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SUPERIOR ORDERS AND DEFENCE OF MISTAKE*

INTRODUCTION

CONFLICT IN THE IDEOLOGIES BEHIND DEFENCE OF SUPERIOR ORDERS

There has for long been a conflict on whether the act of the soldier shall impose criminal liability or not. It is because there are two policies that arise on keenly studying the liability. Both the policies are beneficial to the community of mankind.[1]One policy complies to the discipline in military forces and the other with the adherence to Law of war which lays down principles of peace. The underlying theme of both the policies is that in one case, it is expected that the sub-ordinate voluntarily not obey an order, and the other requires obeyance.[2]The two extreme, opposite theories are described[3] as follows:

DOCTRINE OF *RESPONDEAT* SUPERIOR

The doctrine signifies the lack of responsibility on sub-ordinate's part since, the act that he had committed was in pursuance of the order by his superior. This view is deemed fit in the case of Armed Forces.[4] Since, the Armed Forces require discipline, that is the superiors be obeyed .Such a principle is used to conduct the men to battle, and lead them to victory, even at the risk of their lives. Human psychology works on selfish motives and self-preservation.[5]

However, as a part of military discipline, soldiers have to keep aside their selfish motives, accomplish the military objective, emerge victorious, preserve life of other soldiers and protect the national security. Such a discipline requires unqualified obedience. No hesitation or doubt in the time of emergency.[6]

When noted jurist Renault touches upon the vulnerable spot of "ignorance of law" he continues to keep it going. He notes that knowledge of laws of war within national armies is uncommon. This is his first contribution to what was later propounded by Oppenheim.[7]He contends that the doctrine of *respondeat superior* not only abides by the principles of military discipline, but also mistake of law on the part of recipient of order. [8]Even Eagleton for his part contends that "it is

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[1] Aubrey M. Daniel ,The Defence of Superior Orders, 7 U. Rich. L. Rev. 477 (1972).
[2] Captain Luther N. Norene, Obedience To Orders as a Defence 342 (1971).
[3] I.Y. Dinstein, The Defence of Obedience to Superior Orders in International Law 8 (1965).
[4] An Inquiry into the Juridical Basis for the Nuremberg War Crimes Trial, 30 MNN. L. Rev. 313 (1946).
[5]C. Phillipson, Internatonal Law and The Great War 260 (1916).
[6] Rothberg A., Eyewitness History of World War 932 (1966).
[7] 2 L. Oppenheim, International Law 253 (1st ed. 1906).
[8] *Supra at 2.*

repugnant to the average person to think of punishing a soldier who, in the first place would be ignorant of the legality or illegality of his act."[9]

Another important facet as given by Renault, that makes the soldier follow the superior orders is "compulsion". It is the focal point of Renault in his entire theory. He says that it is "practically impossible" that a soldier refuse an order. Military discipline is strict, and it threatens with such inexorable sanctions that he has to obey *nolens volens.*[10] Even Carlyle expresses that when a man becomes a soldier, his body becomes the property of his commanding officer".[11] According to this approach, the training and the mentality of the soldier infuses a recurrent drilling and this becomes his second nature. He is thus paralysed of all the will power he had and is transformed into a puppet. At the times of war, orders are issued at the point of a sword or the muzzle of a gun, by threat implicit or explicit that can consist of capital punishment.[12]

DOCTRINE OF ABSOLUTE LIABILITY

At the other side of this defence, lies the doctrine of absolute liability.It entails that obeying superior orders does not in fact form a defence.[13] It is an antithesis of the doctrine of *respondeat superior.*It is in line of the thought that, duty of soldier to obey superior orders only exists for the lawful orders.[14] And only such orders shall relieve a person of criminal responsibility imposed. It is important to note that whether the soldier was *ab origine* duty bound to obey orders. Also, if a person is called in the Court of Law, it is because he has committed an illegal act, an offence[15]. When a person obeys a lawful orders, he does not perform an illegal act, *ex hypothesi* and does not have to seek any defence.[16]

To hold the offender liable, one has to preserve interests for the sake of supremacy of law.[17] The laws of war necessitate conduct by the way of commission or omission .It requires sanctions in case of violations, for international law. It requires some real, down-to-earth sanctions.[18] The supporters of absolute liability, regard the doctrine of *respondeat superior* as "passing the buck".[19]It is swinging the responsibility from one echelon of command to another. The reliance is placed on the instruction of the superior and through that veil, total immunity is claimed or "*reduction ad absurdum".*[20]

This argument is based on the upward transfer of responsibility and global immunity. An unconscientious and insidious can systematically digress the entire legal system,[21] while the executive arms, soldiers and civilians are immune from responsibility by virtue of this obedience.[22]The inference is that the doctrine on *respondeat superior* incites "international lawlessness" on a large scale.[23]But, if international law recognizes mistake of law as an excuse, and if a certain accused proved that he did not know that the certain act constituted a war crime, he

[9] Clyde Eagleton, Punishment of War Criminals by the United Nations, Am. J. Int'l L. 495 (1943).
[10] *Supra at 2.*
[11] Carlyle, Nuremberg Trial, Final Plea for the High Command, L.M.T., vol. 22(1946).
[12] Hiromi Sato, The Defence of Superior Orders in International Law: Some Implications for the Codification of International Criminal Law, 9 Int'l Crim. L. Rev. 117 (2009).
[13] Barlett, Liability of Official War Crimes, vol. 35, L.Q.R. 177 (1919).
[14] *Ibid.*
[15] J.A. Appleman, Military Tribunals and International Crimes 56 (1954).
[16] Eustathiades, Orders , L.R.U.N.W.C.C., vol. 15 (Digest) 157 (1986).
[17] Mitchell v. Harmony, 13 How. 115, 137 (1851).
[18] Yoram Dinstein, The Defence of "Obedience to Superior Orders" in International Law 70 (1965).
[19] *Ibid.*
[20] G.A. Finch, Superior Orders and War Crimes, The American Journal of International Law, vol. 15, 440 (1921).
[21] The Einsatzgruppen Case, 4 Trials of War Criminals 470 (1948).
[22] Winthrop, W., Military Law and Precedents (1920).
[23] R. Jackson, Nuremberg in retrospect: Legal Answer to International Lawlessness, A.B.A.J., vol. 35, 813 (1949).

shall be acquitted and absolute liability shall not apply. This is the moot point for consideration in this approach. That shall be dealt in the next few chapters.

SUPERIOR ORDERS AND MISTAKE

In order to apply to apply the doctrine of *les baionettes intelligentes* a soldier has to weigh the illegal order. If he disobeys the order, then there lies a threat. A chance of copuslion or the element of compulsion comes into play. Also, if he disobeys, then he shall face possible prosecution for disobeying his own nation. However, if he obeys, then he faces prosecution in an International tribunal.[24]He is therefore, placed in a quandary and be an instantaneous judge, and himself be the finder of facts and the interpreter of law. An unfortunate young man out of high school is not supposed to have such an intelligence. He has been trained always to obey the seniors, which seems the best option to him at that time.[25]

The Courts have taken into account this human factor. That is why, they do not take the extreme approaches. They have to best protect the military discipline along with the principles of International law.In order to determine this defence, first its nature shall be determined. The term "manifestly unlawful" brings with itself a particular defence [26].This defence shall be delved in further from different viewpoints.

Ignorance or Mistake of Law

A number of supporters of the *respondent superior* doctrine rationalize it in terms of a *bona fide* mistake of law by subordinate. It is because, soldiers cannot judge the illegality due to their ignorance.[27] Secondly, even if it is assumed that he was willing to disobey orders, then too, he might be incompetent to assess, since international law which is uncertain and irrational is involved.[28]Thirdly, the soldier may not be "positioned" to ascertain the legality.

On a very large scale, the mistake of law ground for *respondeat superior* seems proper. To illustrate, several defence counsels at the Nuremberg trials' argued that military discipline made it unfeasible to impress upon an officer the responsibility to probe into the legality of the orders to wage war. First, soldiers will hardly ever be in an arrangement to discriminate all relevant circumstances to determine whether war is permissible. Second, as by the definition of aggression, as a matter of law, is questionable even among scholars versed in international Law, soldiers should not be obligated to resolve such a subtle question.[29]The. defence argued that the officer or soldier standing trial is not a judge and is neither obliged nor competent to pronounce a verdict on the lawfulness of his nation's policy. Furthermore, even when the soldier has reservations about the legality of orders, he still must obey.[30]

It is accurate that subordinates who "receive orders from duly constituted authorities operating within an apparently legal framework... may well assume that the orders themselves are legal,"' thus affirming arguments that this mistake of law should absolve them. In many cases, however, even soldiers with nominal training and experience will have some sense of when they are given an

[24] *Supra at 2.*
[25] Bert V.A. Roling, Aspects of the Criminal Responsibility for Violations of the Laws of War, The New Humanitarian Law of Armed Conflict, 203 (1979).
[26] Oren Gross, The Grave Breaches System and the Armed Conflict in the Former Yugoslavia, 16 Mich. J. Int'L L 783 (1995).
[27] Eagleton, Punishment of War Criminals by the United Nations, 37 Ahi. J. INTL L. 495 (1943).
[28] Wasserstrom, The Responsibility of the Individual for War Crimes, PHIL, MORLEY AND INTL Ar'. 59 (1974).
[29] 19 Trial of the Major War Criminals Before the International Military Tribunal [hereinafter Military Tribunal] 21-22 (July 19, 1946).
[30] Laws of Australia: Homicide 1181 (1992) .

illegal order. For example, at the trial of U.S. Army Lieutenant Calley one of the enlisted soldiers of "Charlie Company" described how he directly disobeyed Lieutenant Calley's orders to fire upon the occupants of the village of My Lai 4 in Vietnam. It is clear that some soldiers will often have a sense that what they are doing is wrong even if they are unable to frame their objection in legal terms. Therefore, a rationale for *respondeat superior* based on mistake of law can only be justified in a limited number of situations. Accordingly, the rationale fails to explain why a soldier who carries out an illegal order with full knowledge of its illegality should be exculpated. Although military discipline is a necessity for the smooth operation of a hierarchical chain of command, allowing obedience as a defence to carrying out an obviously illegal order makes military obedience superior to the rule of law. Even the advocates of the *respondeat superior* doctrine have not gone so far.[31]

This Chapter suggests that, given the exigencies inherent to the duty to obey and the presently overbroad scope of the defence of superior orders, Article 33(1)(c)'s manifest illegality provision should be applied under a more flexible *Schuldtheorie* mistake of law framework. This Part of the Chapter begins by illuminating the possible functional implications of applying Article 33(1)(c) under the *Schuldtheorie* framework. And then the normative implications shall be dealt.

FUNCTIONAL IMPLICATIONS

Under the *Schuldtheorie* doctrine's analytical process on Article 33 would need applying the manifest illegality standard under the two-part inquiry applied to mistakes of law under Section 17 of the German Criminal Code.(The German Criminal Code provides for the mistake of law doctrine). Firstly, the court would be mandated to found whether a defendant was conscious of the wrongfulness of his conduct at the time of his actions. If knowledge was present, the defence is not given. If he was not aware, then the consequences can be avoided.[32]

Three factors to determine knowledge were given by Claus Roxin .Firstly, the court would be required to find that the subordinate had reason to investigate the lawfulness of the command based upon some indication of its illegality. Secondly, the court would be required to uncover that the subordinate had not or had insufficiently investigated the wrongfulness of his conduct. [33]Finally, a court would be required to find that sufficient effort would have provided the subordinate with knowledge of the wrongfulness of his conduct. If the court found all three of the above factors satisfied then the defendant's obedience to superior orders was an avoidable mistake that could at most mitigate his punishment. If any of the above factors were not met, however, and the defendant's conduct was the result of an unavoidable mistake, he might invoke the defence of superior orders.[34]

NORMATIVE IMPLICATIONS

If Article 33(1)(c) were applied under the *Schuldtheorie* framework, Article 33 would no longer run afoul of beforehand established customary international law. It would have the possibility to make desirable results, thereby addressing some of the criticisms of Article 33(1)(c)'s manifest illegality

[31] The Defence of Obedience to Superior Orders: The Mens Rea Requirement, 17 Am. J. Crim. L. 55 (1990).
[32] Jessica Liang, Defending the Emergence of the Superior Orders Defence in the Contemporary Context, Goettingen Journal of International Law 718.
[33] Robert Cryer, Superior Orders and the International Criminal Court, International Conflict and Security Law: Essays in Memory of Hilaire Mccoubrey 49 (Richard Burchill, Nigel D. White & Justin Morris eds., 2005).
[34] Manifest Illegality and the ICC Superior Orders Defence: *Schuldtheorie* Mistake of Law Doctrine as an Article 33(1)(c) Panacea, 47 Vand. J. Transnat'l L. 1425 (2014).

standard. As Professor Mark Osiel argues, in cases involving "close judgment calls to choose the best course of action," a command will rarely be found to have been manifestly unlawful.[35]

The question would thus be whether the judgment call made by the subordinate was reasonable, not simply whether a judgment call was made in the first place. Under this approach, a subordinate exercising situational judgment and arriving at an unreasonable conclusion cannot be said to have made an "unavoidable" mistake of law. Only a subordinate who considers the command and circumstances at hand and reasonably, though mistakenly, concludes that the command is unlawful or not. [36]By turning the inquiry to one of reasonable avoidability, rather than manifest illegality as understood today, a *Schuldtheorie* approach to Article 33(1)(c) would narrow availability of the superior orders defence by requiring subordinates to investigate their doubts to the extent feasible. The *Schuldtheorie* approach would then tailor the consequences of obedience-mitigation or defence accordingly. Finally, application of the *Schuldtheorie* analysis would address vagueness concerns by providing a three-part inquiry to be applied by courts assessing the applicability of the defence.[37]

MISTAKE OF FACT

Proof of obedience to superior orders should be approved to prove a mistake of fact defence. Frequently subordinates will not have all the facts to appraise the legality of a superior order, even a manifestly illegal superior order. Compliance with orders becomes a "stepping stone"[38] to proving the belief necessary for a defence based on ignorance or mistake of fact. The fact that subordinates obeyed orders allows the conclusion that they believed "in good faith and on reasonable grounds, in the existence of a state of facts" that validate the carrying out of the orders. Since subordinates conceded to the orders, it can be inferred that the soldier believed that the facts were such that the orders were legal. Consequently, to say that obedience to orders cannot be authorized as a defence is to strip subordinates of a means of proving that they justifiably believed in certain facts that, if true, would make their actions non-criminal.[39]

The mistake of fact defence is critical when subordinates are told to take on orders that compose "reprisals" for enemy war crimes, but which breach the laws of war. A reprisal is "an action taken by a nation against an enemy that would normally be a violation of the laws of war, but that [is] justified as necessary to prevent the enemy from continuing to violate the laws of war." [40]A reprisal is acceptable because of the lack of apparent alternatives; i.e., a case where the enemy's violations "were beyond the reach of the offended belligerent, and protests had proved fruitless." [41]In such conditions, a reprisal is necessary in order to force compliance with the laws of war.[42]

The fact that violations of the laws of war may be legal within the context of reprisals creates a special quandary for subordinates. When confronted with an order utterly and palpably contemptuous of law and humanity, subordinates may be expected to assert their own standard of law and morality. Though, no such independence of conviction and action may be accepted in cases where subordinates are confronted with a command ordering an act admittedly illegal and

[35] Mark J. Osiel, Obeying Orders: Atrocity, Military Discipline, and the Law of War, 86 California Law Review 939 (1998).
[36] Annemieke Van Verseveld, Mistake of Law: Excusing Perpetrators of International Crimes 31 (2012).
[37] Edward M. Wise, Commentary on Parts 2 and 3 of the Zutphen Intersessional Draft: General Principles of Criminal Law, Observations on The Consolidated ICC Text Before the Final Session of the Preparatory Committee 53 (M. Cherif Bassiouni ed., 1998) ; Manifest Illegality and the ICC Superior Orders Defence: *Schuldtheorie* Mistake of Law Doctrine as an Article 33(1)(c) Panacea, 47 Vand. J. Transnat'l L. 1425 (2014).
[38] S. Gluchek ,War Criminals - Prosecution and Punishment 244 (1944).
[39] T. Taylor, Nuremberg and Vietnam: An American Tragedy ch. 2 (1970).
[40] Trial of Karl Adman Golkel and Thirteen Others (Brit. Milit. Ct., Wuppertal, Germany, 1946) V L. Rept. Trial war Crim. 45 (U.N. War Crimes Comm'n, 1948).
[41] *Ibid*.
[42] M. Greenspan, The Modern Law of Land Warfare 477 (1959).

cruel, but issued as a reprisal against the similarly culpable conduct of the adversary.[43] It is not always reasonable to expect subordinates to be in possession of the information required to make a judgment about the lawfulness of a castigatory measure. One author has noted that "such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime."[44] Another has stated "the fact that a superior commands a subordinate to disobey the laws of war, and, in phrasing the order," labels it a reprisal, "cannot of itself inoculate the subordinate against responsibility."[45]Reprisals can be used by an unscrupulous enemy seeking a pretext for illegal conduct.The real problem is whether subordinates believe "in light of the explanation given by the superior and the other circumstances of the case, that they are performing a legitimate act of reprisal."[46] How can a soldier know that a command that violates the rules of warfare is not a reprisal and therefore not permitted? Each case should be determined on its own merits. Subordinates should be allowed to show obedience to superior orders for purposes of alleging a mistake of fact defence. Allowing such evidence to be admitted brings the trier of fact closer to the state of mind of subordinates who carried out illegal orders.[47]

CURRENT INTERNATIONAL LAW REGIMEN ON SUPERIOR ORDERS

STATUTORY FORMULATIONS OF THE DEFENCE

In International Criminal law, the plea of obedience to superior orders has been widely discussed. Under national systems, the soldiers have to, indisputably follow the superiors' instructions. However, complexity is when a war crime has to be committed. The dilemma takes different undertones. Duress plays an integral part in making a sub-ordiante obey the superior's orders. The Article 33 of International Criminal Court adopted in Rome provide that superior orders is not a defence unless the person was under a legal obligation to obey the orders of Government or superior. The person did not know that the order was unlawful or the order was not manifestly unlawful.

The third condition does not apply to charges of genocide, since they are manifestly illegal.This approach has departed from the Nuremberg Trial under which sub-ordinates were liable in any case. The German delegation while arguing for the Nuremberg Code said that through the London Agreement, it had become a part of the customary rule of International law. However, Unites States stood up for the new ICC approach, that post- World War II things have changed. The clash between both the doctrines prescribed led to the formulation of Article 33. This is major detriment on Part Three of the Rome Statute on "General Principles of Criminal Law" .The two approaches were juxtaposed, to provide a prevention against genocide and also give a defence.

However, there exists some conflict between the Rome Statute and Article 33. On one hand, Article 33 assumes that war crimes can be committed if they are not manifestly unlawful and the sub-ordinates are ignorant about the same. On the other hand, Article 8 gives a list of war crimes that are blatantly criminal. It is highly contradictory and perplexing.[48] The Tokyo IMT Charter's Article 6(b), as well as paragraph 16 of American Regulations Governing the Trial of War Criminals in the Pacific Area, were similar to that of Nuremberg's Article 8. As at Nuremberg, pleas of superior orders in those proceedings, the *Jaluit Atoll Case*[49], for example, were rejected.

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[43] H. Kelson, Peace Through Law 107 (1944).
[44] Oppenheim L., International Law Treatise, vol. II (6th ed., 1940).
[45] *Supra* at 33.
[46] *Ibid.*
[47] Jeanne L. Baker, The Defence of Obedience to Superior Orders:The Mens Rea Requirement, 17 Am. J. Crim. L. 55 (1990).
[48] Paola Gaeta, The Defence of Superior Orders: The Statute of International Criminal Court v. Customary International Law, EJIL (1999).
[49] Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy (The Jaluit Atoll Case) (U.S. Milit. Comm'n, United States Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshal Islands, Dec. 7-13, 1945) I L. Rep. Trial war crim. 71 (U.N. War Crimes Comm'n, 1947).

Similar evidentiary articles were contained in American regulations for the trials of war crimes in the Pacific area, and in the Mediterranean. Soviet law rejected and continues to reject superior orders, both as a defence and as mitigation of war crimes. Today's German military law rejects them as a defence, although they are allowed as a defence under its criminal law. Denmark and Norway excuse the soldier who disobeys lawful orders he reasonably believes to be illegal.

Negotiations during the formulation of the 1977 Additional Protocols illustrated that the Communist bloc and many Third World states, wishing to maximize compliance with official directives, offer their soldiers full immunity when they obey *un*lawful orders, even if they cannot demonstrate that they mistakenly believed the orders lawful.

Demonstrating the continuing vitality of the defence of superior orders, trials before the International Criminal Tribunal for the Former Yugoslavia have seen the defence raised even though the ICTY's Articles specifically reject it. From the outset, the Tribunal has made clear, however that, although not strictly a defence, obedience to orders may be a relevant and admissible defence assertion. In the ICTY's first case, Dražen Erdemović, was sentenced to ten years confinement. As *The* Wash*ington Post* phrased it, "the tribunal rejected the hauntingly familiar excuse of Nazi war criminals – that Erdemovic was following orders…" Similar verdicts have followed: prison commander Zdravco Mucic, convicted of ordering subordinates to commit murders; Major General Radislav Krstic, who directed the 1995 attack on Srebrenica, charged with genocide for personal involvement, as well as his command responsibility; paramilitary commander Anto Furundzija, sentenced to ten years for failing to stop subordinates' rapes. Low ranking and high, all pleaded obedience to orders.

In future cases the defence of superior orders will no doubt continue to be a defence stand by. The International Criminal Court, in matters of command responsibility and obedience to orders, echoes the Yugoslavia Tribunal standards.[50]

Superior Orders in Customary International Law

Peter von Hagenbach in 1474 tried for "murder, rape, perjury, and other malefacta" his defence of superior orders was rejected as "contrary to the law of God." [51] In the seventeenth century trial of Cooke, the Chief Justice of Ireland, for treason by presenting an indictment and demanding judgment against the King, the defendant attempted to use the defence of superior orders.[52]Similarly, in another case it was so held that who obeyed a traitorous superior is himself a traitor[53]

In a trial for the killings of internees during the Second Boer War, a South African court stated about the mistake of fact and mistake of law principle , the soldier is therefore protected if the act is not grossly illegal.[54] Elaborating on this principle, the German Reichsgericht, in rejecting the superior orders defence in the unlawful sinking of a hospital ship, found: "The killing of enemies in war is in accordance with the law of the State that makes war.., only in so far as such killing is in accordance with the conditions and limitations imposed by the Law of Nations. The fact that [the] deed is a violation of International Law must be well known to the doer, apart from acts of carelessness in which careless ignorance is a sufficient excuse.... The rule of International Law

[50] Gary Solis, Obedience of Orders: The First Defence, The Law of Armed Conflict 23 (2011).
[51] G.Schwarzenberger, International Law 462 (1968).
[52] Leslie C. Green, The Defence of Superior Orders in the Modem Law of Armed Conflict 31 *Alberta L. Rev.* 320 (1993).
[53] *Ibid.*
[54] R. v. Smith, 17 S.C. 561, 567-68 (1900).

which is here involved, is simple and universally known.... [The superior's] order does not free the accused from guilt." [55]

Both the British and American militaries adopted the position that members of armed forces do acts by orders of government and therefore are not criminals .[56] However, this liberal perspective of the defence was explicitly rejected by international tribunals.[57] This changed in 1940 *Llandovery Castle,* a German decision.[58]Further, no national court applying international law adopted the unlimited version of this defence advocated by Oppenheim. In the *Peleus* case, an English tribunal, while recognizing that soldiers are only bound to follow lawful orders, convicted a subordinate and found that the order in question was obviously illegal, but the court stated that soldiers could not be held liable if the lawfulness of the order was questionable.[59] An Israeli court trying Adolf Eichmann also recognized the principle of manifest illegality, and the court found both actual knowledge of illegality and manifest tunlawfulness under the facts of the case.[60]The court interpreted the principle of moral choice narrowly, requiring a danger to the subordinate's life.[61] Finally, the American Tribunal recognized the importance of actual knowledge of illegality or manifest illegality, and the Tribunal limited the concept of moral choice to those situations in which there is imminent physical peril to the subordinate.[62]

Aside from national courts interpreting international law, this defence has also been applied at the international level. Under the Statute for the International Military Tribunal for Nuremberg, superior orders was rejected as an exculpating defence, limiting its use to the mitigation of punishment only.[63] This provision was interpreted only to apply if a moral choice was in fact possible for the subordinate.[64] Additionally, even though no reference was made to the defendant's knowledge of illegality, the Nuremberg Tribunal implied the incorporation of this aspect of the defence, stating that superior orders "cannot be considered in mitigation where crimes have been committed consciously, ruthlessly and without military excuse or justification."[65]This seems to require at least a good faith belief in the legality of the order as a prerequisite to the already restrictive use of the defence only in mitigation of punishment.

Since Nuremberg, there have been two significant instruments whichrefer to the defence of superior orders. Under the Statute for the International Tribunal for the Former Yugoslavia,'[66] "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."[67]This provision is derived from article 8 of the Nuremberg Charter.[68]The Report of the Secretary-General of the United Nations

[55] Llandovery Castle, H.M.S.O.Cmd. 450 (1921).
[56] Great Britain War Office, Manual of Military Law §443 (1929); United States Dept. of the Army, The Law of Land Warfare §366 (1940).
[57] In Re List and Others (Hostages Trial), United Nations War Crimes Commission, 8 Law Reports of Trials of War Criminals 51 (1948).
[58] Leslie C. Green, "The Defence of Superior Orders in the Modem Law of Armed Conflict", 31 *Alberta L. Rev.* 320 (1993).
[59] Peleus, cited in Cameron (Ed.), The Peleus Trial (1948).
[60] Attorney-General of Israel v. Eichmann, 36 *Int'l Law Rep.* 177 (1961).
[61] *Ibid.*
[62] In Re Von Leeb, 12 War Crimes Rep.(1) 71(1948).
[63] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Nuremberg, 82 UNTS 280 (1945) reprinted in 39 Am. J. Int'l L. 257 (1945).
[64] Nuremberg Judgment, Cmd. 6964,118 (1946).
[65] *Ibid.*
[66] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, UN Doc. S/25704 (1993).
[67] *Ibid.*
[68] James C. O'Brien, "The International Tribunal for Violations of International Law in the Former Yugoslavia", 87 Am. J. Int'l L. 639 (1993).

presenting the Statute of the Tribunal concluded that it could consider superior orders as a factor in connection with other defences, such as coercion or lack of moral choice.

The statutory provision was found by the Commission of Experts Established Pursuant to Security Council Resolution 780(1990) to comply with existing customary international law: The Commission's interpretation of the customary international law, particularly as stated in the Nuremberg principles, is that the fact that a person acted pursuant to an order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact available to him .... The Commission notes with satisfaction that article 7, paragraph 4, of the Statute of the International Tribunal adopts an essentially similar approach on this subject.[69]The American Bar Association Task Force on the ad hoc tribunal for the Former Yugoslavia recommended the acceptance of the defence if the subordinate had a good faith, reasonable belief in the legality of the order.

However, neither the Statute nor the Commentary address the principle of manifest illegality. Thus, this Statute retains the restrictive view of the defence of superior orders from the Nuremberg Principles. Nevertheless, the Nuremberg Principles Cannot be accepted as an articulation of principles of international law.[70] The Tribunal was established in order to sentence a particular group with regard to specific acts already committed.[71] The elimination of this defence was specifically motivated by an attempt to prevent "major war criminals" from placing all blame on Hitler." Additionally, the parties did not apply this Statute to themselves.

Further, a United Nations resolution is only a recommendation and not binding as international law. Finally, the Statute did not reflect the accepted international law at that time.[72] Similar arguments should also apply to the International Tribunal for the Former Yugoslavia. Thus, there is some debate as to whether this position truly represents the present customary international law. However, the Article 33 of the International Criminal Court has tried to put a rest to the debate on defence of superior orders.

CONCLUSION

The greatest problem in defence of superior orders is that it comprises an exception to the universal rule that mistake of law is not an justification. Only people from select professions can plead this defence. Such persons are a part of professions in which they are particularly skilled to obey orders. They obey a supposedly lawful order, that is the State's will.The interests of the State lies in peace and security. In such conditions, they obey orders to preserve the same.

Then, there is the unique context in which the orders are typically given - the situation would often be uptight and dangerous, requiring an instantaneous decision to be made by the subordinate with little information to go on, together with a reasonable belief that the superior knows more about the situation than the subordinate does. The finishing point mentioned about the responsibility of superior officers is noteworthy one and, indeed, some commentators have gone so far as to regard it as another ground for recognising the defence. The Courts have held that unless an act is "manifestly illegal" mistake of fact and mistake of law defence can be provided. It is also enabled under the Article 33 of the International Criminal Court. He shall be protected if he honestly believed the subject of the order to be lawful and within the ambit of laws of crime. However, the

[69] Annex: Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, 61 (1994).
[70] Chrisopher L. Blakesley, "Obstacles to the Creation of a Permanent War Crimes Tribunal", Fletcher Forum World Aff. 93 (1994).
[71] Theo Vogler, The Defence of 'Superior Orders' in International Criminal Law, in M. Cherif Bassiouni and Ved P. Nanda, A Treatise on International Criminal Law, Vol. I, 619 (1973).
[72] Hilaire McCoubrey and Nigel D. White, International Law and Armed Conflict 341 (1992).

Court still has to make clear distinction on the basis of doctrine of absolute liability and *repondeat superior*. As of yet, there are four approaches that exist for the same:

The first category imposes an absolute liability and considers mistakes of law to be immaterial to criminal responsibility. The second gives the courts discretionary authority to accept mistake of law excuses on an *ad hoc* basis. The third category accounts the reasonableness of the defendant's mistake; it allows for a mistake of law to excuse culpability unless "the mistake resulted from the [defendant's] intention or negligence." The fourth category allows the mistake of law excuse to preclude punishment for any intentional crime, "even if the [mistake was] due to [the defendant's] negligence." The international approach, as codified in Article 32(2) of the Rome Statute, basically follows the first approach and restricts the availability of the mistake of law excuse to cases in which the mistake negates the mental element of a crime. This shows that mistake is an important part of the defence of superior orders, recognised worldwide.