.edu/imt/judjodl.asp> 20/03/14.
\textsuperscript{122} DINSTEIN Y The Defence of 'Obiedience to Superior Orders' in International Law. Sijthoff-Leyden, 1965, p. 131-132.
\textsuperscript{123} IBIDEM, p. 144.
\textsuperscript{124} IBIDEM, p. 145.
followed the arguments of the prosecution and stated ‘Hitler could not make aggressive war by himself.’

In their judgement, the judges stated ‘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.’ This statement has been much discussed and interpreted over the years. Dinstein argues this statement did not mean the judges wanted to change the meaning of Art 8, as the possibility of acquittal offered by the judges is only possible when based upon another defence. Art 8 only denies a certain defence, and does not guarantee that one who followed orders cannot be acquitted altogether. Other jurists claim the judges wanted to ease Art 8 and make it possible for a defendant to be excused from criminal liability if he had been the subject of a moral choice, in which his own life or the safety of his family was at stake.

1.2.3. THE TOKYO TRIBUNAL

After the Second World War another international tribunal was set up, the Tokyo Tribunal for war crimes committed ‘in the far East’. Art 6 of its charter seems only more verbose than its Art 8 equivalent of the London Charter, but the two articles are not completely alike:

‘Neither 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.’

Dinstein argues the addition ‘of itself’ means that superior orders are not forbidden as a defence, as was the case at the Nuremberg Tribunal, but only when used as the only defence. This approach of superior orders goes back to the original propositions for the London Charter when only the Soviet Union insisted upon absolute liability. The United

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States, who dominated most of the Court, decided not to publish official transcripts of the judgements.\textsuperscript{130}

While Nuremberg is most known for its ‘superior orders’ defence, the Tokyo Tribunals most famous case is the one of General Yamashita. The United States Supreme Court hold him responsible for the acts of his troops, even when the communication lines were cut by the United States. The command responsability principle coöperates with the principle of superior orders and makes sure both commander and subordinate can be held criminally responsible. The fact that the command responsability principle is more important during the Tokyo Tribunals is no coincidence. The main topic on the Nuremberg agenda was the crimes against humanity, the extermination of Jews and other groups of civilians who whose existence was seen as a problem. The imperial army of Japan had committed huge atrocities against the civil population of China and Anglo-American prisoners of war which were, according to Robertson, ‘in their elemental bestiality even beyond Nazi contemplation’.\textsuperscript{131} Their treatment of prisoners of war especially was seen as caused by a general policy of the military and political Japanese leaders and therefore the Tokyo Tribunal established the command responsibility principle as the Nuremberg Tribunal had established the superior orders principle. However, the Tokyo Tribunal did not manage to judge Emperor Hirohito. He had been granted immunity while his whole entourage was sentenced to death.\textsuperscript{132}

\textbf{1.2.4. ALLIED TRIBUNALS AFTER THE SECOND WORLD WAR}

Apart from the two official International Tribunals of Nuremberg and Tokyo, many Allied Tribunals were set up in occupied countries to bring anyone to justice who had committed a war crime.\textsuperscript{133} By Example, the Far East tribunals tried 6000 war criminals, of which 900 were convicted to death.\textsuperscript{134} Two examples are the United States Dachau Trials and the British and Australian Singapore cases.

\textbf{Dachau trials}

\textsuperscript{131} Ibidem, p. 318-319.
\textsuperscript{132} Ibidem, p. 317-318.
The Dachau Trials\textsuperscript{135} took place at the General Military Government Court at Ludwigsburg, were they, inter alia, treat the deaths of several American airmen who were killed in a variety of ways after their plane crashed. Some were met (or handed over) to angry mobs of bombed civilians, some killed by the ones who found them, or shot by angry German soldiers and police officers. Some of the convicted were acting upon superior orders and used it as a defence. However most of them were still convicted to death or a life sentence.\textsuperscript{136}

In the case of \textbf{Staudinger et al. vs US} three German soldiers were tried for the murder of three American fliers who had crashed. All three of them relied completely upon the defence of superior orders. Staudinger testified: ‘He came to me and told me that Huber and I were to go to Neufahren and if we saw fliers we would have to shoot them. If we didn’t shoot them we would be put against the wall.’ When asked if he took that threat seriously, the defendant answered ‘after everything that happened, yes, and I am convinced that he would have carried out the thread.’\textsuperscript{137} Staudinger also claimed his superior, the Kreigsleiter, had before ordered him to shoot a prisoner and when he refused he stated the next time he would be shot. He also claimed when he replaced his superior for some time and American pilots were captured he did not shoot them but sent them away as he should according to international law.\textsuperscript{138} The other two defendants were subordinates to Staudinger. The first one Herman stated the Kreigsleiter had threatened him four times before to shoot him if he did not obey an order, after that he heard the same Kreigsleiter had received orders to shot any American flier and to shoot any German soldier who refused to obey such an order. The Court stated the Kreigsleiter was not present at the time they shot the American fliers and concluded in both the cases ‘ his desire to cooperate with and please his superior was more important than other consideration’ all three were sentenced to death.\textsuperscript{139} The third member, Huber, stated he did not know what happened to two of the three soldiers until he was ordered by Staudinger to execute the third. He was told by Staudinger if he did not obey he would have

\textsuperscript{135} Dachau was a former concentration camp. Just as with Nuremberg, the Allied forces chose a symbolic location for the new Court. In the end the symbolism grew quite distasteful when was decided to burn the bodies of the convicted of Nuremberg in the ovens of Dachau. Robertson QC G. Crimes Against Humanity. The Struggle for Global Justice. Penguin books, 2012, 4th edition, p. 316.


\textsuperscript{138} IBIDEM

\textsuperscript{139} IBIDEM
to ‘face the consequences’, after that he ‘thought about his family’ and ‘... my mind just stopped’. He also claimed he did not intend to hit the American, as he never hit anything in training, but just shot. A witness concerning the background and character of the defendant was taken in consideration, as was the influence of Staudinger and Herman. The Court allowed some mitigation and sentenced him to life imprisonment.\(^{140}\)

Remarkable is the **US vs Adolf Weger and Julius Schulze** case, in which both defendants were tried for the murder of American fliers and convicted. Nevertheless a petition for review and a petition for clemency were added and signed by all members of the Court. They stated they had not ‘fully understand just what weight and credibilty they were entitled to give the fact that both accused committed the crime charged under the pressure of superior orders.’\(^{141}\) Their sentences have been reduced to life and 25 years of imprisonment. The only difference between there behaviour and those of Staudinger and Herman seems to be their superior was present during the execution.\(^{142}\)

Nevertheless some, who assisted in the execution of American pilots, were acquitted or in the cases of **US v. Karl Neuber** and **US v. Karl Loesch**, sentenced to a light punishment of seven years of prison.\(^{143}\) In his testimony **Karl Neuber**, a driver of the Gestapo, stated he was afraid if he did not fulfil the order he would be shot by his superior and his family transported to a concentration camp. Though he knew the order was illegal the Court considered he had been under severe pressure of his superior. His superior was convicted to death.\(^{144}\) **Karl Loesch** acted in the same circumstances. With the American troops approaching, chief of the section Kueppel ordered him to bring over the command to Weld to shoot the American prisoners at the jail. Karl Loesch protested on which Kueppel exclaimed: ‘Get out of here. Leave this room immediately. I am a responsible and competent man of this section and I do what I intend to do. One more thing like this and you will be punished and


\(^{142}\) At the International Tribunal of the former Yugoslavia, it would also be stated ‘The presence of a superior may be perceived as an important indicium of encouragement and support.’ The Prosecution v. Blagoje Simić, Miroslav Tadić and Simo Zarić, International Criminal Tribunal for the former Yugoslavia IT-95-90-T, Judgement and Sentence 17/10/2003, consulted at: <http://www.icty.org/x/cases/simic/tjjug/en/sim-tj031017e.pdf>, date 02/05/14, p. 58.


punished severely."\textsuperscript{145} Loesch testified he was only ordered to assist in the execution by Kueppler so he would be able to take punitive action in case of a refusal, which made him not dare to refuse. Loesch explained if a Gestapo member disobeyed orders he was brought before a SS or Police Court.\textsuperscript{146}

Since both men only assisted in the execution, and did not distribute the ‘fatal bullet’ one may ask whether or not seven years is a lenient punishment. Especially in the case of Loesch, who was threatened with punishment if he would not fulfil the order. The Court in the Loesch case explains: ‘In the federal practice, no distinction is made between riders, abottors or accessories, all are principals.’\textsuperscript{147} The common sentence for murder is life sentence or death penalty, it can be stated both Loesch and Neuber received a reasonable mitigation of punishment.

In its judgement the Dachau Court based itself upon its own, United States, Military Law of Rules which states the superior orders cannot be used as a defence per se but ‘may be taken into consideration in determining culpability either by way of defence or in mitigation of punishment.’\textsuperscript{148} In the case US vs Adolf Weger and Julius Schulze the Court explains the determining of culpability contains the charge may be changed from murder to manslaughter.\textsuperscript{149}

**Hauptsturmführer Oscar Hans case**

During the Second World War, the Norwegian Lagmannsrett\textsuperscript{150} considered the Hauptsturmführer Oscar Hans case, who was in charge of executions of death sentences of 312 Norwegian ‘patriots’. It seemed that 68 of them were executed without previous trial. Hans, received orders from Fehlis, his superior at the Sicherheitspolizei and a lawyer.\textsuperscript{151} There were specific instructions how to execute the captives: from the fact that an written execution order had to be given, the sentence had to made known to the prisoners to the exact details of the execution itself. It was not forbidden according to international law to


\textsuperscript{146} Ibidem

\textsuperscript{147} Ibidem


\textsuperscript{150} Court of Appeal

\textsuperscript{151} Security Police of Nazi German
execute prisoners as long as an appropriate tribunal convicted them. The Court uses Art 30 of the Hague Convention No. IV 1907, which states that ‘a spy taken in the act shall not be punished without previous trial’. The problem in this case is about the 69 prisoners that were executed but not convicted by any trial. According to Hans, he was aware of the fact that an execution without a trial was not legal, he only did not know the orders, which were given to him by Fehlis, were not the result of a lawful trial. The majority of the Court considered the evidence and decided Hans should have known about the fact that there was no conviction. Two judges dissented about this opinion and the appeal to the Supreme Court, after the appeal of the defendant, followed their protests. The defendant was released because he had not been aware of the fact that the victims had not been tried and sentenced.

**Yoshino case-Singapore cases.**

Yoshino was a member of the Imperial Japanese Army who had executed Paul Lee, a British prisoner. He was asked, not commanded, to fulfill the execution by Sergeant Mukai, who had received those orders himself from a superior. The defendant pleaded he was under the impression the execution was a result of a trial by the military Court and so he considered the order to be perfectly legal. According to the Hague Convention, a prisoner of war may only be executed after a legal trial, the prosecution stated Yoshino did not request whether or not a trial had taken place or ask about the authority of the order.

Also discussed in this case was the difference between an order and a request to assist, which the defendant claimed he regarded as a demand, which he could not disobey. His superior stated he only asked to help him out and would have done the execution himself when defendant Yoshino had refused. There seemed to be no consequences in case Yoshino refused since it was only a question and not an order, which would obligle the defendant to obey. The statement of his superior does not comply with the defendant’s impression of the organization of the Japanese army. The Japanese Manual of Regulations for Operation Art 285 and 286 insists upon obedience of anyone in the army with a superior order, unless it interferes with his own duties. In Art 88 of the Military Orders no. 9 it is also

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155 IBIDEM
stated orders should be carried out immediately and without any question. Besides any regulations, the defendant also states every Japanese soldier is ‘naturally governed by a thought that he must follow the order.’

Yoshino was sentenced with 15 years of imprisonment and would have been more severe if he had not followed a request. The Court did not accept superior orders as a defence, but it also doubted whether or not there had been any superior orders in the first place. It did allow the defence as a mitigation of punishment.

The Einsatzgruppen case
In 1996, the book ‘Hitler’s Willing Executioners: Ordinary Germans and the Holocaust’ was published by Goldhagen. He had a very provocative viewpoint, which claimed the German people were predestined to commit the holocaust, based upon a long history of anti-semitism. He states the vast majority of Germans was prepared to kill Jews and based him upon information concerning the Einsatzgruppen case.

This case, also known as United States v. Otto Ohlendorf dates from 1950. It concerns military bataljons, consisting out of secret police, regular police and SD. They followed the army through the Soviet Union and Poland according to the following order: ‘that in addition to our general task the Security Police and SD, the Einsatzgruppen and the Einsatzkommandos had the mission to protect the rear of the troops by killing the Jews, gypsies, Com-munist functionaries, active Communists, and all persons who would endanger the se’curity.’ So they invaded local villages, and shot all the Jewish civilians, but also other groups criticised by the Nazi Regime as gypsies or partisans. Every defendant pleaded superior orders. Ohlendorf, a commander of one of the groups stated: ‘I had as little possibility as any of the co-defendants here to prevent this order. There was only one thing, a senseless martyrdom through suicide, senseless because this would not have changed anything in the execution of this order, for this order was not an order of the SS, it was an

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order of the Supreme Commander in Chief and the Chief of State; it was not only carried out by Himmler or Heydrich.' The army had to carry it out too.\textsuperscript{160} As discussed before Ohlendorf also stated he would shoot every subordinate who refused the order and would have been shot if he refused himself. He claimed he would pretend sickness because in that case he would leave his 500 subordinates to the assumed lack of care by his successor.

When asked whether or not there was anything he could have done to prevent the atrocities he claimed: ‘If I could imagine a theoretical possibility, then there was only the refusal on the part of those persons who were in the uppermost hierarchy and could appeal to the Supreme Commander and Chief of State, because they had the only possibility of getting access to him. They were, after all, the highest bearers of responsibility in the theater of operations.’\textsuperscript{161}

Ohlendorf was questioned severely by the prosecution. When asked about the right of wrong of the given order he refused to acknowledge the fact he had ‘surrendered his moral judgement to Adolf Hitler’ as the prosecution suggested but finally stated: ‘I surrendered my moral conscience to the fact that I was a soldier, and, therefore, a wheel in a low position, relatively, of a great machinery; and what I did there is the same as is done in any other army, and I am convinced that in spite of facts and comparisons which I do not want to mention again, the persons receiving the orders and all armies are in the same position until today, until this very day.’\textsuperscript{162} Ohlendorf was not allowed mitigation of punishment, according to the prosecution there had to be no moral choice before one could be granted a mitigation of punishment. ‘The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offense. If the nature of the ordered act is manifestly beyond the scope of the superior’s authority, the subordinate may not plead ignorance to the criminality of the order.’\textsuperscript{163} Ohlendorf was found guilty and sentenced to death, as where the

\textsuperscript{161} Ibidem, p. 250.
\textsuperscript{162} Ibidem, p. 306.
40 Befehl ist Befehl, the ‘superior orders’ defence

24 other defendants. The Court stated they were no ‘automaton’ but a soldier should be ‘a reasoning agent’.\textsuperscript{164}

Ohlendorf denied Goldhagen’s recent theory that the German population was acting only upon Anti-Semitism. He stated they were not ordered to ‘kill’ everyone of an inferior race, but to protect the security of Germany. Of course propaganda can be used to depict a certain part of population as a ‘danger’, which has happened by the Nazi Germans of the Jews and Russian ‘bolsjewiks’ among others, but still his theory seems rather a generalisation. According to historian Marc Boone his theory ‘is an example of what happens when one is extremely carried away by a victim perspective and extreme intentionalistic vision: everything is interpreted from a previously stated goal.’\textsuperscript{165} Boone is not the only critic of Goldhagen. Browning states Goldhagen is absolutely wrong when he suggests there was a high degree of voluntarism among the Germans to kill Jews and there were huge amounts of civilians participating in such atrocities. He argues Goldhagen does not take in account context, by example battlefield conditions, and perspective.\textsuperscript{166}

1.2.5. \textit{CONCLUSION}

The Second World War, and especially the Nuremberg trials, provided an important change in international law. Robertson claims the Nuremberg judgement was ‘one legal step forward for humankind’.\textsuperscript{167} The change with the First World War is indeed notable. International war crimes had been defined before, Nevertheless the Nuremberg Trial was the first time an international statement was released to condemn everyone who had participated in war crimes, both the superiors (Nuremberg and Tokyo Tribunal) and subordinates (Dachau, Singapore). This change is also to be seen in the views of the public. While at Leipzig the public rejoiced and supported the ‘escape’ of those convicted, thousands protested against the three acquitted of Nuremberg.\textsuperscript{168}


\textsuperscript{165} Boone M. Historici en hun Metier, Academia Press, Gent, 2007, p. 311.

\textsuperscript{166} Goldhagen D., Browning C. and Wieseltier L. ‘The ‘willing executioners’/‘ordinary man’ debate’ In: Selections from the Symposium, 08/04/1996, p. 25.


\textsuperscript{168} Ibidem, p. 305, 312.
1.3. THE COLD WAR

1.3.1. GENERAL OVERVIEW
Since 1945 many countries have updated their military law. In doing so they abandoned the ‘respondeat superior’ approach and implemented the more practical ‘conditional liability’ approach, as explained during our discussion of the Leipzich trials. Germany, whose Military Criminal Code already adhered to the ‘conditional liability’ principle, added manifest illegality ‘A subordinate who, in compliance with a superior order, has violated the actual prohibition of a punishable offence will only be liable to punishment if it was known to him, or it was manifest from the circumstances known to him, that the act was unlawful.’ The British Manual of Military Law changed as well. In 1944 it stated ‘so long as orders are not obviously unlawful, the duty of the soldier is to obey and to make a formal complaint afterwards’. Ten years later, in the 1956 edition, it said that a soldier might be criminally prosecuted even if the order was not manifestly unlawful. In the 1914 edition of the American Law of Landfare it was stated ‘Individual soldiers who followed orders were exempt from punishment for crimes of war, as were the high government officials who may have given the orders to do so.’

Some claim this changed in November 1944, however the Military Law of Rules already mentioned it in 1940. As discussed in the Dachau trials, one could be prosecuted and the defence of superior orders ‘may be taken into consideration in determining culpability either by way of defence or in mitigation of punishment.’ This shows both the United States and the British Manual of Law were changed from ‘respondeat superior’ at the beginning of the century to ‘absolute liability’ after the Second World War.

Not only the Manuals of Military Law were changed: the jurist Oppenheim, who had inspired the original reversal in the Manuals in the first place, changed his International Law also from ‘respondeat superior’ to ‘absolute liability’. He also stated ‘A different view has occasionally

171 BOOTH C. ‘Prosecuting ‘the fog of war?’ Examining the legal Implications of an alleged massacre of South Korean civilians by US forces during the opening days of the Korean war in the village of No Gun Ri.’ In: Vanderbilt journal of transnational law. Vol. 33, p. 946.
172 Ibidem, p. 962.
been adopted in military manuals and by writers, but it is difficult to regard it as expressing a sound legal principle.¹⁷⁴

During the First World War the Russian Empire was one of the Allied states, as was Stalin’s Soviet Union during the Second World War. In the aftermath of WWII, difficulties and distrust arose in the relations between ‘the communists’ of the USSR and the United States. This struggle is already to be noticed in the handling of the Tokyo Tribunal by the United States. In fear of communism it was strategically interesting to keep emperor Hirohito on the Japanese throne, so any evidence against him disappeared from the trials. The other defendants were happy to oblige and his name was only once accidently mentioned.¹⁷⁵ The war crimes committed by the Japanese Imperial Army were never considered as cruel as the Nazi war crimes. Because of their racial paternalistic view, the war crimes of the ‘uncivilized’ Japanese were less shocking to the Western world, in comparison to the crimes committed by a European state. Even the Nazi crimes in Europe were soon forgotten by the Allied. Lots of war criminals were never tried and simply relocated, most of them to one of the allied countries and some towards a sympathetic regime, where they just continued their career.¹⁷⁶ Even the United States made use of the ‘experience’ of former war criminals such as Klaus Barbie, who hunted communists for the United States Government and was shielded against prosecution in France. According to Robertson, they even pardoned Japanese scientists who participated in experiments on humans, similar to the ones by the Nazi doctor Mengler, as long as their research would end up in the United States instead of the USSR. Jackson, the prosecutor of the Nuremberg trials, stated in despair ‘This country is so heated up about communism at the present moment that the public temper identifies as a friend of the United States any person who is a foe of Stalin’.¹⁷⁷

1.3.2. A NEW WORLD ORDER
The Second World War showed the need for international rules concerning warfare even more as the First World War had done. Four important Conventions soon arose from its

¹⁷⁷ IBIDEM, p. 318.
ashes. The first concerned the most shocking events of the War, the Convention on the Prevention of Genocide.\footnote{Convention on the Prevention and Punishment of the Crime of Genocide, Geneva, 9 December 1948, consulted at: <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=1507EE9200C58C5EC12563F6005FB3E5&action=openDocument> date: 05/04/14.} The United Nations stated ‘genocide is an international crime, which entails the national and international responsibility of individual persons and states’.\footnote{Convention on the Prevention and Punishment of the Crime of Genocide, Geneva, 9 December 1948, consulted at: <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=1507EE9200C58C5EC12563F6005FB3E5&action=openDocument> date: 05/04/14.} In a draft, prepared by the Secretariat of the United Nations Art. 5 stated ‘Command of the law or superior orders shall not justify genocide’.\footnote{Dinstein Y The Defence of ‘Obiedience to Superior Orders’ in International Law. Sijthoff-Leyden, 1965, p. 217.} This Art. 5 did not make it in the final draft of the Convention as it encountered violent opposition, some in the spirit of ‘respondeat superior’, but most was based on more practical reasons.\footnote{Wilner A.M. Superior Orders as a defence to violations of international criminal law. In: Maryland Law Review, vol. XXVI, 1966, p. 141.} Some argued it would not comply with the National Law of most states. Others thought it would unnecessary complicate the Convention and stated it was best to leave it to the Court, the facts of the case and the existing international law.\footnote{At that moment, the United Nations Law Commission was researching the problem of superior orders. Dinstein Y The Defence of ‘Obiedience to Superior Orders’ in International Law. Sijthoff-Leyden, 1965, p. 217-223.} With the Red Cross Conventions of 1949\footnote{Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, consulted at: <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument> date: 05/04/14.} the previously discussed Conventions on the Wounded, Sick and Shipwrecked were updated (I and II), as was the Convention on the Prisoners of War. Another new convention, the Convention on Civilians, was also created, which concerned the treatment of refugees and was inspired by the problems of the Second World War concerning civilians.\footnote{Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, consulted at: <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument> date: 05/04/14.} The same discussion concerning superior orders as encountered during the preparations on the Genocide Convention arose here as well and superior orders were not mentioned in any of the four conventions.\footnote{Dinstein Y The Defence of ‘Obiedience to Superior Orders’ in International Law. Sijthoff-Leyden, 1965, p. 223-225.}

1.3.3. The Adorno and Asch Experiments
After the Second World War the question ‘how was this possible?’ was frequently posed. According to Weijzen, several Jewish scientists who had emigrated to the United States, started to research the link between the individual and authority. One of them was Theodore Adorno, who published his ‘The Authoritarian Personality’ in 1950. He created an anti-semitism scale, ethnocentrism scale and facism scale. The first two measured whether one determines his opinion about Jews or minority groups based upon rational facts or prejudice. The latter whether a consistency existed between prejudice against Jews or minority groups and anti-democratic feelings. His research indicated there was a strong connection indeed. Based upon this, Adorno split people into two groups of personalities, an authoritarian and a democratic one.186

In 1951, Solomon Asch published his findings upon ‘the social and personal conditions that induce individuals to resist or to yield to group pressure when the latter are perceived to be contrary to fact.’187 His research was important in answering the question whether an individual is free to act or subject to group pressure. To understand this relationship between group and individual, is essential to comprehend concepts as propaganda, attitude and public opinion.188 As we have seen, and will be seeing, the factor of public opinion and propaganda play an important role in the decision of an individual to commit war crimes.

Asch invited fifty male college students and put them in groups of 8 persons. He then ordered them to fulfill a simple exercise. Out of the eight persons, one subject believed he was part of a visual perception test, the other seven were actors instructed by Ash to answer in a certain way. Every group was shown several cards with a line next to three other lines. The task was to point out which of the three lines was of the same length as the first line. By letting the actors answer correct or incorrectly, the effects of the group dynamic upon the answer of the test person could be examined. There were also error groups where every actor gave the correct answer and the test persons rarely made mistakes. The results were striking, a substantial majority of the test subjects succumbed to pressure of the group. However, a substantial minority also remained with its own viewpoint, regardless of the group’s opinion. Afterwards the test subjects were interviewed and all stated the group pressure

188 IBIDEM, p. 224.
made them feel uncomfortable.\textsuperscript{189} Asch also experimented with variations, the size of the majority or the presence of a similar thinking ‘partner’ who also gave the right answer.\textsuperscript{190}

1.3.4. **The Korean War**

The first test of the new conventions and world order established after the Second World War came within a decade. The Security Council supported the South Korean case and the United States was granted a consent to undertake military action against North Korea and its ally China.

The Korean war can be seen as the origin of the modern United States’ Rules of Engagement (ROE). A first motivation for these rules was the introduction of weapons of mass destruction. The actions of one single soldier could now cause world wide consequences. Another motivator was that it was not Nevertheless technologically feasible to have a constant undisturbed line of communication between a subordinate and his commander. Lastly, and most important of all, it was noted that ‘an aggressive and skeptical news media has emerged, willing to question the use of military force, capable of projecting the consequences of this force into millions of living rooms, and prepared to focus the wrath of the American people on a political leader who appears to have lost control.’\textsuperscript{191} Political fear of the reaction of the public on atrocities committed by United States soldiers started to rise. Human rights played an important role in the propaganda of this war. Both sides of the conflict stated at the beginning of the war they would respect the new Geneva Conventions. Nevertheless both committed atrocities and claimed that the enemy was committing them as part of their war propaganda.\textsuperscript{192}

The first ROE were created for the air campaign. Fearing an international nuclear war, there were strict restrictions not to cross any state borders. It was the first time since George Washington that an American political leader intervened with such military matters. During this war a few air-to-air combats took place with USSR planes.\textsuperscript{193} Any ROE rules concerning Land Forces had to wait until the Vietnam war, ten years later. Since there was no restriction

\textsuperscript{189} \textit{IBIDEM}, p. 225-235.
\textsuperscript{190} \textit{IBIDEM}, p. 230-233.
whatsoever on each side of the battle, 30,000 American soldiers were killed or wounded each year of the war. In September 1999, a group of Associated Press Journalists from the United States published an article that claimed the existence of a massacre at No Gun Ri by American soldiers upon Korean civilians, all refugees, at the beginning of the Korean War in 1950. It is stated almost 300 Korean refugees died while hiding under a bridge for three days while under constant gunfire. They had been placed under the bridge by American soldiers and been searched for North-Korean spies. The United States soldiers started shooting after a command was given, but due to the fog of war it is very difficult to find out who was responsible for the command. Shooting upon civilian refugees would be a severe breach of the Geneva Convention on the Protection of Civilians, which the United States had helped to design and signed the previous year.

After the publication of the article, the United States Army started an investigation which pointed the No Gun Ri atrocities as an isolated case. There was no proof, it stated, a concrete order existed for the United States soldiers to shoot upon refugees. It is clear, however, there was an understanding between the soldiers and the top of the United States Army: it was allowed to shoot refugees 'as a last resort to control their movements'. There had been incidents in which North Korean soldiers, dressed in civilian clothes, fired upon American soldiers. Also some North Korean spies had been caught among refugees before. The massive displacement of tens of thousands of South Koreans hindered the South-Korean and UN troops, which was seen as a strategy by North Korea. The hastiness with which the decision to involve itself in the Korean war was made, caused the United States military leaders to be unprepared. Their equipment consisted mostly of leftovers from the Second World War, the officers were incapable or too old and most of the soldiers were not...
properly trained for a war.\textsuperscript{200} The first year they were most definitely losing, took a lot of casualties and had to retreat their troops among the Korean territory.\textsuperscript{201} All this caused fear and even panic among the United States soldiers, fear which was instigated by the commanding officer: any Korean could be an armed North Korean spie, therefore every Korean was to be treated as an enemy. This culture of fear explains the understatement at the beginning of the war, to make fire at refugees, at a last resort, acceptable.\textsuperscript{202} Already in the first month of the war, the \textit{New York Times} wrote ‘The American G.I. is now beginning to eye with suspicion any Korean civilian. – ‘Watch those guys in white’- the customary dress among Koreans- is an often heard cry near the front.’\textsuperscript{203} Even in a 1954 published Belgian comic book about the quite realistic adventures of US Air Force pilot \textit{Buck Danny} in Korea this fear of infiltration is shown. The spirit of the age would not let the fiersome pilot kill civilians (and in fact he even saves a whole airplane full of Korean children), but his trusting Army unit is infiltrated by nasty North Korean spies who stick at nothing.\textsuperscript{204} A very Western perspective of course, but it does show that even the European public was aware of the risks of infiltrating spies. To deal with the huge amount of refugees and the risk of spies among them, a \textit{civilian control policy} was installed. This policy created an extensive set of rules, for example no civilian was allowed outside after dark and in battle areas civilians were instructed to leave immediately or would be considered an enemy.\textsuperscript{205}

Contrary to the previously stated conclusions of the United States Army Investigation, plenty of proof of existing orders has been found. The existence of spies and infiltration was known even among the public, and although the 1954 Buck Danny would not shoot upon refugees, in 1950 a Time-Life article was published which made it very clear such orders existed as a, last resort, solution of the problem. The Time-Life article reconstructed a scene in which an order is given concerning approching refugees. It ended with: ‘Well, then, fire into them if you

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\textsuperscript{200} \textsc{Booth} C. ‘Prosecuting ‘the fog of war?’ Examining the legal Implications of an alleged massacre of South Korean civilians by US forces during the opening days of the Korean war in the village of No Gun Ri.’ In: \textit{Vanderbilt journal of transnational law.} Vol. 33, p. 940-946.

\textsuperscript{201} \textsc{ibidem}, p. 940-946.


\textsuperscript{203} \textsc{Booth} C. ‘Prosecuting ‘the fog of war?’ Examining the legal Implications of an alleged massacre of South Korean civilians by US forces during the opening days of the Korean war in the village of No Gun Ri.’ In: \textit{Vanderbilt journal of transnational law.} Vol. 33, p. 947.

\textsuperscript{204} \textsc{Charlier} J-M and \textsc{Hubinon} V. \textit{Korean Skies}, Dargaud, 1954.

Befehl ist Befehl, the ‘superior orders’ defence

have to. If you have to, I said.\footnote{206} In the 1999 Associated Press article, it is stated that a very clear order left an units headquarter: ‘No refugees to cross the front line. Shoot everyone who crosses the front line. Use discretion in case of woman and children.’\footnote{207}

The Far East Air Force was also instructed not to shoot upon anyone who carried something on their head (a woman), anyone in white (traditional clothes of the Korean). Sometimes a commanding post received information containing the presence of North Vietnamese in a certain area. They would pass on the presence of soldiers in disguise and the pilots were expected to shoot in contrast to the previous ROE. In theory they were only supposed to shoot when they were absolutely sure they would not hit a civilian. In practice it proved very difficult to tell one from another. By example, one of the guidelines was Nort Vietnamese spies were going south: ‘Hell, how can we tell a real refugee from a disguised soldier when they’re all moving south?’\footnote{208}

The Korean war shows the United States did have good intentions to make good practice out of the new Conventions. Nevertheless confusion, bad preparation and the fear for the safety of the solders made them forget some good intentions. After the war, under an authoritarian government, many South Korean victims of the No Gun Ri massacre did not dare to step forward out of fear to be marked as a communist. In 1994 survivors started to hand in different claims against the United States and South Korean Government. Those were only taken seriously after the investigation and publication of the facts by Associated Press journalists in 1999.\footnote{209} The Pentagon started its own investigation and its results were criticised by both journalists and historians. However the United States Government never prosecuted an involved soldier and/or commander.

\textbf{United States v. Kinder}


\footnote{207} \textsc{Booth} C. ‘Prosecuting ‘the fog of war?’ Examining the legal Implications of an alleged massacre of South Korean civilians by US forces during the opening days of the Korean war in the village of No Gun Ri.’ In: \textit{Vanderbilt journal of transnational law}. Vol. 33, p. 946.


\footnote{209} \textsc{Booth} C. ‘Prosecuting ‘the fog of war?’ Examining the legal Implications of an alleged massacre of South Korean civilians by US forces during the opening days of the Korean war in the village of No Gun Ri.’ In: \textit{Vanderbilt journal of transnational law}. Vol. 33, p. 950-952.
The No Gun Ri massacre may remain unpunished but there are at least two cases to be found concerning war crimes by United States soldiers as the result of an unlawful order. The first is United States v. Toth. Since he used, successfully, the jurisdiction of the military Court as a defence he is not of importance in the superior orders debate. The second one is Kinder, a United States soldier that had arrested a Korean in the area of an ammunition dump. When he asked for instructions by his superior he was told to ‘take him out to the ammunition dump and shoot him’, in contrast with the regular procedure to deliver him to the Air Police. Kinder fulfilled the order and was charged with premeditated murder. He ‘a soldier or airman is not an automaton but a reasoning agent, who is under duty to exercise judgement in obeying the orders of a superior …’ Kinder was expected by the Court to have understood the fact that his superior was not allowed to give such an order and the order was so ‘palpably’ illegal that any reasonable men would not have fulfilled it. Therefore the Court could not accept the plea of superior orders and Kinder was sentenced to 20 years of imprisonment, which would be reduced later to only two years. According to Art 92 of the Uniform Code of Military Conduct, in the version of 1949, ‘Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a Court-martial may direct’. According to the Military Law of Rules which states, as discussed before with the Dachau trials, superior orders cannot be used as a defence per se but ‘may be taken into consideration in determining culpability either by way of defence or in mitigation of punishment.’ The Court did not accept the defence, just as it almost never did at the Dachau trials. But it did mitigate the punishment of death or life imprisonment: 20 years, reduced to 2 years, which it almost never did at the Dachau trials. The examples discussed before resulted in death, life imprisonment, 25 or even 7 years of imprisonment.

210 Booth C. ‘Prosecuting ‘the fog of war?’ Examining the legal Implications of an alleged massacre of South Korean civilians by US forces during the opening days of the Korean war in the village of No Gun Ri.’ In: Vanderbilt journal of transnational law. Vol. 33, p. 958.
212 The Kinder case had not been the first case in the United States on which the defence of superior orders had been denied. At 1804 the Supreme Court did not accept the defence of superior orders invoked by a Navy captain who had sunk a Danish ship due to illegal orders. A few decades later in 1886 a colonel was convicted for crimes during the Mexican war. The Court stated 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.
214 Booth C. ‘Prosecuting ‘the fog of war?’ Examining the legal Implications of an alleged massacre of South Korean civilians by US forces during the opening days of the Korean war in the village of No Gun Ri.’ In: Vanderbilt journal of transnational law. Vol. 33, p. 965.
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<td>Dachau 1946</td>
<td>murder, superior present</td>
<td>mitigation</td>
<td>25 years</td>
</tr>
<tr>
<td>Schulze</td>
<td>Dachau 1946</td>
<td>murder, superior present</td>
<td>mitigation</td>
<td>25 years</td>
</tr>
<tr>
<td>Neuber</td>
<td>Dachau 1946</td>
<td>assistance execution</td>
<td>mitigation</td>
<td>seven years</td>
</tr>
<tr>
<td>Loesch</td>
<td>Dachau 1946</td>
<td>assistance execution</td>
<td>mitigation</td>
<td>seven years</td>
</tr>
<tr>
<td>Yoshino</td>
<td>Singapore 1946</td>
<td>murder, follow requests</td>
<td>mitigation</td>
<td>15 years</td>
</tr>
<tr>
<td>Kinder</td>
<td>US 1953, Korea war</td>
<td>murder</td>
<td>mitigation</td>
<td>20-2 years</td>
</tr>
</tbody>
</table>

The huge difference between a conviction of 2 years of imprisonment and a death sentence is striking. It seems the United States Military Court judges different when it Prosecutes an United States soldier or not. Perhaps there is an explanation to be found in the circumstances of the offences: when we look at the offenses judged during the Dachau and Singapore trials, only the cases of Staudinger, Herman and Huber in Staudinger et al. vs US (death, death and life imprisonment) and US vs Adolf Weger and Julius Schulze (25 years of imprisonment) seem comparable with the Kinder case. In other cases the accused only assisted in an execution of a prisoner of war and got 25 and 7 years imprisonment. In both cases every defendant believed they would be prosecuted or shot at the spot, if they disobeyed the order. In both cases their superior had expressed such a threat on previous occasions. The difference between the more severe sentences of Staudinger et al. vs US compared to the 25 years of US vs Adolf Weger and Julius Schulz was the fact the superior was not present. As discussed during the general overview of the Second World War, it seems to be very obvious the threats expressed by the superiors were to be taken seriously. It was legally possible to prosecute a soldier for simply refusing an order. United States soldier Kinder on the other hand was never threatened by his superior, nor in fear for his life. Even if we would threat this fact as irrelevant to the case, Kinder is still punished more lenient as the others. Especially when his sentence is reduced to 2 years. It seems the United States succeed to apply the superior orders defence the same way it had during the Dachau trials, only a few years before the 1953 Kinder trial. However it failed to apply them in same way to determine a punishment.

1.3.5. EICHMANN AND THE KAPO TRIALS
Already before the First and Second World War the Zionist movement had been created and immigration towards Palestina had started. Nevertheless the atrocities of the holocaust provided a huge argument for the creation of a Jewish state. When in 1948 the state of Israel became official, it included a community of 200 000 survivors of the Holocaust. Their fate during the Second World War was seen as crucial and it would become an important purpose of Israel, not only to protect, but also to avenge them.

Eichmann was, as described by the prosecutor, 'a new style murderer ... one who carries out killings from his desk'. As head of the Central Office for Jewish Affairs he can be seen as the practical organiser of the holocaust. He arranged deportation, transport and extinction, in a very efficient way and only in command after Hitler, Himmler and Heydrich. After the Second World War, Aldolf Eichmann escaped to Argentina where a sympathizing Perón made good use of former Nazi’s both in the government and in the army. He was abducted by Israeli agents in 1960 and brought to Jerusalem, a breach of Argentinan sovereignty, which created a discussion between Argentina and Israel in the Security Council. Israel excused itself and was pardoned by the Security Council because of the ‘universal condemnation of the persecution of the Jews by the Nazis.’

His trial in Jerusalem was based upon the 1950 Israeli Nazis and Nazis Collaboration law. The law was seen as a complement to the Genocide Convention of 1948. The law was created in purpose of the community of holocaust survivors in Israel. Some of them had complained about other survivors in the community who had ‘collaborated’ with the Nazis. The law was necessary to clarify the people of those feelings and create a ‘community of victims.’

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According to superior orders, this law has a section 8 which states: ‘sections 16, 17, 18 and 19 of the Criminal Code shall not apply to offences under this Law.’\textsuperscript{224} When we take a look at section 19 of the Israeli Criminal Code:

\begin{tabular}{|l|}
\hline
\textbf{Criminal Code Ordinance, 1936, section 19:} \\
\hline
\textit{A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances, that is to say:} \\
\hline
\textit{...} \\
\hline
\textit{b) in obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful.}\textsuperscript{225} \\
\hline
\end{tabular}

This principle of manifest illegality is, according to the District Military Court in the Kafr Kassem case, not to be seen as unlawfulness, but as a ‘conspicuous and flagrant breach of the law’, the same interpretation which has been used at the Leipzich trials.\textsuperscript{226}

An important purpose of the 1950 Nazi Collaboration Law was to help create a national identity, as a quote of the former Israeli prime minister shows: ‘It is not an individual that is in the dock at this historical trial, and not the Nazi-regime alone, but Anti-Semitism through history.’\textsuperscript{227} The show-trail of Eichmann was seen as an Israeli nation binding instrument to illustrate 2000 years of Anti-Semitism, resulting in the Holocaust.\textsuperscript{228} During the proceedings witnesses came to testify forward about the atrocities of the holocaust, which had in fact nothing to do with the guilt or innocence of Eichmann.\textsuperscript{229} Hannah Arendt, one of the many critics of the case was very concerned with the way the Eichmann case was handled. She called the prosecutors plea ‘bad history and cheap rhetoric’\textsuperscript{230} and claimed the sole purpose

\begin{thebibliography}{99}
\bibitem{225} DINSTEIN Y The Defence of ‘Obedience to Superior Orders’ in International Law. Sijthoff-Leyden, 1965, p. 9.
\bibitem{226} IBIDEM, p. 9.
\bibitem{228} WILSON R.A. Writing History in International Criminal Trials. Cambridge University Press, 2011, p. 2-5.
\end{thebibliography}
of a Court is to judge a person, not to answer historical questions such as ‘Why the Germans’ and ‘How did it all happen?’\(^\text{231}\)

Eichmann was charged with fifteen crimes. Four against the Jewish people, seven against humanity (including Czech, Poles, Yugoslavs and Gipsies), one war crime and three as a member of a hostile organisation.\(^\text{232}\) His crimes were not seen as crimes against humanity, but as crimes against the Jewish people.\(^\text{233}\)

The show factor of the trial was not the only problem concerning the legality of the case. The defence was poorer as it has been at the Nuremberg Trials: very little time for preparation, a low budget and no research means. To top it all one of the judges had presided over another Holocaust criminal, Krastner, and had compared him to Faust. A hero, written by Goethe, who sold his soul to the devil. According to the judge that devil was Eichmann. At least the Israeli Knesset made sure the judge in question would be joined by two others.\(^\text{234}\) Eichmann had been able to choose his own attorney and chose Dr. Robert Servatius who had already defended Nazi leaders at Nuremberg. He tried to convince that the trial was not fair, in which he had a point as discussed above, and attacked the jurisdiction of the Court.

Eichmann also used the defence of superior orders and combined it with ‘the act of state’ defence, claiming he had been less important to the extinction of Jews as claimed by the prosecution. An example of his defence is the fact he thought the ‘’ meant ‘finding a home for millions of Jews in Madagascar.’\(^\text{235}\) The prosecution stated, as the prosecution at Nuremberg had done, that the Nazis could not shelter themselves under their own laws. The prosecution also stated he had been able to make a moral choice and it was strange Eichmann would call himself a subordinate when he only had to answer to Hitler, Heimlich and Heydrich.\(^\text{236}\) Since section 8 of the Nazis Collaboration Act made it not possible to plea superior orders, unless as a mitigating factor, it was not allowed. The Court did not consider it just to apply it as a mitigating factor.\(^\text{237}\)


\(^\text{236}\) IBIDEM, p. 363-367.

\(^\text{237}\) IBIDEM, p. 370.
Eichmann is by far the most illustrious person to be tried by this law, However it was called the Nazi and Nazi collaboration law. Between 1951 and 1964, 40 other cases passed the revue, all concerning Jewish Holocaust survivors who had at one part collaborated with the Nazis. Their prosecution fits within an ideology concerning the necessity of a Jewish state. Israel was seen as the only place where Jewish people would ever be safe. Those who chose to remain elsewhere were blind to the dangers surrounding them, it was seen as self-destruction. Nevertheless the safe haven of Israel had to be safe indeed, filled with ‘pure’ victims. To protect the family of the accused, the archive in which the cases are to be found is locked for at least 20 more years. It is not be possible to look at the defence of the accused, However some sources remain available to provide a general idea.

The people who are brought to justice in the Kapo cases are victims themselves. They are Jews locked up in one of the many concentration camps. It is their behaviour towards other victims, in collaboration with the Nazis which is discussed in this cases. They describe, as Ben-Naftali states ‘the grey zone’ between good and evil, but as she criticises, are not able to deal with it and make another distinction as ‘victims-Nazis’. The most interesting case is the one of Enigster. He was a ‘kapo’, or ‘concentration policemen’ which means he was pointed out by the Nazis to coordinate the life in a group of prisoners. He would have to survey food distribution, accompany the prisoners to and supervise the work, end fights and make sure everyone was in time for the daily counting muster. He was accused of cruelty against the other prisoners, his inmates. The Court stated: ‘we reject without a doubt the testimony of the defendant as if he was forced to accept the job … entailed various privileges in the areas of food, living conditions and freedom of movement … if the job was not done to the satisfaction of the Germans, the consequences would have been no more severe than being put out of the job and resume the life of an ordinary inmate.’ In another case, concerning Tarnek they stated: ‘the defendant was placed in charge, against her will, of a block were 1000 persecuted woman lived. She herself was a persecuted person, just as they

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239 IBIDEM, p. 146-150.
240 IBIDEM, p. 146-152 en 168.
The availability to chose whether or not to accept the job seemed to change by how they fulfilled it. Tarnek was considered a ‘just kapo’, Enigster was no, as one of the witnesses described him: ‘a heavy man, a red-neck, dressed in a leather jacket and heavy boots, walking with a wire-club covered with rubber, which he used to hit whoever happens to cross his path’ In other words … a Nazi. The moral complexity in the cases was not served. There was no attention for the complications of human nature, only a stark division between good and evil. The only way they handled this complex situation was by handing out lenient sentences. Enigster, by example, received ten years of imprisonment, which would later be reduced to two.

Both the 1950 Nazi Collaboration law, the Eichmann trial and the Kapo trials are to be seen in the light of a young nation trying to use the past as a legitimation of the future. Israel was in need of unified and purified collective memory and used Eichmann to create a part of it.

1.3.6. THE WAVE, ZIMBARDO AND MILGRAM EXPERIMENTS.
The Eichmann process in 1961 played an important role in the understanding of what repulsive crimes had happened in Europe. A few years later, in 1967, world history teacher Ron Jones could not answer a students question how it was possible humans joined in such atrocities. He planned ‘to do a oneday situation of Nazi Germany to show the students how the German people could have remained silent … I found them so willing to join that it carried over through the week.’ He used slogans as ‘strength through discipline’ and ‘strength through community’ and created an authoritarian atmosphere in class with himself as the great leader. Already at the third day of the experiment, his class had grown to over 40 students, the next day it would count 200 (school cook and principal included). He started to distribute member cards and appoint students to make sure others obeyed the rules of the group. He also gave everyone a specific order. To design a logo, or to tutor youger students

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\[\text{\ldots}^{242}\]
how to sit, byt also to stand guard and made sure people who were no member of the movement could not enter the class.\textsuperscript{251} The next day he noticed how students came te him reporting other students behaviour and started bullying everyone who did not comply to ‘the rules’. One of them decided his teacher needed a bodyguard and followed him around. His students were told it was all part of a new national movement and at the end of the week he summoned them together to watch a message of the presidential candidate of the movement. At the real events they were shown a blank channel followed by an explanatory speech: ‘You thought that you were the elect. That you were better than those outside this room. You bargained your freedom for the comfort of discipline and superiority. You chose to accept that group’s will and the big lie over your own conviction. Oh, you think to yourself that you were just going along for the fun. That you could extricate yourself at any moment. But where were you heading? How far would you have gone? Let me show you your future.’ on which he showed a Nazi parade at Nuremberg.\textsuperscript{252}

Psychological researcher Zimbardo at Palo Alto’s Stanford University heard about the experiment.\textsuperscript{253} In 1971 he started his own experiment with college students. They were divided, by change, in two groups: guards and prisoners. After six days, instead of the intended fourteen, he had to quit the experiment. The guards had established rules and cruel punishments resembling concentration camps and the experiment was getting out of hand. 30 percent of the guards abused their power, some just stood by and some tried to help the prisoners. In the antecedent interviews he had not be able to differentiate how students would react.\textsuperscript{254} In 1973 Milgram published his ‘\textit{The Perils of Obedience}’, where the results of his famous Milgram experiment were explained. His test subjects participated in a ‘learning experiment’ and were told by an authority in a white coat ‘the experiment leader’ to perform electroschocks on someone they believed was another participator in the experiment. 65 percent of the test subjects administered the maximum level of electroschocks, even when it was clearly labeled as ‘danger severe schock’ and the other participant, an actor, cried out in pain, begged to stop or even passed out.\textsuperscript{255} The term ‘\textit{conditional behaviour}’ arose, which

\begin{flushright}
\textsuperscript{252} \textsc{Ibidem}, p. 8-10.
\textsuperscript{253} \textsc{Weinstein} L. ‘Remembering Third Wave.’ Consulted at: <http://libcom.org/history/remembering-third-wave-leslie-weinfield> date 10/04/14.
\textsuperscript{254} \textsc{Weizen} A. \textit{De gewone man als oorlogsmisdadiger}. Davidsfonds Uitgeverij, 2013, Leuven, p. 149.
\textsuperscript{255} \textsc{Ibidem}, p. 1151-154.
\end{flushright}
stated almost everyone was able to commit cruelties while under the influence of group pressure and social isolation. Group pressure and social isolation seem to be the exact environment in which almost every war crimes case took place. Which started the debate whether it is fair to prosecute someone for an act he could not avoid?\textsuperscript{256}

In 1976 history teacher Ron Jones published the results of his ‘experiment’ as a short story. It would be picked up by local newspapers and after ABC made a television film out of it in 1981, major United States newspapers paid attention to the film. Ron Jones and some students were interviewed, However the attention to the story was placed in the television part of the newspaper.\textsuperscript{257}

\textbf{1.3.7. The Vietnam War}
Briefly discussed above, is explained how United States High School children, college students and average civilians responded towards group pressure and authority. All of them in the safe environment of an experiment or classroom. Despite of the fact that the Eichmann process in 1961 had made sure the world understood what repulsive crimes had happened in Europe during the Second World War,\textsuperscript{258} the results were shocking and proved humans could be strongly influenced by group pressure to unconditionally follow orders. Meanwhile on the other side of the world, real Unites Stats soldiers were placed in groups of military units under extreme, and real, circumstances.

After the Second World War France had lost one of his former colonies, France-Indochina, to communist independence rebellions. Since the Cold War against the USSR made the West, under influence of the domino theory, panic at the idea of a march of communism. At the Conference of Geneva, in 1954, it was decided to split France-Indochina in three, of which

\begin{flushleft}
\textsuperscript{256} Bohrer Z. Is the prosecution of war crimes just and effective? Rethinking the lessons from sociology and psychology IN: Michigan Journal of International Law, Vol. 33, summer 2012, p. 753.
\end{flushleft}
Vietnam became a part. Vietnam was spitted again in a communist northern part and a southern republic supported by the United States. The Catholic president they installed turned out to be a dictator and a rebellion which consisted mostly out of communistic Vietcong arose. The United States kept supporting the South Vietnam government, which directed to the Vietnam war, the main conflict of the sixties.\textsuperscript{259}

As explained above, the fear of a nuclear war, lack of communication means and the fear of press criticism, started the use of Rules of Engagement in the United States Army during the Korean War. The United States Air Forces were used with the ROE since the Korean war and they were also frequently used during the Vietnam War. The fear to start a nuclear war or international scandal was more notable concerning the Air Forces as it was concerning the isolated Land Force units. This resulted in the fact that ROE concerning Land Forces was only used for the first time during the Vietnam War.\textsuperscript{260}

The Air Force ROE turned out to be very complex and restrictive: ‘Attacks on populated areas and on certain types of tar-gets, such as hydropower plants, locks and dams, fishing boats, sampans, and military barracks were prohibited.’\textsuperscript{261} They seem to be very specific and exactly as ROE are meant to be: a commander with knowledge of the International Law and of the situation passes them on to his subordinate commanders who pass it on to their subordinate soldiers. In theory it was possible to have different guidelines about how to act in a different region according to the local circumstances.

Nevertheless the same reasons that made the United States Army develop the ROE, provided to be a challenge in exercising it. By example, to avoid international scandals, before bombing a location had to be authorized by a commander, who had to go to an American Embassy. The whole process could take up fifteen days, which was very inefficient. Of course those ROE were not only inspired by international law, but mostly by

\textsuperscript{261} IBIDEM, p. 38.
politics. At the end of the war the quantity of ROE was contained and a debate was started about its necessity. It is possible ROE created more casualties it solved.262

The Land Forces individual soldiers were granted seven information cards, each of them on a different topic. The most famous was the ‘Military Assistance Command Vietnam Pocket Card’ (MACV), containing an introduction explaining the cause of the war and nine rules concerning contact with the Vietnamese population.263 Another card was titled ‘The Enemy in Your Hands’ which stated ‘suspects, civilians, or combat captives, must be protected against violence, insults, curiosity, and reprisals of any kind.’264 When criticism, and worse photographs appeared in the press upon ‘indiscriminate fire and brutality’ against prisoners of war, even more cards were distributed.265 An example of such a card, concerning targets:

<table>
<thead>
<tr>
<th>Individual and crew-served weapons... may be employed by commanders against:266</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Enemy personnel observed with weapons who demonstrate hostile intent either by taking a friendly unit under fire, taking evasive action, or who occupy a firing position or bunker.</td>
</tr>
<tr>
<td>(2) Targets which are observed and positively identified as enemy.</td>
</tr>
<tr>
<td>(3) Point targets from which fire is being received.</td>
</tr>
<tr>
<td>(This will not be construed as permission for indiscriminate firing into areas inhabited by non-combatants).</td>
</tr>
<tr>
<td>(4) Suspected enemy locations when noncombatants will not be endangered.</td>
</tr>
</tbody>
</table>

According to Martins, the text on the card above does not differ from the information presently handed out to United States soldiers.267

The problem during the Vietnam war was, as stated by senior leaders, that soldiers neither understood nor stuck to the ROE directives concerning civilians.268 “Several of the men

265 IBIDEM, p. 49.
266 IBIDEM, p. 50.
267 IBIDEM, p. 51.
testified that they were given MACV’s “Nine Rules” and other pocket cards, but... they had put the cards in their pockets unread and never had any idea of their contents. It was not sufficient to just hand out cards, the rules should also be an important part of the training.

Except for the presence of a clear set of rules, inspired by international law, the circumstances of the Vietnam War played a determining role in the way the war was fought. The Vietcong were not as well equipped or strong as the combined forces of the United States and South-Vietnam. Therefor they started a guerillawar, using mines and boobytraps, which caused fear and frustration among the United States soldiers. A British General who observed the United States forces in Vietnam described the practiced tactics as followed: ‘prophylactic firepower, that means that if you don’t know were the enemy is, make a big enough bang and you may bring something down.’ The invisible warfare also started a culture of mistruts against the Vietnamese civilians. Just as in the Korean war, Vietcong would infiltrate with South-Korean civilians.

In 1956, the United States ‘Law of Warfare’ manual recognized the Geneva Convention of 1949. It also stressed the fact that a soldier could be criminal prosecuted. but considering superior orders it changed again. In the 1946 edition it had pointed out superior orders could not be used as a defence, but may be used in order to determine the culpability or a mitigation of punishment. In 1956 it was added: ‘unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.’

The Calley Case
In 1970, Lieutenant William Calley was tried by the United States Army Military Court for his part in the My Lai massacre, which had taken place in March 1968. It was the result of a military operation to invade the village of My Lai. According to their commander, lieutenant-colonel Barker, it would be completely deserted except for Vietcong warriors. The ordinary civilians had all gone to a nearby market. It was assumed by another commander, captain

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269 Ibidem, p. 49.
270 Ibidem, p. 16.
272 BOOTH C. ‘Prosecuting ‘the fog of war?’ Examining the legal Implications of an alleged massacre of South Korean civilians by US forces during the opening days of the Korean war in the village of No Gun Ri.’ In: Vanderbilt journal of transnational law. Vol. 33, p. 963.
Medina, this meant everyone in the village should be shot. Lieutenant Calley was in charge of the first group of soldiers to invade the village. While entering a lot of captives were taken, mostly unarmed woman, children and elderly men. Calley testified his superior, Captain Medina, who he informed of the captives, radioed him twice. Captain Medina ordered him to ‘waste them’. Hereafter Lieutenant Calley collected the villagers in a ditch and shot them, he repeated this a second time with a different group of prisoners. Calley also insisted all of them had been briefed the previous day by Captain Medina in which ‘it was made plain that everyone in the village was to be shot’.

Calley also insisted he only followed those orders because throughout his military career he was taught to obey. On the other hand Captain Medina denied to have ever given the orders. The Court of Appeal stated it did not matter whether Medina had given the order or not. Since Lieutenant Calley knew the order was illegal he was criminal responsible anyway. The villagers were unarmed, which was testified by a lot of present soldiers, they were only unresisting prisoners. According to both military and international law killing them is murder. As we discussed above, Calley should most certainly have knew the order was illegal, or at least we can state it was printed upon his MACV and ‘the prisoner in your hands’ cards. On those it was very decisively written ‘maltreatment of any prisoner whatsoever is a criminal offence’.

The choice of the Court to minimize the fact whether there had been an order or not connects to the opinion of the Court at the Eichmann case ‘the true test, is not the existence of the order but whether a moral choice was in fact possible’. This is also phrased by the Military Court in this case: ‘soldiers 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. He

278 Ibidem, p 5.
who takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders." The Court used the exact same reasoning as during the Korean Kinder case, ten years before: 'a soldier or airman is not an automaton but a reasoning agent, who is under duty to exercise judgement in obeying the orders of a superior ...' Lieutenant general Peers, who led the My Lai investigation, shared this opinion as well. He stated the lack of communication about the ROE towards soldiers could not be seen as an explanation of the My Lai Massacre: 'there were some things a soldier did not have to be told were wrong—such as rounding up women and children and then mowing them down, shooting babies out of mothers' arms, and raping.'

By its reasoning it seems the Court is not taking in account the stressful circumstances of the situation of the soldiers in Vietnam, or even the circumstances of group pressure as discussed before. Zimbardo would often relate to the My Lai case as a real life example of his 'guards and prisoners' experiment. 'Situations exert much more influence over human behavior than people acknowledge' he states. 'It's an unpleasant message people don't like to hear. But unless you're aware of the vulnerability, you don't recognize how easy it is for simulation to become reality, for the uniform to dominate the person.' Or as one of the students in Ron Jones' third wave class stated: 'people may watch this show and say “Well, I wouldn’t do that. It wouldn’t happen to me.” Well come on.' There is one interesting factor in this case, which makes it so different against all the previous discussed cases. According to lieutenant general Peers, who led the My Lai inquiry in 1979, 25 soldiers participated in the atrocities at My Lai that day. Nevertheless some of the present soldiers did not participate, one of them formulated a formal complaint once he had left the army. There was also a helicopter pilot, passing by who saw the atrocities and, after contacting Calleys superiors, landed and threatened to shoot the other United States soldiers if they would continue to harm the prisoners. He saved some children and complained to his superiors afterwards.

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which let to nothing. Only in 1998 he was rewarded with a Soldier’s Medal. It seems there really were soldiers present who could confront Ron Jones’ student and say ‘it wouldn’t happen to me’. In this case it was possible for the Court to compare a soldier who operated as ‘reasoning agents’ instead of the ‘obedience of an automaton’ Calley demonstrated. Those soldiers had lived in the same circumstances; the same fear and had received the same information.

It is necessary to point out an observation. The Court may have convicted Calley to prison for life and therefore neglected the superior order defence, only three days later president Nixon changed the penalty to house arrest in which he stayed during the appeal. The appeal reduced his sentence to twenty years but in fact it remained house arrest as Nixon had granted him until he was paroled in 1974. When we take a look at the United States v. Kinder case of 1953 there are some resemblances. First of all the Court provides an appropriate sentence, 20 years of prison in the Kinder case, however afterwards it is reduced significantly. Dinstein put the Calley case forward as an important case against the acceptance of the ‘superior orders’ defence. The Court had not accepted the exclusion of guilt, but in practice the defence had been accepted as a considerable mitigation of punishment. In the Calley case this seems even more striking as it had been in United States v. Kinder.

Nixon was criticised severely by the fact that only one soldier was prosecuted, and afterwards released after only four months, which made it look more as a cover-up instead of justice. It was also stated Calley was made a scapegoat for all the committed atrocities in Vietnam and it should have been politicians and military leaders who were prosecuted. The massacre at My Lai resembles the No Gun Ri atrocities in the 1950 Korean War. They can both be seen as ‘staines upon the honor of the United States Army’. Unless the criticism it was the memory of the My Lai massacre which forced the United States to start an

289 Ibidem, p. 601
291 BOOTH C. ‘Prosecuting ‘the fog of war?’ Examining the legal Implications of an alleged massacre of South Korean civilians by US forces during the opening days of the Korean war in the village of No Gun Ri.’ In: Vanderbilt journal of transnational law. Vol. 33, p. 940.
investigation when details about Nu Gun Ri emerged in the press in 1999. Nevertheless the memory of the My Lai massacre and public indignation seemed not strong enough. The investment stated no proof could be gathered and no one would be prosecuted. On the other hand triggered My Lai ‘a process of critical investigation and self-study by the Army.’ Vietnam had been the first time Land Forces were confronted with ROE and the critical opinion of the press would made it seem sure they would do better next time.

293 BOOTH C. ‘Prosecuting ‘the fog of war?’ Examining the legal Implications of an alleged massacre of South Korean civilians by US forces during the opening days of the Korean war in the village of No Gun Ri.’ In: Vanderbilt journal of transnational law. Vol. 33, p. 936.

1.4. Nazi Trials in the Last Decades: Demjanjuk, Barbie, Finta
In July 2013 operation ‘last change’ was launched in the streets of principal German city’s. The campaign was launched by the Siemon Wiesenthal Centrum, which guards the memory of the holocaust. The centre stated at least sixty war criminal would still be alive, however concerning their assumed age it was time to bring them to justice. The Eichmann process in Jerusalem had brought the attention back to war criminals who had escaped justice. In the last few decades some names of Nazi criminals had turned up, and all of them used the superior order defence. By example Klaus Barbie, Touvier, and of course Eichmann. Those trials consider the same crimes people were convicted for during the many tribunals after the Second World War, by example the Nuremberg or Dachau Trial. Only in those cases there has been a serious amount time gap makes of time between the offences and the trial, by example the Finta case dates from 1994 and the Demjanjuk case only from 2012. This time gap makes it difficult to gather evidence, on the other had it provides a distance which should protect the Court for the criticism that has befallen the Nuremberg Tribunal.

Klaus Barbie
Klaus Barbie, a former subordinate SS officer, was arrested in Guyana by France. As a former war criminal he was searched by the French authorities but shielded by the Unites States government, his new employer. He was the only defendant at the Lyon Trial where he had been stationed during the biggest part of the Second World War, which gave him the nickname ‘the butcher of Lyon’. His defence was not based upon superior orders but, among others, upon the fact he claimed to have committed war crimes, which had a ten-year statute of limitation, and not crimes against humanity. Those crimes against humanity were codified at the Charter of Londen, under which Barbie would be tried as well. The defendant did claim Art 8 of the London Charter and argued he should be offered mitigation of punishment since he only followed orders. The Court claimed the mitigation of punishment ‘may’ be considered ‘when justice so requires’, as is stated in Art 8 of the London Charter.

Barbie was convicted for all his accusations, except for one, and condemned to life imprisonment. The death penalty had been abolished in 1981 by president Mitterand.  

**Demjanjuk**

In Cleveland, United States, in 1977, a problem arose with the citizenship of John Demjanjuk, an Ukrainian immigrant, who had moved to the United States in the 1950’s. The Government researched his case and came to the conclusion he must be ‘Ivan the terrible’, an executioner in the Polisch concentration camp of Treblinka. He was known by survivors tales of his cruel behaviour against the prisoners. The United States extradited Demjanjuk to Israel where they started the second holocaust show trial since Eichmann in 1961. Demjanjuk was also to be tried under the 1950 Nazi Collaboration Act, he was charged with crimes against the Jewish people, crimes against humanity, war crimes and crimes against persecuted people. He did not use the superior defence, he denied to be ‘Ivan the Terrible’ as who he had been identified. The evidence was striking, five witnesses had recognised him and there had been found an identification card. Nevertheless Demjanjuk claimed he had simply been a German prisoner of war and had therefor never been to Treblinka. The Court followed the evidence and Demjanjuk was convicted to death, as Eichmann had been, in 1988. There was some protest against the trial, the extradition to Israel was discussed, as were the offences: Lord Denning, a British judge, wrote a ‘letter to the editor’ in the London Telegraph of 1988 in which he touched the subject of superior orders ‘nor were the offences committed against the laws of Germany or Poland. They were committed in the concentration camp at Treblinka and were done by the orders of those in authority in those states’. Demjanjuk may not have used the defence, Lord Denning seemd to use it in his stead. In his appeal Demjanjuk managed to find new evidence which identified someone else as ‘Ivan the Terrible’ and he was aquitted by the Supreme Court of Israel in 1993.  

However new information placed Demjanjuk at the concentration camp of Sobibor, he was admitted back to the United States and extradited again in 2009, this time to Germany. The

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300 IBIDEM, p. 137-179.
301 DENNING ’Trial was contrary to international law’ In: London Telegraph, 28/04/1988, consulted at: <http://www.willzuzak.ca/lp/dennin01.htm> date 14/04/14.
302 IBIDEM, p. 160-162.
Demjanjuk trial started a ‘revival’ of holocaust commentaries. Sommer, at the Institute of Media Research, has researched the online discourse. She distinguished several memory frames, ways how people reconstructed the history of the holocaust. One of those was the ‘victim of circumstances’ memory frame, which touched the superior orders defence. Through this frame, Demjanjuk is a victim of the Nazi Regime itself, he was placed within a concentration camp as a guard against his own will. This memory frame resembles the idea behind the superior orders: the fact that not Demjanjuk is guilty but his superiors at the concentration camp who placed him there. He did not plea superior orders, however he did plea: ‘They were just like Jews forced to work in the gas chambers... either they did their jobs or were murdered.’ The German Court convicted Demjanjuk to five years of imprisonment, but he died before his appeal procedure had finished.

R.v. Finta, 1994
Finta was a captain in the Hungarian Royal Gendarmerie during the Second World War. He emigrated to Canada. Decades later evidence was found he assisted in the deportation of 8000 Hungarian Jews as a fulfilment of the Baky order, a decree of the Hungarian ministry to oblige the Gendarmeries to assist the Nazi regime with the deportation. The case was brought before the Canadian Supreme Court in 1994. Finta pleaded superior orders, compulsion and mistake-of-law. Hungary was in constant fear of a Soviet Invasion, the deportation of Jews did not seem that illogic at the time. Furthermore the Hungarian State fully participated in the deportation. The Court accepted his plea the public opinion and belief concerning Jews as printed in Hungarian newspapers, the open manner by using the national police forces, etc. As Bohrer states, the statement of the Court seems to agree with psychological and sociological research concerning group behaviour. When the press and mass of the public is convinced by an idea it is very difficult as an individual to go against

305 'John Demjanjuk.' In: The Economist, 24/03/2012, consulted at: <http://www.economist.com/node/21550734> date 14/04/14.
307 Ibidem
it. Furthermore, the manifest unlawfulness of Finta’s crimes is excused because ‘there was such an air of compulsion and threat to the accused that the accused had no alternative but to obey the orders.’

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310 BOHRER Z. Is the prosecution of war crimes just and effective? Rethinking the lessons from sociology and psychology IN: Michigan Journal of International Law, Vol. 33, summer 2012, p. 766.
1.5. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

1.5.1. GENERAL OVERVIEW

When Fukuyama proclaimed in 1992 the end of history after the end of the cold war he stated the ‘big stories’ were finally over.\(^{311}\) He shared this optimism about a peaceful future with most of the inhabitants of the Western World. The atrocities of the Second World War would never happen again and world peace was within reach. Only two years after Fukuyama his optimistic statement, Europe would be shocked by the massacres at its own doorstep.

After the First World War two Early Modern Empires came apart: the Austrian Habsburg and the Ottoman Empires. Over time one, or both had covered the territories of Serbia, Croatia, Slovenia, Bosnia, Macedonia and Montenegro. This created a mixed population with various religious and ethnic differences. After the 1919 Treaty of Versailles, a federation was created, under a Serb monarchy. Soon an unified name was proposed: Yugoslavija, South Slav State. Nevertheless a separatist movement existed for diverse parts of the federation. During the Second World War a conflict arose between those in favour of Hitler and followers of the communist leader. He won the civil war and managed a unified federation, administratively divided in six ‘republics’ and two provinces. After his death in 1980 separatist movements arose again. Only Serbia and Montenegro wished to maintain the federation, the other territories preferred independence, Croatia and Slovenia soon declared themselves a sovereign state, Bosnia followed. Former Communists leaders, of who the Serbian Milosovic played the most important role, tried to regain their power manu military. An ‘ethnic cleansing’ program was organised to create space for Serbians in the, now independent, territories. As stated before the population of the area was a very mixed one. Serbians did not only live in Serbia but also in the territories of the other countries, their strategy to create space was copied by Croatian forces.\(^{312}\) Those forces were not one organised army. They were disorganised and consisted of inexperienced troops with a want of proper training and suitable materiel.\(^{313}\) Such a chaotic situation made sure not only subordinate soldiers and

\(^{313}\) The Prosecution v. Thihomir Blasvić, International Criminal Tribunal for the former Yugoslavia IT-95-14-T, Judgement and Sentence, 03/03/2000, consulted at: <www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>, date 01/05/14, p. 252.
policemen were soon involved in the ‘ethnical cleansing’ policy, but also civilians. The most famous of them is Duško Tadić, a freelance torturer. He is seen as ‘the representative of those who had committed the millions of crimes against humanity perpetrated since the end of the Second World War’. The ‘ethnical cleansing’ existed of rape, expulsions, and mass-murder of civilians. Alone in Sebrenica, 8000 Muslim men were murdered, by 1994 there would be 200 000 victims and 4.4 million refugees. The International Community was shocked, but failed to take concrete action. For the first time since Nuremberg, an international criminal tribunal was installed. A United Nations Court of law, established in 1993. It did not make a huge impression in the former Yugoslavia: only in 1996 a peace meeting was organised in Ohio. However a new conflict arose in Kosovo, new atrocities were committed and finally in 2001 the conflict ended after a NATO air offensive.

The ICTY focuses upon the people responsible for the atrocities, more then 160 people have been brought to justice. Not only head of states or army leaders, but also ministers and local police and military leaders. The Court does not focus upon subordinates, but works closely together with local Courts, where those cases are handled. This does not mean the superior orders principle is not important. While browsing through all of those 160 cases it becomes clear it is seldom used. The few cases in which it is discussed however are important. Reported and published in English, eagerly read by journalists, they form a public and important precedent of much more consequence as the judgement of a local Court ever could be. Secondly the decision of the Security Council concerning the composition of the Statute has its consequence in International Law. When one takes a close look at the ICTY Statute, it is clear the article concerning superior orders (Art 7.4) has been inspired by the Art 8 of the Nuremberg Charter.

Art 7 Individual Criminal Responsibility

316 About the ICTY, consulted at: <http://www.icty.org/sections/AbouttheICTY> date: 06/05/14.
318 About the ICTY, consulted at: <http://www.icty.org/sections/AbouttheICTY> date: 06/05/14.
Superior orders is not allowed as a defence, but it may be taken in consideration for mitigation of punishment.

1.5.2. A Mitigation of Punishment

Art 7(4) excludes the principle of superior orders as a defence, it may only be considered as a mitigation of punishment. The Prosecution in the Predrag Banović case points out the difference between those two options. When the defence pleaded: ‘due to his low rank and subordinated position, the Accused Predrag Banović could not resist the power of his superiors and others who committed crimes and forced him and other to commit crimes, too,’ the prosecution argued the low rank of the defendant could not be used as a defence, the defence quickly stated it was only meant as a mitigating circumstance.

In the Čelebići Camp case the position of an accused is further discussed. The defence argued that ‘an accused’s level in the overall hierarchy should be compared with those at the highest level, such that if the accused’s place was by comparison low, a low sentence should automatically be imposed’. But the Court of Appeal did not agree with this reasoning and stated: ‘establishing a gradation does not entail a low sentence for all those in a low level of the overall command structure.’ Instead the Chamber of Appeal pointed out which matters should be taken in consideration to determine a sentence: the level of gravity of the crimes, the particular circumstances and the form and degree of the participation in the crime. When considering mitigating circumstances, by example superior orders, it should be taken in account that ‘in certain circumstances, the gravity of the crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called overall command structure, a very severe penalty is nevertheless

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323 Ibidem, p. 303.
justified.324 This statement by the Appeal Chamber stresses the fact that mitigating circumstances, especially the rank of a subordinate, can only be taken in consideration when the level of gravity of the case permits it. This principle is often repeated, by example in the Delalić et al. and the Višegrad cases.325

The Keraterm Camp case
In the Keraterm Camp case three accused were put to trial. Duško Sikirica, Damir Došen and Dragan Kolundžija, They were charged with crimes against humanity in an area in the North-West of Bosnia-Herzegovina and especially in the detention facility of Keraterm. Sikirica was the camp commander, Došen and Kolundžija two shift leaders, of which only the latter pleaded superior orders as a defence.326 He argued he ‘was never a free agent who could exercise discretion’ and would have been imprisoned in case he deserted. The defence acknowledges the fact that, according to Art 7(4) of the Statute, the principle of superior orders is not available a defence, but stresses it may be taken in consideration as a mitigation of punishment. To illustrate the morality of the defendant, in the defence plea it is argued Kolundžija had often complained to his superior and even threw his weapon at his feet and left for a few days in protest of the circumstances at the camp. Witnesses were brought forward to testify they had not been harmed on the shifts of the accused and he even ‘disobeyed the order of a superior and might have been punished for having allowed men to come out of their room’.327 It was his good behaviour towards the inmates of the camp which would persuade the Court to convict Kolundžija with a light sentence of three years. He also never personally involved himself in any criminal conduct, except for his serving in a detention camp. The Court in its determination of sentence did not mention the defence of superior orders.328

327 IBIDEM, p. 60.
328 IBIDEM, p. 66.
Ivika Rajić

Ivika Rajić was accused of the planning and organising of an attack against the village of Stupni Do, which caused the death of 31 civilians and the mistreatment of 250 Muslim men. While discussing the gravity of the crimes ‘the Trial Chamber also notes that Ivika Rajić was acting upon orders of his own superiors’ according to his defence this ‘does not place him among the gravest perpetrators’ however both the prosecution as the Court stresses the impact of the crimes upon the victims and their family. Nevertheless it is not mentioned again by the Court and is not even brought forward by the defence as a mitigating factor, he was sentenced 12 years of imprisonment.

Darko Mrđa, Vlašić Mountain case

Darko Mrđa was a member of the Intervention Squad in the city of Prijedor. This Squad participated in the violence against the non-Serb population. They escorted a convoy of non-Serbs from two camps and made a selection of 200 military-aged men. While making the selection they were fully aware of the fact those men were to be executed. The selected 200 were loaded in two buses which stopped at a ravine where all 200 were shot by members of the Intervention Squad, including Mrđa. The prosecution stated the victims suffered more as victims of murder usually suffered. 12 persons survived the massacre; Mrđa was, apart from the slaughter of the 200 non-Serbs, also accused of inhumane acts against them and attempt to murder those survivors.

While discussing the gravity of the case, the role of Mrđa is discussed: ‘The Trial Chamber accepts that Darko Mrđa was not the “architect” of the massacre and that he was acting pursuant to orders along with other members of the Intervention Squad. Nevertheless, the fact that he personally participated in the selection of the civilians who were going to be killed and in their subsequent murder and attempted murder, knowing that a widespread and systematic attack against civilians was underway, makes the crimes charged especially

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330 IBIDEM, p. 16.
It is clearly stated the Court accepts the fact that Mrđa was following orders, Nevertheless it takes in account the gravity of the crimes.

### 1.5.3. **LINK WITH DURESS**

In the above-discussed Vlašić Mountain case, the defence also argued that Mrđa acted under the duress of his superiors’ orders and that, if he did not obey, he would have suffered ‘serious consequences’ or even risked death. In his defence plea, the superior orders principle and the principle of duress are combined. According to Dinstein there are many ways in which one can commit a crime, which makes superior order linked to other defences as mistake of law, mistake of fact and especially duress. The defence of superior orders and duress are easily confused. From the moment the soldier’s dilemma between a national command and the violation of international law is weighted with any ‘threats of life and limb’ the superior orders defence is no longer relevant. As discussed in the Dachau cases, the element of duress has often been used to stress the fact that the soldier did not have a choice but to obey, not as a secluded defence. By example at the Nuremberg Trials some judges stated the defence of superior orders could only be used when there had been ‘a moral choice’. This moral choice consisted between the criminal act or a person’s own life and/or his family’s. However, the international law has changed since the Nuremberg Tribunal: in the Vlašić Mountain case the Court made a clear distinction between superior orders and duress: ‘a subordinate may be granted mitigation where he has executed an order without having been directly threatened, such as when the order was not manifestly illegal. Conversely, a person with no superior authority over another may compel him to commit a crime by means of threats.’ Nevertheless, the Court in the Vlašić Mountain case did not accept the defence of duress, as a mitigating factor, since there was no satisfactory proof available. The jurisprudence of the ICTY states duress is not accepted as a defence to

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committing war crimes or crimes against humanity at the ICTY. By example in the Predrag Banović case, it is argued by the Prosecution duress could not be invoked when one took a life wilfully. The trial chamber in Drazen Erdemović case however could not ‘rule it out absolutely’ as a complete defence. But the appeal chamber voted three against two ‘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’. The appeal chamber ruled a new chamber should do the case again. Erdemović was offered the choice to plea guilty and use duress as a mitigating factor or plea not guilty, but sure of the fact the defence of duress alone would not be sufficient for acquittal.

1.5.4. Influence from psychological experiments?
In the Vlašić Mountain case, the defence plea stressed the fact that Mrđa was a ‘low-ranking member of the Intervention Platoon and subject … to the constant anti-Muslim brainwashing and hate propaganda of his superiors’. The presence of propaganda is combined with the assertion that ‘without any doubt, he had the legal and moral obligation to oppose the order given to him … had neither the intellectual nor personal ability to do so.’ The defence also called professor Gallwitz’s forward, to clarify the circumstances of the crime. He concluded that ‘Darko Mrđa acted in a way of reduced self-control caused by acute stress or in a normal emotional reaction, with age, indoctrination, increased brutality, obedience, group-conforming conduct reducing the ability of independent thinking.’ The fact that group pressure indeed has the power to reduce the ability of independent thinking has already been explained by the line experiments of Ash, the prison experiment by

342 Subjects systematically gave the wrong answer in accordance with the opinion of the group, even if they knew it was wrong. ASCH S. E. ‘Effects of Group Pressure Upon the Modification and Distortion of Judgements.’ In: HENLE M. Documents of Gestalt Psychology, 1961, p. 222-223.
Zimbardo\textsuperscript{343} or Milgram’s experiment with electric shocks.\textsuperscript{344} The Prosecution was not impressed with the statement of professor Gallwitz and proclaimed it ‘superficial’. They also argued it showed ‘a lack of understanding of the circumstances of the conflict or of the offence.’\textsuperscript{345} The Court agreed with the Prosecution. It accepted the facts summed up by the defence might have had some influence, however, they were not sufficient to prove Mrda saw no alternative but to cooperate in the murdering of 200 civilians. Finally the Court ruled ‘the orders were so manifestly unlawful that Darko Mrda must have been well aware that they violated the most elementary laws of war and the basic dictates of humanity,’\textsuperscript{346} mitigation of punishment was not allowed and Darko Mrda was sentenced to 17 years of imprisonment in 2003.\textsuperscript{347}

The clarification of a specialist is often used to explain the superior orders defence, by example in the Višegrad case: Dr. Hough, a clinical psychologist, was asked by the defence to analyse defendant Milan Lukić. His conclusion was the defendant was ‘a follower and not a leader’ but no other evidence was presented to persuade the Court Milan Lukić was only following orders. The Court stated it would take the matter in consideration but decided Milan Lukić was not a ‘victim of the chaos of the war’ but an ‘opportunist’ who had taken advantage of the possibility of impunity the situation had offered him.\textsuperscript{348} In the Brčko case, defendant Jelisić was also diagnosed by an expert who concluded he suffered personality disorders as borderline combined with narcissistic and anti-social characteristics. The Court stated even if

\textsuperscript{343} In which a group of students was divided between ‘prisoners’ and ‘guards’. The experiment was put to a stop after only a few days because the ‘guards’ behavior towards the ‘prisoners’ had became problematic. 

\textsuperscript{344} In this famous experiment participants were to follow the commands of an instructor of the experiment (an authority figure) to administer electric shocks to another person whenever he gave a false answer. Even when the other person, in truth an actor, cried out in pain. 60% continued even after the other person had lost conscience.


\textsuperscript{346} IBIDEM, p. 17.

\textsuperscript{347} IBIDEM, p. 31.

\textsuperscript{348} Dr. George Hough is certified by the American Board of Professional Psychology in the United States Milan Lukić Sredoje Lukić ” Višegrad “, International Criminal Tribunal for the former Yugoslavia IT-98-32/1-T, Judgement and Sentence, 20/07/2009, consulted at: <http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tjug/en/090720_j.pdf>, date 05/05/14, p. 326.
it had been proved he was obeying orders, the gravity of the offences still would not allow a mitigation of punishment.349

The Court followed the same reasoning in the Lašva Valley case. Bralo, the defendant, did not plea superior orders. However his defence mentioned he was used by his superiors as ‘a weapon of war’. After he had killed a neighbour who had destroyed his house with a grenade, Bralo was locked up in prison. He was liberated after a few weeks on the condition he would participate in an attack upon a nearby village with as purpose to ‘ethnically cleanse it’. The defence asked apprehension of the Court for the ‘enormous pressures placed on many people of good character and of bad character.’ However the Court did acknowledge the existence of pressure it claimed many civilians were subjected to the same pressure but they did not yield to it. The Court also states there is no evidence of any orders and even if such evidence was to be found the crimes were so manifestly unlawful the defence would not have any mitigatory value.350

1.6. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

1.6.1. GENERAL OVERVIEW
A long long time ago a mythical king, and son of God, Gihange gave each of his children a cup of milk to guard before he went to bed. Mutwa drank it straight away, Muhutu fell asleep and spilled his milk by accident. The following morning only Mututsi was left with a full cup of milk to offer his father, who granted him Rwanda in return. This Rwandan legend with the triumphant Tutsi illustrates the relation between the three Rwandan ethnic groups, before 1994: Twa, Hutu’s and Tutsi’s. Their history goes back to the year 3000 before Christ. Twa hunters and gatherers moved from the surrounding area’s to the hills of Rwanda. In 700 after Christ the Hutu’s migrated, they brought agriculture and after a few centuries, a primitive hierarchical system arose, dividing Rwanda in little kingdoms ruled by a mwami. Dropwise, starting from 1000 after Christ, Tutsi’s started to settle in the Rwandan hills. They brought cattle in need of meadow land which conflicted with the agriculture and hunting lands of Hutu and Twa. The Tutsi’s took over language, culture and the primitive hierarchical system of the Hutu’s. The Hutu mwami kingdoms used the organisatorial structure of the Tutsi’s to develop hierarchy. Leadership was divided between Hutu’s and Tutsi’s. But with the growth of population the scarceness of land became a problem and the cattle wealth of the Tutsi’s gave them the statute of landlord, where Hutu’s would become tenant. This feudal, ubuhake, society changed the ethnic meaning of Hutu and Tutsi to a social and economic meaning. A Tutsi with a low position on the social ladder would become a Hutu and vice versa. In the 19th century colonisation would bring the difference between the two terms back as an ethnic distinction.352

In the 19th century Rwanda was assigned to Germany, which had to transfer the colony to Belgium after the First World War. As a part of Belgian Congo, the former feudal ubuhake system was tightened in order to maintain more gaining for the colonizer. The former hierarchical society was stripped and a tutsification policy was invented in collaboration with Catholic missionaries who had gained influence in Rwanda since the 19th century. When positions of leadership used to be ethnical diffused, Hutu’s, two third of society, were now

351 In a feudal society, as was Rwanda in the period described, a cow would be a source and symbol of wealth and power.
excluded from power and education.\textsuperscript{353} After the Second World War the Belgian colonisers started a emancipatory movement for the Hutu population.\textsuperscript{354} This in opposition to the interests of the, by now one instead of many, Tutsi King and elite who forced independence. A conflict arose between Belgians, Hutu’s and the church on one side against the governing Tutsi’s. The conflict got out of hand and when the Tutsi king died suspiciously in 1959, hundreds of Tutsi’s were killed with \textit{machete}s. This weapon would later become the symbol of the 1994 massacre. Elections were held in 1965 and the hate and discrimination of the Tutsi’s made about one third of them flee the country. Another conflict arose between different groups of Hutu’s and in 1973 a new government was installed. The new president, inspired by the Catholic Church, reduced the discrimination. Passports with an ethnic classification became obliged to organise a quota system dividing power positions in society. In 1994 those passports would be used as a helpfull tool in the genocide. In 1979, the Tutsi refugees, still living in camps in the surrounding countries, started to organise themself in order to get back to their homes. Meanwhile in Rwanda the former economic growth of the last two decades had stopped. Poverty and famine made sure even more mouths to feed were were not welcome in Rwanda. Belgium and France tried to work out a compromise between Rwanda and the Tutsi refugees but in 1990 the latter invaded the country military with a guerilla war. Thousands died and again a large part of the population was forced to fled. This resulted in represailles by the Hutu government and the arise of Hutu militia, to protect the civilisation against the Tutsi guerilla’s. Those militia were formed out of the youth departments of political parties, trained and armed by the military. At first they were secret, but soon they were held in public, while chanting slogans announcing the extermination of Tutsi’s. In 1992, lists were composed, collecting details of ‘the enemy’. Those lists would later be used, together with the ethnic passports, to organise the genocide as militia and soldiers would know exactly were to find the Tutsi family’s in the villages.\textsuperscript{355}

A year before the genocide, in 1993 an unsteady government was composed, with a Hutu president and Tutsi members. This resulted in the 1993 Arusha agreement, which divided the power in the government between ethnic groups, Nevertheless political murders were


\textsuperscript{355} The Prosecutor v. Bizimungu and others, International Criminal Tribunal for Rwanda, 2000-56-I, Consulted at: \textless \texttt{http://www.haguejusticeportal.net/Docs/ICTR/Bizimungu_Indictment_EN.pdf\textgreater } date 28/03/14, p.10-12.
frequent and furthered the distrust.\textsuperscript{356} Violence and fear made the conflict escalate, supported by the media. Newspapers and especially radio stations played a central role in the hostile environment, claiming on air ‘The grave is only half full. Who will help us fill it?’\textsuperscript{357} In 1994 another Hutu president was killed\textsuperscript{358} which resulted in the start of the long planned genocide of Tutsi’s by the Hutu army, militia, gendarmes but also a huge amount of civilians. They were assisted by the local authorities who gathered Tutsi refugees in public places as schools and churches, with the intention to ease the work of the murdering militia.\textsuperscript{359} Not only Tutsi’s were targetted, but also parts of the Hutu population, who refused to go along with the killing.\textsuperscript{360} Some of those moderated Hutu’s had been listed as well, even before the atrocities started.\textsuperscript{361} The United Nations did not act, wich made the slaughter of 800 000 people in the spring of 1994 possible. Most of them were atrociously murdered with a \textit{machete}.\textsuperscript{362} Systematic rape would also be used as a weapon against the Tutsi population.\textsuperscript{363} During the genocide, one of the Tutsi refugee armies tried to undertake action, commiting atrocities itself. They were led by General Kagame, who would later become the new president.\textsuperscript{364} After the massacers his new government tried to install a policy of unification. People returned to their villages which caused victims and perpetrators to live next to each other. By example, minor participants of the genocide were put into reeducation camps. However sent back to their home town after a few years. To deal with the juridical implications and crowded

\textsuperscript{356} \textsc{P}almer R. \textsc{C}olton J. and \textsc{K}ramer L. \textit{A history of the modern world}. McGraw-Hill International edition, 10\textsuperscript{th} edition. p. 962-963.
\textsuperscript{357} \textsc{Robertson QC G.} \textit{Crimes Against Humanity. The Struggle for Global Justice}. Penguin books, 2012, 4\textsuperscript{th} edition, p. 485.
\textsuperscript{358} After the death of the president a power struggle arose. First a military takeover failed, killing many political opponents including the prime minister (who was raped before she was killed, together with the ten Belgian UN soldiers who garded her). Afterwards an interim government was installed which would ‘aid and abed the continuation of the massacres’. The Prosecutor v. Bizimungu and others, International Criminal Tribunal for Rwanda, 2000-56-I, Consulted at: <http://www.haguejusticeportal.net/Docs/ICTR/Bizimungu_Indictment_EN.pdf> date 28/03/14, p.15.
\textsuperscript{360} \textsc{Palmer R. Colton J. and Kramer L.} \textit{A history of the modern world}. McGraw-Hill International edition, 10\textsuperscript{th} edition. p. 962-963.
\textsuperscript{364} \textsc{Robertson QC G.} \textit{Crimes Against Humanity. The Struggle for Global Justice}. Penguin books, 2012, 4\textsuperscript{th} edition, p. 485.
prisons, which kept no less than 80,000 accused\textsuperscript{365} awaiting trial, the government installed the \textit{gacaca} system in the period 2002-2012. The \textit{gacaca}, or grass Courts, were a pre-colonial juridical system which allowed the villages to judge their own accused.\textsuperscript{366} You would not find the superior orders defence or even due process in these Courts, which concerned human rights observers. However the \textit{gacaca} system made reconciliation in certain communities possible and the ‘Courts’ were only allowed to sentence community duty and imprisonment since 2007.\textsuperscript{367}

In Tanzania, the International Criminal Tribunal for Rwanda was installed by the United Nations, which focussed upon the leaders of the genocide.\textsuperscript{368} The death penalty was not allowed and its location in Tanzania created a distance with the vengefulness of the Rwandan government and victims. Distance was also created by the lack of television coverage and translation of Court decisions.\textsuperscript{369}

The Security Council composed a statute in November 1994.\textsuperscript{370} ‘\textit{Remaining convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law will contribute to the process of national reconciliation and the maintenance of peace in Rwanda and the region}.’\textsuperscript{371} In this statute an article concerning Individual Criminal Responsibility was added, which excluded the superior order defence:

\begin{center}
\textbf{Article 6 Individual Criminal Responsibility}\textsuperscript{372}
\end{center}

\begin{quote}
4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in
\end{quote}

\textsuperscript{365} \textit{Robertson QC G. Crimes Against Humanity. The Struggle for Global Justice}. Penguin books, 2012, 4\textsuperscript{th} edition, p. 484.
\textsuperscript{368} \textit{Ibidem}, p. 482.
\textsuperscript{369} \textit{Ibidem}, p. 484.
mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

The above Art 6.4. is almost an exact copy of the Art 8 of the Nuremberg Charter. Superior orders is not allowed as a defence, but it may be taken in consideration for mitigation of punishment.

1.6.2. **LINK WITH COMMAND RESPONSIBILITY**

Similar to the Nuremberg Tribunal, the ICTR focuses on the ‘leaders’ of the genocide, not only ministers or high ranked officers in the army, but also ‘bourgemestres’, on a local level. The difference with Nuremberg is the importance of the principle of ‘Command Responsibility’, also to be found in Art 6 of the Statute:

<table>
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<th>Article 6 Individual Criminal Responsibility</th>
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<td>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.</td>
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*Command Responsibility* and Superior Orders are both essential in the determining of criminal responsibility. No commander ordering war crimes should go unpunished, but neither should the individual soldier who simply acts, as stated in the Calley case, as ‘an automaton’. In the Rwanda cases, it is not only the ordering of illegal commands, which is challenged, but also the incapacity of local officials to control their subordinates. The genocide may have been planned since 1992, there was no Eichmann to organise transport and camps. Trained and armed militia, of young radical people, were set loose upon the country, incited by evoking messages in the media. This was no genocide in camps, far away in Poland and out of sight. This happened in plain view, in the middle of society. In April 1994, genocide and chaos was all that was left of Rwanda. The top of society was either

373 Charter of the International Military Tribunal, consulted at: <http://avalon.law.yale.edu/imt/imtconst.asp> date: 19/12/2012.
planning the massacres or unable to stop them. Teachers, priests and ‘bourgemestres’ were forced to lure Tutsi civilians in public buildings were they could more easily be killed.

1.6.3. **INFLUENCE FROM PSYCHOLOGICAL EXPERIMENTS?**

They were not just following orders; they were cooperating at gunpoint and under severe group pressure. In the **Kayishema case** two scientific experts were called forward as a witness of the defendant to sketch the ‘explosion of the rule of law in Rwanda in 1994’ and the fact that the defendant was ‘overwhelmed by the events and the mob or ‘crowd psychology’ that existed in Rwanda in 1994’. The Court considered them as a mitigating factor but thought them to be of ‘very little weight’ and stated that the explanations of the two scientific witnesses were ‘not particularly probative.’ Which was confirmed in appeal. Another of those local authorities was Dominique Ntawukuliyayo, a sub-prefect. As is stated in the **Ntawukulilyayo case** ‘his participation in the killings may have resulted from external pressures to demonstrate his allegiance to the government rather than from extremism or ethnic hatred’. It seems the experiments concerning group pressure of, by example Ash, did not make an impression upon the judges of the ICTR.

1.6.4. **A MITIGATION OF PUNISHMENT**

As illustrated above with the quotation of the **Ntawukulilyayo case**, the absence of extremism or ethnic hatred is often used as a defence or mitigating factor. Most of the time the family, social and individual background is described, his Tutsi friends, neighbours, wife or other relations and conduct before the genocide. None of those have been accepted in the 44 completed cases as a mitigating factor. On the contrary, the presence of hate is also seen as an aggravating circumstance. Other mitigating circumstances are cooperation with the prosecution, remorse, guilty plea, etc. Superior orders is almost never used, which is logical since the ICTR targets the commanders of the genocide. Sometimes it is used as an

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379 Rwanda was partly organized in prefectures and sub-prefectures, who were governed by prefects and sub-prefects.
example by the prosecution, even when the defendant did not mention it in his defence: ‘The Prosecution maintains that there are no mitigating circumstances. Neither Gérard Ntakirutimana nor Elizaphan Ntakirutimana co-operated with the Prosecutor, nor have they shown that in the commission of these crimes they were merely following orders’. In the Kambanda case the existence of the possible mitigating factor of superior orders is stressed again by the prosecution, however with a strange sense of irony: ‘with regard to the mitigating circumstances, Article 6 (4) of the Statute … The problem should not arise in the instant case, since the accused was the Prime Minister.

Bagosora, Kabilgi, Ntabakuze en Nsengiyumva case

Only once in the the 44 completed cases, the superior orders principle, Art 6 (4) is properly used. This case is called the ‘most important verdict since Nuremberg’ by the British newspaper The Guardian. The central person on trial was Théoneste Bagosora, the highest authority within the Rwandan army and also responsible for the training, arming and organisation of the militia. The second accused was Gratien Kabilgi, a brigadier-general who served at the bureau of the general staff. He was acquitted of all charges.

The other two defendants invoked the superior orders principle as a mitigating factor: Aloys Ntabakuze was a major in the Rwandan Army, he served in an ‘enemy commission’, which was chaired by Bagosora, the first person on trial in this case. Anatole Nsengiyumva was the chief of the military intelligence and also a commander of a local operational sector. In the trial a great deal of attention was paid to the background of the 1994 atrocities. The

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387 The enemy commission was organized to vilify Tutsi civilians. MGRAIL C. ‘Enemies of humanity jailed for war crimes.’ In: The Guardian, 19/12/2008, consulted at: <http://www.theguardian.com/world/2008/dec/19/rwanda-united-nations> date 24/04/2014.
organisation of the Rwandan army is explained, the uniforms of the soldiers are discussed as is the structure of the army and how orders were transferred in the hierarchical chain of command. There is also an analysis of discipline in the Rwandan Armed Forces which points out ‘the overarching principle of obedience and respect for superior rank.’ A special act concerning discipline has even been installed defining discipline as an ‘absolute obedience to the laws, military regulations and to superiors’ and providing certain punishments for the disobedience of orders. However in the same act it is stated ‘a subordinate shall not execute an order to perform an obvious unlawful act.’ This can be seen as an example of the ‘conditional liability’ approach. As discussed above, it only acquits one from responsibility when certain conditions are fulfilled. The condition in this case is the absence of an obvious unlawful act. Many states used this ‘conditional liability’ approach after the First World War, but changed it to the ‘absolute liability’ principle soon after the Second World War.

The importance of discipline in the Rwandan Armed Forces seems clear, however it is also stated this discipline should not be followed unquestioning. The accusations in this case however are so serious they can be seen as obvious unlawful: planning and preparing the genocide, genocide, incitement to commit genocide (Nsengiyumva), crimes against humanity (murder, extermination, rape, persecution and other inhumane acts) and violation of the Geneva Conventions. The Court decided not to allow any mitigation of superior orders:

‘The Chamber is aware that Nsengiyumva and Ntabakuze were at times following superior orders in executing their crimes, …However, given their own senior status and stature in the Rwandan army, the Chamber is convinced that their repeated execution of these crimes as well as the manifestly unlawful nature of any orders they received to perpetrate them reflects

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their acquiescence in committing them. No mitigation is therefore warranted on this ground.  

The abomination of the crimes and the experience and ranking of both the accused were found too grave. The Court did not to allow the mitigation. Ntabakuze and Nsengiyumva were each sentenced to a single sentence of life imprisonment, as was Bagosora, who had not pleaded superior orders.  

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396 IBIDEM, p. 7.
2. Analysis

2.1. Link with Duress and Superior Orders

Link with Duress

In Art 31 of the Statute of Rome different grounds of excluding criminal responsibility are discussed, by example self-defence or a state of intoxication. Duress is one of those grounds:

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<th>Art 31 (d) Grounds of Excluding Criminal Responsibility</th>
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<td>The 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:</td>
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<td>(i) Made by other persons; or</td>
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<tr>
<td>(ii) Constituted by other circumstances beyond that person's control</td>
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From the moment a soldier is not just blindly following the orders from his superior, but threatened to comply he may also use the defence of duress, as explained by Gaeta: ‘The soldier who refuses to obey an order which is legal from the standpoint of national law may well find himself before a firing squad after being Court martialed by his own state. Here the plea of superior orders is often combined with that of duress.’

While examining Art 31(d) it is clear following an order to escape imminent death or serious bodily harm is accepted by the Court as a defence. At the ICTY this distinction between duress and superior orders was clearly made. Also duress was not accepted as a defence, only as a mitigating circumstance. In the Drazen Erdemović case the Court stated: ‘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...’

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innocent human beings.\textsuperscript{399} At the ICTR, ‘external pressures’ are discussed but not accepted by the Court in the \textit{Ntawukuliyayo case}. In this case, but also in many others, the absence of racial hate in the defendant is used to illustrate the ‘external pressures.’\textsuperscript{400} Though the combination must certainly have existed as the chaos at the time suggests, not only Tutsi’s were killed, but also those who sympathised.

This distinction between duress and superior orders is quite recent. At the Nuremberg Trial the only way the superior orders defence, as a mitigating factor, was accepted was when there was no moral choice possible.\textsuperscript{401} This was repeated by the Court at the Eichmann case ‘\textit{the true test, is not the existence of the order but whether a moral choice was in fact possible.}’\textsuperscript{403} With moral choice is intended the choice between one’s life or a member of his family’s safety and carrying out the given order. Otto Ohlendorf, tried under the Nuremberg rules at the \textbf{United States v. Otto Ohlendorf case} testified: ‘\textit{there could be no doubt about it. Whoever refused anything in the front lines would have met immediate death.}’\textsuperscript{403} His defence was not accepted; the Court suspected he agreed more with the orders as the defendant let appear. As in the more recent ICTR \textit{Ntawukuliyayo case}, the Court considered it important to weigh the opinion of the defendant on the orders. Whether or not he was sympathetic with those might have illustrated the real impact of duress.

The strict rules and fear of death of German soldiers who refused an order is also illustrated at the Dachau trials. In those cases the defence of duress is also often used not as a plea by itself but as a part of the superior orders defence. Both in the cases of \textbf{Staudinger et al. vs US}, \textbf{US vs Adolf Weger and Julius Schulze}, \textbf{US v. Karl Neuber} and \textbf{US v. Karl Loesch}, the defendant had been threatened by his superior. By example the superior in the case of


Staudinger et al. it was stated their superior warned ‘*If we didn’t shoot them we would be put against the wall*’. All the other defendants testified of similar circumstances. The Court made a distinction between whether the superior was present at the scene of the crime or not and whether the defendant distributed ‘*the fatal bullet*’ or only participated in the crime. Still the sentence remained severe; life imprisonment and 25 or 7 years of imprisonment were verdicts the Court adjudged. The conditions to accept the combination of duress and superior orders were very strict and narrowly interpreted. The 1994 Canadian *R. v. Finta case* accepted the element of duress, even when it was not proven Gendarmerie Captain Finta risked his life if he refused to go along with the deportation of 8000 Jews during the Second World War ‘*there was such an air of compulsion and threat to the accused that the accused had no alternative but to obey the orders*’.

There is a clear evolution in the link between duress and superior orders. At the Nuremberg Trial duress was seen as a condition to allow mitigation of punishment. Today there is a clear distinction between both defences, the moment one is obliged to follow orders at gunpoint he can use duress as a plea by itself.

**Link with Command Responsibility**

While Nuremberg is most known for its ‘superior orders’ defence, the Tokyo Tribunals most famous case is the one of General *Yamashita*. The United States Supreme Court hold him responsible for the acts of his troops, even when the communication lines were cut by the United States. The command responsibility principle cooperates with the superior orders defence and makes sure both commander and subordinate can be held criminally responsible. In the ICTR Katanga case this principle of co-perpetration is further explained: ‘*originally rooted in the idea that when the sum of the coordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all of the others, and, as a result, can be considered as a principal for the whole crime*’.

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405 BOHRER Z. Is the prosecution of war crimes just and effective? Rethinking the lessons from sociology and psychology IN: Michigan Journal of International Law, Vol. 33, summer 2012, p.766.


superior is not only responsible for an order he gives, but also for the actions of his subordinates he did not order.

There is no discussion who is criminal responsible for an act: the subordinate who carries out or the superior who gives the order. Both are to blame and conviction varies from case to case depending upon different circumstances. As the Dachau trials both superiors and subordinates were punished indiscriminately\(^{408}\); in the United States v. Karl Loesch case the Court explains: ‘in the federal practice, no distinction is made between riders, abottors or accessories, all are principals.’\(^{409}\) The Court however granted a lenient sentence of seven years to ‘accessory’ Loesch.

Both at the Nuremberg Tribunal, the ICTR and the ICTY one focussed upon the ones responsible at the top of society. There are many reasons to do so: limited resources, by example, and heads of state are best placed to prevent future atrocities to happen. Secondly the prosecution of subordinates is often handled by national Courts, by example the Rwandan gacaca.\(^{410}\) On the other hand, it is often less complex to catch a subordinate ‘in action’, the proof is immediately available. By example at the Calley case, the defendant Lieutenant Calley testified his superior, Captain Medina, radioed him twice during the invasion of the village of My Lai. When he asked what he was supposed to do to with the prisoners, Captain Medina ordered him to ‘waste them’.\(^{411}\) Hereafter the defendant collected the villagers in a ditch and shot them, he repeated this a second time with a different group of prisoners. Calley also insisted all of them had been briefed the previous day by Captain Medina in which ‘it was made plain that everyone in the village was to be shot’.\(^{412}\) On the other hand Captain Medina denied to have ever given the orders. He was never convicted, neither was anyone else concerned with the massacre. At the time of the process it was stated in the press Lieutenant Calley was only a scapegoat.\(^{413}\) It is often difficult to prove what is ordered through a radio in the fog of war. Of course this is national law. 


International Tribunals and International Criminal Court, the principle of ‘command responsibility’ is much more complex.

2.2. INTERDISCIPLINARY INFLUENCE

2.2.1. INFLUENCE FROM PSYCHOLOGICAL AND SOCIOLOGICAL RESEARCH

After the atrocities of the Second World War, the ‘how was the possible?’ question arose. Diverse scientists started to work upon the link between personalities, group pressure and authority. Those results all resulted in a behavioural deterministic viewpoint: only a small amount of people is able to resist influences as group pressure and authority. Such pressure is most likely to succeed in a close and distinct social group facing violence and threats. Bohrer gives the example of a domestic society, combat unites, nationalist groups or tribes.

It has to be noted: the results of most experiments are achieved in a safe test environment. The discussed examples of the horrible things people are capable off when placed in a situation fed by fear; propaganda and a strange, hostile environment are even more horrific.

During the discussed cases, it became clear those experiments are, considering the superior orders defence, dealt with suspicion in the International Courtrooms. In the Kayishema case the two scientific experts, brought forward by the defence, tried to explain the fact that the defendant was ‘overwhelmed by the events and the mob or ‘crowd psychology’ that existed in Rwanda in 1994’. It was only considered as a mitigating factor of ‘very little weight’ and the testimony of the experts was seen as ‘not particularly probative.’ In the Darko Mrda case the testimony of a professor Gallwitz, who explained the conduct of the defendant as ‘a normal emotional reaction’ was called ‘superficial’.

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Befehl ist Befehl, the ‘superior orders’ defence

Court even claimed many civilians had been subjected to the same pressure but they did not yield to it.\(^{419}\) In most of the cases using a psychological plea, the absence of proof of orders and the manifestly unlawfulness of the crimes is considered to grave to allow any mitigation. Nevertheless in the **R. v. Finta case**, the statement of the Court seems to agree with psychological and sociological research concerning group behaviour. The influence of press and propaganda are considered to be able to have had an impact on the defendant which was difficult to refuse. Combined with the element of duress, Finta was acquitted.\(^{420}\)

We already discussed the fact that, concerning superior orders, a psychological explanation is not appreciated in Court. Another question remains, *should* it be taken into account? At first sight, the goal of the prosecution of war crimes and crimes against humanity is to influence the behaviour of individuals.\(^{421}\) During the Second World War, at a conference in Moscow, in 1943, Stalin, Roosevelt and Churchill warned their enemy: ‘let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done’.\(^{422}\) As discussed it was during the Second World War soon decided an International Tribunal would be installed and the defence of superior orders would be denied. The promise of justice for the victims of war crimes was a part of propaganda. The question remains how much of such propaganda reached subordinate soldiers. During the atrocities in Yugoslavia, in the nineties, one of the actions the UN Security Council took was to install an international Tribunal in 1993. The massacres continued until the beginning of the new century, However the accusations of The Hague did intensely influence his popularity in Yugoslavia, which made him lose the elections.\(^{423}\) Whether or not the existence of the Tribunal influenced subordinates is not clear.

\(^{421}\) BÖHRER Z. Is the prosecution of war crimes just and effective? Rethinking the lessons from sociology and psychology IN: Michigan Journal of International Law, Vol. 33, summer 2012, p.753.
According to the results of the psychological experiments, humankind suffers from behavioral determinism. We cannot avoid the atrocities we commit in extreme circumstances. Some jurists state the prosecution of war crimes is therefore morally illegitimate. Only in a few occasions should people be punished for their actions. A huge contrast with the opinion of the Court in the Višegrad case, where the opinion of clinical psychologist Dr. Hough was swept away and the defendant was called an ‘opportunist’ who had taken advantage of the possibility of impunity the situation had offered him. The Court connects with the majority of the jurists who reject the integration of sociological and psychological research in the Courtroom. They argue every individual is in complete control over his or her own actions, because most individuals are both rational and dissuadable actors. Only in case when a person acts irrational or undissuadable, is it morally unjust to hold them in account for their actions. Minow states that teaching soldiers the importance of the superior orders defence just doesn’t work at all. ‘Both research and common sense indicate the near futility of teaching soldiers the rule that superior orders do not shield them from punishment or liability for genocide, mass violence or crimes against humanity.’ In diverse Military Law Rules it is clearly stated superior orders cannot be used as a defence and the soldier should always be critical against manifestly unlawful orders. In the Vietnam war, by example, the soldiers were handled a ‘Military Assistance Command Vietnam Pocket Card’ which they could carry around with them and explained what they were allowed an not allowed to do.

It has to be noted that the punishment of war crimes has more justification as the setting of an example. In Rwanda by example, the installation of a International Tribunal Court and especially the installation of the gacaca grass Courts helped society to cope with the perpetrators of genocide.

There is a middle ground, proposed by Bohrer and based upon recent research, which states behaviour results from rational behaviour as well as psychological and sociological

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circumstances. To reconcile the other two viewpoints it should be possible to allow excusatory claims, which result from psychological and sociological research. Those defences could only be used in domestic law. When applied to international law almost no one would be punished for his or her crimes since war crimes and crimes against humanity only happen when those psychological and sociological circumstances appear. Every war crime could be explained by those circumstances. Bohrer discusses the introduction of new defences, but he does not mention the combination of the existing defences with sociological and psychological proof.

According to Bohrer, there is a risk to overestimate the impact of conditioned behaviour. There are perpetrators like the Court in the Višegrad case points out, who are just an ‘opportunist’ taking advantage of the possibility of impunity the situation had offered him.

To fully introduce psychological and sociological elements in the Court room, more research is necessary to distinguish real ‘conditioned violators’ from ‘rational dissuadable violaters’.

Today the distinction is made by judges who estimate the worth of psychological research themselves. Even if they are not necessary educated to take such a discussion. This explains why the decision to take or not take psychological circumstances differs from Court to Court and judge to judge. According to Bohrer There should be a ‘moral line’ drawn to mark the difference between conditioned and rational behaviour, which should be as scientific accurate as possible, while the gasps science leaves are filled with the perception of society of what is excusable behaviour. There is some scientific research available, the problem today is the absence of an international consensus upon what society considers fair.

2.2.2. INFLUENCE FROM HISTORY

Not only psychological and sociological research is keen to explain the occasion and immediate and remote causes of gruesome and shocking crimes. To find such a cause is no straightforward task. Every situation and conflict is different and asks for various approaches.

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432 Ibidem, p.784-786.
Internal dynamic can play a role, external circumstances, or even conflict as Marx suggested with his class struggle.\textsuperscript{433} The danger of an explanation is one does not always take such different circumstances under consideration. One of such dangers is the book ‘Hitler’s Willing Executioners: Ordinary Germans and the Holocaust’ published by Goldhagen in which he claimed the German people were predestined to commit the holocaust, based upon a long history of anti-semitism. He states the vast majority of Germans was prepared to kill Jews and based him upon information concerning the Einsatzgruppen case by analysing or ‘generalising’ the background and testimonies of the defendants.\textsuperscript{434} Any historian may write whatever he likes, however the urge to explain the past can also be found at Court. History was most certainly present at the Eichmann case: ‘It is not an individual that is in the dock at this historical trial, and not the Nazi-regime alone, but Anti-Semitism through history.’\textsuperscript{435} The show trial of Adolf Eichmann was used as a nation binding instrument. The necessity of the new state was illustrated by two thousand years of anti-semitism resulting in the Holocaust. Even the Ancient Egyptians were reviewed.\textsuperscript{436} Hannah Arendt protested against this urge for historical explanation and called the prosecutors plea ‘bad history and cheap retoric’.\textsuperscript{437} She stated the sole purpose of a Court is to judge a person, not to answer historical questions such as ‘Why the Germans’ and ‘How did it all happen?’\textsuperscript{438} The Eichmann case was used as a show trial to find a nation binding element for the new state of Israël, but even in 1989 France the same critical remarks were applicable: ‘What is especially worth criticizing … is not that they wrote bad history, it is that they wrote history at all.’\textsuperscript{439} While the Barbie case should be about the guilt of Barbie himself, a Nazi war criminal, topics as the French national identity, the resistance and collaboration were discussed.\textsuperscript{440} The Demjanjuk trial in 2011 was well handled, and illustrated the need of the public for an explanation of the holocaust.

\textsuperscript{434} GOLDHAGEN D., BROWNING C. and WIESELTIER L. ‘The ‘willing executioners’?ordinary man’ debate’ In: Selections from the Symposium, 08/04/1996, p. 17.
\textsuperscript{438} WILSON R.A. Writing History in International Criminal Trials. Cambridge University Press, 2011, p. 2-5.
\textsuperscript{440} Ibidem, p. 913.
Somers distinguished several memory frames, different ways how people reconstruct the history of the holocaust for themselves.441

History in the Courtroom can be essential to ‘provide the kind of contextual knowledge necessary to make sense of an armed conflict and to see the conflict as a broader social and cultural phenomenon.’442 By example, in August 2009, the International Criminal Court's Outreach Unit visited the Democratic Republic of Congo. They met with military officers and members of the legal profession. The goal of the visit was to absorb extra information concerning the conduct of cases, one of the themes which was treated was the defence of superior orders.443

But History in the Courtroom can also be a dangerous weapon. One can be distraught from the essence of a trial: the criminal responsibility of the defendant and be tempted to establish a truth commission at Court. Historical research can be used very effectively in a trial to sketch a certain image of a defendant. The muse of History can be a very efficient mistress and easily manipulate our view of the past. Whether or not a Court is receptive to such pleas depends from Court to Court and even from time to time. Wilson states most of the International Tribunals are much more eager for such background information in their first trials.444

A historian myself, I dedicated much thought, and pages, to the circumstances of the discussed crimes. To fully understand and compare a judgement, it is necessary to take several factors in account. Especially the legal circumstances as the ROE or Fuhrerprinzip combined with the prevention of soldiers are as important to understand a crime as are the psychological and sociological circumstances.

2.3. SUPERIOR ORDERS TODAY

2.3.1. THE ICC – DEBATE

443 ‘Third outreach mission to Kisangani, Democratic Republic of the Congo.’ 07/09/2007, consulted at:<http://www.iccoci.int/en_menus/icc/structure%20of%20the%20Court/outreach/democratic%20republic%20of%20the%20congo/press%20releases/Pages/pr449.aspx > date 05/05/2014.
After the various tribunals, especially created for a certain conflict, in 1998 the consensus was finally created to establish a permanent International Criminal Court in The Hague.\textsuperscript{445}

**Art 33, Superior Orders and Prescription of Law**\textsuperscript{446}

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.

The Rome Charter allows the plea of superior orders, not just as a mitigating factor, but as a defence against criminal responsibility. There are three conditions, applied cumulatively,\textsuperscript{447} to be allowed to plea this defence and it is not allowed against genocide and crimes against humanity. This means the Rome Statute follows the ‘conditional liability’ approach as by example used in the Llandovery Castle case. According to Dinstein Art. 33 is ‘a dissonant note’ in the use and acceptance of this principle over the last century.\textsuperscript{448} As discussed before, the superior orders defence has only been allowed as a mitigating factor since the London Charter, establishing the Nuremberg Tribunal. The ICTY and ICTR used a similar phrase, as have most International Conventions.\textsuperscript{449} They uphold the ‘absolute liability’ approach.

\textsuperscript{445} About the Court, consulted at: <http://www.icc-cpi.int/en_menus/icc/about%20the%20Court/Pages/about%20the%20Court.aspx> 06/05/14.


\textsuperscript{448} DINSTEIN Y. The Defence of ‘Obedience to Superior Orders’ in International Law. Oxford 2012, p. XXI

It is stated this ‘restoration’ of superior orders is ‘an apparent softening of the international legal approach to war crimes in an age in which such violations are all too prominently before the world’s scrutiny’.\textsuperscript{450} Jurists like Dinstein can see absolutely no motivation for it.\textsuperscript{451} Others see it as a recognition of ‘the essential doctrine as it existed prior to 1945 and which, properly understood, should not have been thought essentially to have changed’.\textsuperscript{452}

Not every International Tribunal since Nuremberg has forbidden the superior orders defence. The different formulation of Art 6 of the Statute of the Tokyo Tribunal, also installed after the Second World War, suggests the defence of superior orders can be accepted, but it cannot be the only defence. Furthermore the decision not to accept superior orders as a defence at the Nuremberg Tribunal was the result of a very long and intense discussion with different drafts and propositions.\textsuperscript{453} Gaeta does not follow this interpretation and sees Art 6 of the Tokyo Tribunal as an example of ‘absolute liability’.\textsuperscript{454}

To fully understand whether or not the Rome Statute has changed the acceptance of the plea of superior orders, it is necessary to fully understand the three conditions and their evolution this century.

2.3.2. THE PERSON WAS UNDER A LEGAL OBLIGATION

The problem with the circumscription of ‘a legal obligation’ is it has the word legal in it. As discussed in the different cases, the ‘legality’ of an order has been the subject of many debates at Court. It is a changeable perception, depending upon which group is in power.

At Nuremberg it was regularly repeated the Nazi regime was an illegal or criminal organization, so being part of it was enough to be put on trial. The convicted Goering called it ‘victor’s justice’ and there are many things to say in its favor. When we study Art 33 of the Statue of Rome we discover the order has to be ‘not manifestly unlawful’ and the person in question had to be ‘under a legal obligation to obey orders of the Government or the superior
in question’. In Nazi Germany around 1943 it was quite lawful to fulfill every act Goering was convicted for, it was the law he was fulfilling. Of course the Art 33 could not have saved him from the gallows since there’s a catch all second paragraph: ‘for the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful’. But the question still remains: when you follow the orders of an unrecognized government or rebel group can you use the superior orders defence?

In the **Pius Nwaoga v. The State Nigeria case** the Supreme Court considers this question. Pius Nwaoga was part of rebel forces, the Biafran army. He was ordered to lead a small group into a village and shoot a specific person there. The trial judge decided there could be no superior orders defence because the order was given by an officer in an illegal army and convicted him of murder, so Pius Nwaoga appealed to the Supreme Court. To consider the aspects of the case they went back in time to 1866 to the **Keighly v. Bell case** where judge Willes, at a British Court, stated that no one should be prosecuted when they were following an order unless that order was manifestly unlawful. Judge Willis expanded his statement during an 1900 case considering the Boer war: ‘In the case before me that order to eliminate the deceased was given by an officer of an illegal regime, his orders therefore are necessarily unlawful and obedience to them involves a violation of the law.’ This approach corresponded with the ‘absolute liability’ approach, which was used in Military Law before the First World War. The Supreme Court agreed with this approach but decided to consider the case from a different angle. They rejected the appellants’ defence because he was wearing civilian clothes at the time of the murder at territory of the Federal Army. According to Oppenheim’s *International Law* this means you are liable for punishment. The question of illegality of an order also arose during colonial struggles. In an attempt to claim independence, the Smith Regime of Southern Rhodesia (Zimbabwe) claimed all prerogative powers. One of them was the right to confirm and fulfil death executions. One of the first three
executions were announced the Common Wealth Office in Londen warned those would be considered ‘murder’ and every executioner risked criminal prosecution.460

A popular criticism for the Nuremberg and Tokyo Tribunals after the Second World War, is they are installed by the victorious nations, according to occupation law.461 In his defence, Eichmann called this ‘ex post facto law’.462 So does jurists Green463 who also puts forward the critic that a victorious state will never put up a tribunal for its own violations. If those are prosecuted it is according to internal criminal law, something that is denied to the ‘loser’.464 Green seems to forget the gesture after the First World War when the German Supreme Court was granted by the Treaty of Versailles to judge the German War Crimes. It all ended in a farce, when the most severe punishment turned out to be a sentence of four years of imprisonment and some of the acquitted ‘escaped’ to Sweden.465 The delusion of the Leipzich Trials increased the hunger to serve injustice with justice during and after the Second World War.

The changeableness of the legality of an order is best illustrated by some examples from the Second World War.

Hitler passed a degree which abolished tribunals in occupied countries, which left the Sicherheitspolizei to themselves to decide on executions whenever they considered it necessary. Which is of course a violation of international law. In the Hans v. Norway case, of the Lagmannsrett466 in 1949, it was stated that everyone who had acted on it was criminal responsible.467 After the second World War the SS, SD and the Gestapo, important organizations during the Nazi regime, were considered to be criminal organizations. Which made every member of it liable for criminal execution.468

460 GREEN L.C. Superior orders in national and international law, Sijthoff, p. 10.
463 GREEN L.C. Superior orders in national and international law, Sijthoff, p. 3.
464 IBIDEM, p. 3.
466 Court of appeal in Norway.
This puts forward an interesting question about the defence of supreme orders. In the definition of the Rome Statute it is stated that the person was under a legal obligation to obey orders of the Government or the superior in question. In this definition they speak of a Government or a superior, it is stated this can be a military or civilian superior. It also states the order should not be unlawful, but according to which law? In Nazi German, every order of the Fuhrer was law and the SS, SD and Gestapo were legal organizations. So whomever was, as happened in the Norwegian Hans case, a member of the Sicherheitspolizei and executed persons without trial was following their national law. Only after the Nazi regime fell those were to be considered illegal.

So perhaps the order should be lawful according to international law? But isn’t the point of those cases that when the order had been lawful according to international law there wouldn’t be a case at all? By example, in the Hans v. Norway case of 1949, an officer of the Sicherheitspolizei was put to trial because he executed 68 persons without a trial. He was responsible for the execution of 312 people, but the Court made clear he was judged only for the 68 non-convicted persons. Also, in this case only a minority of the judges pointed out the fact that the German regulations, used during the executions, had to be considered while judging the conduct of the defendant Hans. Only two judges took it in consideration that the defendant always used the correct, German, procedure. The majority of the judges stated that the German occupation powers had employed violence and used their power contrary to international law, and as a result punishment must be meted out not only to those who had issued the orders but also to their subordinates if blind obedience had made it possible to put into effect such a criminal system. True as it may be, this is not just a person put to trial for war crimes. This is a victor condemning a whole system. It seems not only the defendant is judged but also the Sicherheitspolizei and Hitler himself. The same, criticized, trend is to be seen in the Eichmann case: ‘It is not an individual that is in the dock at this historical trial, and not the Nazi-regime alone, but Anti-Semitism through history.’ The show trial of Adolf Eichmann was used as a nation binding instrument. The necessity of the new state was illustrated by two thousand years of anti-semitism resulting in the Holocaust. He did admit

470 After appeal to the Supreme Court, defendant Hans was released.
that ‘for my work in this program I am guilty. This is quite clear. To this extent I certainly cannot abdicate from responsibility and I could not attempt to do this, because in legal terms I am certainly guilty of being an accomplice to this. This I see clearly myself and I accept this’.\textsuperscript{473} He accepted himself as begin a part of the system, which did ‘something unlawful, something terrible, but to my regret I was obliged to deal with it.’\textsuperscript{474}

The same problem appears in two recent Canadian cases. In the case \textbf{Yassin VS the minister of citizenship and immigration}, Yassin was denied access as a refugee to Canada because he was a former member of the Sarandoy. This used to be a police force under the former communist regime in Afghanistan known to cooperate with the Khad, secret police, which held a practice of torture.\textsuperscript{475} The defendant did not participate in any torture himself but was fully aware of the fact that it would be the fate of every prisoner he handed over to Khad. Yassin stated that he would be considered a traitor if he refused but this was not accepted because ‘he never stated he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.’\textsuperscript{476}

In Canada the Crimes against humanity and war crimes act was passed,\textsuperscript{477} which incorporated the Rome Statue in domestic law. Art 33 was adopted completely but an interpretation was added. At the consideration of this case, the Court articulated that ‘an accused cannot base their defence under subsection on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group or persons that encouraged, was likely to encourage of attempted to justify the commission of inhumane acts or omissions against the population or group’.\textsuperscript{478} This interpretation follows the idea of the London Charter, or the proclamation of the Nazi organizations as criminal by the Nuremberg Tribunal. The fact that it is possible to condemn a whole regime as unlawful, together with everyone who took part in it. But the difference is this interpretation seems more neutral. It is an objective criterion, which tests the former Sarandoy and Khad, not a condemnation of the acts of a vanquished regime. The difference between this case and the

\begin{thebibliography}{9}
\bibitem{473} \textsc{Green L.C.}, Superior orders in national and international law, Sijthoff, p. 295.
\bibitem{474} \textit{Ibidem}, p. 295.
\bibitem{476} \textit{Ibidem}, p. 21.
\bibitem{477} Crimes against humanity and war crimes act (Canada), consulted at: <http://laws-lois.justice.gc.ca/eng/acts/C-45.9/index.html> date: 20/12/12.
\end{thebibliography}
example of Nuremberg and Eichmann is the existence of an objective international standard with conditions.

In the case of **Jeremy Hinzman v. Canada** an U.S. deserter applied for refugee recognition in Canada. He stated that the Iraq war was illegal, which would make him criminal responsible for participating in it. It was stated that ‘a sincerely held political or religious objection to a specific war may some day provide a sufficient basis on which to ground a claim for refugee protection. This, however, represents the “international consensus of tomorrow”, and not the state of the law today’.**479** Hinzmans objections to the Iraq war were interpreted as a political or religious objection and he was not viewed as responsible for the decisions of his government.**480**

Whether or not the plea of superior orders falls on good soil may have depended on the nationality of the soldier. At the **Fryatt case** in 1915 a German Court uses the ‘absolute liability’ approach to judge a British franc-tireur, a few years later at the **Leipzig trials** the Supreme Court goes back to the ‘conditional liability’ approach of Art 47 of the German Military Penal Code to judge the German war criminals. By example in the **Llandovery Castle case** both defendants are convicted and the Court seemed very severe about the crimes ‘to be whatever without any doubt whatever against the law’.**481** Nevertheless they were granted a severe mitigation of punishment and only received a sentence of four years imprisonment. The same result appeared while discussing the Dachau trials. The United States Courts judged the German war criminals severely. But only a few years later during the Korean war they accepted the superior orders plea de facto as a mitigation of punishment in the **Kinder case**.**482** The moral difficulties about such cases, in which a nation tries ‘one of its own’ is the most distinct at the **Eichmann case** and the **Kapo cases**. The only way the Court seems to be able to handle such a moral complexity is by maintaining a stark division between good and evil, followed by a lenient sentence. Gaeta has also noticed the distinction between the use of the ‘conditional liability’ approach for nationals and the ‘absolute liability’

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**482** BOOTH C. ‘Prosecuting ‘the fog of war?’ Examining the legal Implications of an alleged massacre of South Korean civilians by US forces during the opening days of the Korean war in the village of No Gun Ri.’ In: *Vanderbilt journal of transnational law*. Vol. 33, p. 958.
Befehl ist Befehl, the ‘superior orders’ defence

approach for ‘enemy nationals’. In some country’s, by example the Netherlands, this difference is even pointed out in military law.\(^{483}\)

Attention to the circumstances of the cases illustrates the ‘reason’ behind the gap between the statement pronounced by the Court and the final sentence they apply. The Leipzig trial and Calley case were under severe pressure from the public, which could not understand why its war heroes were on trial. Nuremberg and Dachau served the indignation after the Leipzig Trials and the promise made by the Allied forces during the Second World War: ‘let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.’\(^{484}\) As fierce as their promise may be, the goals of the ICTY and ICTR sound much more self-possessed. Their impartiality already seems clear from the location. Dachau was previously the site of an extermination camp,\(^{485}\) Nuremberg had been the city were the Nazi’s held their Reichstag, filmed by Reni Riefenstahl.\(^{486}\) The Hague and Tanzania do not claim a specific symbolic message against the defendants. The United Nations Security Council installed both Courts, provided judges with different nationalities. To top an impartial International Tribunal the International Criminal Court was installed, which will solve most of the critical remarks concerning superior orders and victors justice.

A legal order is not always crystal clear. By example during the Korean War United States soldiers were confronted with a guerrilla war and spies. The scared soldiers were given various and contradictory instructions towards the treatment of civilians and allowed to shoot upon civilians ‘as a last result to control their movements’.\(^{487}\) After the massacre of No Gun Ri there was a discussion whether or not a clear order had been given to the soldiers concerning civilians. By example, what should a random soldier make off “Well, then, fire into

\(^{485}\) IBIDEM, p. 738.
them if you have to. **If you have to, I said**,\(^{488}\) or off the order off Captain Medina to Lieutenant Calley to ‘waste’ the captivated prisoners?\(^{489}\)

### 2.3.3. The Person Did Not Know That the Order Was Unlawful

**Ought to know?**

Mc Coubrey describes the perception of superior orders before 1945 as a ‘ought to know’ doctrine,\(^ {490}\) which we have described as the ‘conditional liability’ approach. In this approach the defence of superior orders could be used as a complete defence, but only when certain conditions have been fulfilled. There are different standards or interpretations towards these conditions. The first one was set at a 1915 Austro-Hungarian Military Court and is based on whether or not the order was manifestly illegal. The other interpretation of conditional liability is whether or not one knew or should have known the order was illegal.\(^ {491}\) At the **Llandovery Castle case** the two conditions were combined and the Court ruled the order in this case was, ‘*universally known to anybody, including also the accused, to be without any doubt whatever against the law.*’\(^ {492}\) The personal knowledge of the accused did not matter since the crime was supposed to be manifestly unlawful and the defendant should have known better.\(^ {493}\) The Leipzich Court followed the same reasoning in the **Stenger and Crusius case**. The manifestly unlawfulness was used as an auxiliary test to estimate the subjective knowledge of the crime. Oppenheim agrees with this concept in his ‘International Law’: *they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity.*\(^ {494}\) In **United States v. Kinder**, a soldier executed a prisoner while complying to the order to ‘take him out to the ammunition dump and shoot him.’\(^ {495}\) The Court stated it was so ‘palpably'
illegal that any reasonable men would not have fulfilled it. About fifteen years later, the **My Lai case** took place. During the Vietnam War, United States Lieutenant Calley massacred a whole village with his men. He claimed it was upon orders by Captain Medina, who denied ever given such orders. The Court of Appeal stated it did not matter whether Medina had given the order or not. Since Lieutenant Calley knew the order was illegal he was criminal responsible anyway.\(^\text{496}\) *There were some things a soldier did not have to be told were wrong—such as rounding up women and children and then mowing them down, shooting babies out of mothers' arms, and raping.*\(^\text{497}\) Adolf Eichmann, one of the practical organisers of the holocaust, tried to escape the manifest unlawfulness of his actions by stating he did not know about the gas chambers and thought Hitler’s ‘*final solution*’ meant ‘finding a home for millions of Jews in Magdagascar.'\(^\text{498}\)

During the Second World War, the Norwegian Lagmannsrett \(^\text{499}\) considered the **Hauptsturmführer Oscar Hans case** \(^\text{500}\) He had executed 69 prisoners but did not know they had not been convicted. The majority of the Court decided Hans should have known about the fact that there was no conviction. Two judges dissented about this opinion and the appeal to the Supreme Court, after the appeal of the defendant, followed their protests. The defendant was released because he had not been aware of the fact that the victims had not been tried and sentenced.\(^\text{501}\) The same problem can be found in the **Yoshino case** of 1946. Yoshino was a member of the Imperial Japanese Army whom had executed Paul Lee, a prisoner while he was under the impression the execution was a result of a trial by the military Court and so he considered the order to be perfectly legal.\(^\text{502}\) In both the Yoshino and Hauptsturmführer Hans case the conduct of the defendant is under question. Even if they did not know about the lack of any trial, should they have taken more pain to invest the rightfulness of the orders? Are they supposed to research the lawfulness of the order? In the Yoshino case the prosecution adduced the defendants lack of inquiry concerning the reason for the execution or the guilt of the accused. In the Hauptsturmführer case the Court followed...


\(^\text{499}\) Court of Appeal

\(^\text{500}\) Security Police of Nazi German


the fact that the defendant could not know the illegality of the order. In the Yoshino case the Court did not. The 17th century jurist Grotius already stated that ‘an executioner who is to put a condemned malefactor to death, ought to be acquainted with the merits of the cause, either by being present at the trial, or by the criminals confession, in order to satisfy himself that the person deserved death’ His intentions are clear: one should not take another’s life easily. However it is not a practical concept and the implication should be considered for each case individually, dependent on the facts and the actions of the executioner in question.

The role of media as prevention of war crimes

Psychological and sociological research points out deterministic behaviour can be reduced. By example, in the Ash experiments of 1951 concerning group pressure, when another person gave the right answer instead of the wrong answer of the other members of the group, the subject was more likely to follow his own opinion and provide the right answer.503 Or, as Bohrer concludes: ‘dissent within a group breaks the group’s coercive psychological influence and leads even those individuals who disagree with the dissenter's view to act in a manner that they independently determine is correct.’504 In the debate whether or not behavioural determinism threatens the legality of International Criminal Law, the importance of the punishment of crimes against humanity and war crimes as a way of prevention is used as a moral justification of International Criminal Law.505 Even when strong group pressure or authority plays a part, a person should have a moral example and moral standard to follow. International Tribunal Courts and the ICC could provide such a standard. The knowledge one could be punished, even when following superior orders, may be a determining factor and holdfast for a subordinate when subject to a difficult moral decision. As stated by the Commission of human rights illegal superior orders and mob rule have the power to subordinate individual conscience and personal objections but on the other hand: ‘the expectation of impunity for violations of international human rights or humanitarian law encourages such violations.’606

505 IBIDEM, p.752-754.
The fact some Court in The Hague or Tanzania punishes war criminals will not influence low ranked soldiers worldwide without a minimum of press attendance. The **Dusko Tadić case**, by example, gained worldwide press attention.\(^{507}\) Tadić was a subordinate, he did not plea the superior orders defence but started a debate at the ICTY whether or not a low ranked soldier should be granted the same punishment as a ‘mastermind’ Milosović. Not only was he the first one to be convicted by the Court, as a subordinate his conviction sent the same message as the indictment of Milosović: neither head of state or low ranked soldier would ever escape justice.

There may have been criticism about the costs and slowness of the ICTY and ICTR, their cases have been followed by the International Community. Perhaps the UN was not able to act and end the atrocities sooner, but they did make sure the victims would not be forgotten and justice would be provided. Bohrer states the ‘continuous visible enforcement’ of war crimes and crimes against humanity is more important as the practical prosecution of everyone who did commit a war crime.\(^{508}\) The visibility of prosecution is very important because this visibility is sends a warning message.

Not only the decisions of the Court after the atrocities have gained attention over the last few decades. Communication has taken an important leap forward. War crimes are to be witnessed by millions of people on CNN, Al Jazeera, BBC World or their own Twitter or Facebook account. This evolution creates a worldwide outcry for justice whenever such a piece of news is filmed by someone’s smartphone and spread within seconds across the world.\(^{509}\) The first pictures of the gas attack in Syria, August 2013, were spread through Social Media.\(^{510}\) According to the World bank, 35.6% of the world population has access to the internet, in 2004 this was only 14.1%, which means this has doubled in only eight years.\(^{511}\) These increasing numbers have the direct result that everyone has become a journalist and possess the medium to get in touch with the rest of the world population. Even

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\(^{508}\) BOHNER Z. Is the prosecution of war crimes just and effective? Rethinking the lessons from sociology and psychology IN: Michigan Journal of International Law, Vol. 33, summer 2012, p.796-799.


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when the Syrian government banned foreign reporters in 2011, it could not ban YouTube or the Social Media, used actively by its own population.\textsuperscript{512}

The Internet also brought us WikiLeaks, which created with its ‘electronic dead letter-box’ an opportunity for government officials to bring out shocking government behaviour.\textsuperscript{513} At the Chaos Communion Congress at the end of 2013, J. Assange, founder of WikiLeaks, called up computer scientists around the world to join secret services or government organisations. In his opinion, the only way to create change is to leak information and force transparency.\textsuperscript{514}

Bohrer states the presence of a working, enforced and fair criminal justice system is as essential as the access for a huge part of a population to information about this system. He is contradicted in his view by some psychological and sociological research. By example the ‘bystander effect’, which states no one, will help a victim because they suppose someone else would have intervened if the act was truly wrong.\textsuperscript{515}

2.3.4. The order was not manifestly unlawful

Most of the crimes the International Criminal Court handles are of such a nature they are manifestly unlawful in the first place.\textsuperscript{516} In practice, the regulation of Art 33 does not differ that much from the London Charter. None of the defendants at the Nuremberg Tribunal would have been allowed to use the defence as described in Art 33 either. The London Charter was meant to deal with manifestly illegal crimes indicated in the Charter itself.\textsuperscript{517} The exception of Art 33 (2) forbids using the defence concerning crimes against humanity and genocide. The International Tribunal of Nuremberg was only to deal with such crimes. In Art 7 of the Rome Statute it is stated: ‘any of the following acts …(by example: murder, extermination, torture, enslavement or rape) … when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.\textsuperscript{518} A widespread or systematic attack is not possible without political or military authorities. Some of the cases we

\textsuperscript{513} Ibidem, p. xxvii.
\textsuperscript{514} ‘WikiLeaks roept computerexperts op om geheime diensten te infiltreren’ In: De Standaard 30/12/13 Consulted at: <http://www.standaard.be/cnt/dmf20131230_00907276> date 20/02/14.
\textsuperscript{515} BOHRER Z. Is the prosecution of war crimes just and effective? Rethinking the lessons from sociology and psychology IN: Michigan Journal of International Law, Vol. 33, summer 2012, p.794.
\textsuperscript{517} DINSTEIN Y The Defence of ‘Obedience to Superior Orders’ in International Law. Sijthoff-Leyden, 1965, p. 278.
discussed can only be seen as crimes against humanity. The definition however states ‘*with knowledge of the attack*’ which might mean a subordinate who was not part of the ‘bigger picture’, and by example not evoked by hate can still try to plea the superior orders defence.

The defence of superior orders is also not allowed in crimes of genocide. The definition of genocide can be found in Art 6 of the Rome Statute, which is an exact copy of the Genocide Convention:

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**Art 2 Convention on the Prevention and Punishment of the Crime of Genocide**

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Genocide, which was dealt with in the Eichmann case, some of the Dachau trials and of course the ICTR and ICTY dealt with the crime of genocide. In all those cases the defence of superior orders had not been accepted, perhaps as a mitigating factor. The Rome Statute does not change this custom.

According to Art 33, the complete defence of superior orders is allowed for war crimes. A list of those crimes is to be found in Art 8 of the Rome Statute. Those crimes are divided between international and internal armed conflicts. One of the four categories contains ‘*Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following*’

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acts against persons or property protected under the provisions of the relevant Geneva Convention\textsuperscript{521} by example: wilful killing and taking of hostages.

According to Gaeta, almost every war crime is manifestly unlawful. He states ‘how would it be possible to claim that the order to commit one of those crimes is not manifestly unlawful or that subordinates cannot recognize its illegality?’\textsuperscript{522} He believes the case law of the Court should see every Art 8 crime as manifestly unlawful, which would bring the practical implementation of Art 33 back to the ‘absolute liability’ approach.

2.3.5. A BREACH IN THE INTERNATIONAL LAW?

The concept of ‘conditional liability’, as putted in art. 33 of the Rome Statute, has been used over the last few decades. The same three conditions keep returning: the defendant cannot have known the order was unlawful, the order has to be legal and the order cannot be manifestly unlawful. Genocide and Crimes against Humanity are considered manifestly unlawful. Since most of the crimes discussed at the ICC can be considered manifestly unlawful, it does not seem such a ‘dissonant note’. Art 33 may protects a subordinate defendant who has committed a not manifestly unlawful crime and did not know it was unlawful, but such a war criminal is not often found at The Hague. McCoubrey agrees with this viewpoint and states those three conditions are ‘a strong presumption’ against the defence of superior orders in the Statute of Rome and there is no practical difference between Art 8 of the London Statute and Art 33.\textsuperscript{523} Even at the Nuremberg Trials, where the superior orders defence gets its name as ‘the Nuremberg defence’ the prosecution did not rule out the defence completely. Gaeta states the British, French and Russian prosecutors referred to the manifest illegality of the orders, a criterion only necessary when one is reasoning according to the ‘conditional liability’ approach.\textsuperscript{524} Dinstein states the two approaches are not to be reconciled\textsuperscript{525} but Gaeta argues the approach of Art 33 is no pure ‘absolute liability’ or ‘conditional liability’ approach. It is split up according to the nature of the crimes. For genocide and crimes against humanity the ‘absolute liability’ of the London


\textsuperscript{525}DINSTEIN Y The Defence of ‘Obedience to Superior Orders’ in International Law. Sijthoff-Leyden, 1965, p. 200.
Charter is maintained, for war crimes the ‘conditional liability’ is applied. Nevertheless, it is no pure ‘conditional liability’ as discussed before. There is no defence of superior orders, which can be teared down by the prosecution, by example when a subordinate knew the order to be illegal or the order was manifestly illegal. At the Rome Charter, there is no superior defence, unless the defendant can prove he is an exception.\textsuperscript{526}

The London Statue was only realised after years of discussion and different propositions. Even during the preparation of the Statute of the ICTY, the representative of the United States in the Security Council stated she would prefer to exclude the defence of superior orders only when ‘\textit{a person of ordinary sense and understanding would not have known the orders to be unlawful}’.\textsuperscript{527} Today only five country’s have adopted the ‘absolute liability’ approach of the London Charter in their national law. Since most of the subordinate war criminals will be tried by their own national law. On the subject of superior orders, the International Criminal Tribunal is especially important as a warning message everyone, even a subordinate following orders, can be brought to justice. This message will especially be diffused by its case law. The only freedom the Court has is to determine, case by case, whether or not the perpetrated war crimes are manifestly unlawful or not. Time will tell if the Art 33 of the Rome Statue is either a dissonant note or either not.

\textsuperscript{526} \textsc{Gaeta P.}, \textit{The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law}. In: \textit{EJIL}, 1999, p. 190.

\textsuperscript{527} \textit{Ibidem}, p. 181.
3. CONCLUSION

The principle of superior orders has not changed much in practice over the last century. A soldier who follows a manifest unlawful order will be convicted, together with his superior. What has changed are the circumstances in which a defendant is tried: the International Criminal Court and the International Criminal Tribunals have made the prosecution of international crimes objective. This progress was necessary as showed how a Court will not differ its conviction and outrage concerning atrocities on order, but it will vary its acceptance of mitigation of punishment whether one is a national or a foreign soldier.

Another positive evolution is the split between duress and superior orders.

Impressive are the sociological and psychological research. Not only do they prove humans are easily influenced by group pressure and authority, as Hannah Arendt called ‘the banality of evil’, they also offer a solution. With the rising impact of communication technology, the prosecution of war crimes is present in households or at the little screen of ones smartphone. They can be used as prevention and may reduce deterministic behaviour.

Whether or not the Court should use sociological, psychological or historical analysis in its judgement cannot be provided with a straightforward question. A Court should be careful not to be forced in generalisation and consider each case individually. The most important result should be the ICC and Tribunals may provide us with an exemplary, realistic, moral standard.
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