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**THE DEFENCE OF SUPERIOR ORDERS
IN INTERNATIONAL CRIMINAL LAW**

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The defence of superior orders in international criminal law

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*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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Abstract

This research paper examines the defence of superior orders defined in article 33 of the Rome Statute. It begins with an overview of the history and the development of the defence. Then, the paper explores in depth the conditions of the defence and the definition of manifest illegality considering legal-philosophic theories and judgments on the issue. It continues with describing and commenting on the current legal debates about the defence. The paper asks whether there still is a need for the defence exploring the other defences of the Rome Statute and shows, why article 33 is a valuable part of the treaty. Lastly, it points out that the defence of superior orders is an excuse and not a justification.

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I INTRODUCTION

“And they came to the place which God had told him of; and Abraham built the altar there, and laid the wood in order, and bound Isaac his son, and laid him on the altar, upon the wood.” – Genesis 22 - 9

The obedience of superior orders without questioning them is an idea promoted by many sources. Abraham's willingness to sacrifice his own son made him a good servant of God. Obedience of law makes you a good citizen. As a child we learn that obeying parents and teachers saves us a lot of trouble. There are people who know better and we learn to trust superiors. Nevertheless there are some clear examples of disobedience. Although he had committed terrorist acts, had incited people to violent resistance against the government and planned a guerrilla war, Nelson Mandela was a recipient of the Nobel Peace Prize. He received the award together with Frederik Willem de Klerk "for their work for the peaceful termination of the apartheid regime, and for laying the foundations for a new democratic South Africa."¹ Mahatma Ghandi instigated thousands of Indians to ignore the Registration Act and created the non-cooperation movement, yet he is a hero, best known for his non-violence policy and his work for the liberation of India. Who would not side with the outlaw Robin Hood against the Sheriff of Nottingham, who did nothing except his law-abiding job of collecting taxes? Obviously, resisting orders or the law can be good and moreover, necessary. Why is that?

An answer was given by Gustav Radbruch, a most notable philosopher of jurisprudence in the 20th century: “Extreme injustice is no law”²

¹ The Nobelprize “The Nobel Peace Prize 1993” www.nobelprize.org (accessed 24 February 2010).

² David Dyzenhaus “The Dilemma of Legality” in *The Limits of Law* Autin Sarat, Laurence Douglas, Martha Merrill Umpfrey (ed) (Stanford University Press, Standford, 2005) 142.

This provides a reason but little guidance therefore, it is even more important to ask: When is that the case? How do we know?

This research paper tries to answer these questions. It has a close look at article 33 of the Rome Statute. It begins with an overview of the history of the defence of superior orders. It then deals with the conditions under which the defence can be raised and the current definition of manifest illegality. For that purpose the essay gives a brief overview of the main philosophical theories relevant and the most important judgments. Further, the paper discusses the current points of criticism. Can civilians raise the defence? Is the defence a violation of customary international law? Why are war crimes not included? Lastly, the paper asks whether the defence is needed anymore at all.

To anticipate that last answer: Yes, the defence of superior orders is needed. Very much. The Rome Statute has done a good job with article 33 and this paper will show why.

II HISTORY – FROM BREISACH TO ROME

The defence of superior orders is as old as war and criminal law itself, domestic and international. For just as long it has also been a matter of controversy for scholars and judges.

The first person to be tried by an ad hoc tribunal for war crimes³ such as murder, arson and rape and to raise the defence of superior orders was the German Governor of Breisach Peter von Hagenbach in 1474.⁴ Hagenbach had followed the order from Charles the Bold, Duke of Burgundy to force the citizens of Breisach so they would submit. He defended himself: “Is it not known that soldiers owe absolute obedience to their superiors?”⁵ The Judges, however, found his behaviour to be contrary to the laws of God and of man. Hagenbach, as a knight, had had the duty to prevent such crimes. He was found guilty, deprived of his rank and decapitated. So even in the Middle Ages, when obedience to superior orders was of great importance and civilian lives were not worth very much, the Court acknowledged that an order contrary to the very core of justice could not be followed.⁶ The same attitude can be found in the cases *Cook*⁷ and *Axtell*⁸ in the year 1660, and later in a non-military context in *R v James*⁹ (1837) and *R v Trainer*¹⁰ (1864). In *R v James* the Court stated:

³ This classification as war crimes is disputable. The war had not formally started yet; however, Breisach had been occupied territory. See Edoardo Greppi “The evolution of individual criminal responsibility under international law” www.icrc.ch (accessed 20 November 2009)

⁴ See with further references: Greppi, above n 1; Hitomi Takemura *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders* (Springer Berlin Heidelberg 2009) 139; Matthew R Lippman “Humanitarian Law: The Development and Scope of the Superior Orders Defense” (2001 – 2002) 20 Penn St Int’l L Rev 153, 158.

⁵ Quoted in: Greppi, above n 1; Leslie C Green “Superior Orders and the Reasonable Man” (1970) 8 Can YB Int’l L 61 [cited as Green 1970], 77.

⁶ Howard S Levie “The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders” (1998) 70 Int’l L Stud Ser US Naval War Col 169, 270.

⁷ *Cook’s Case* (1660) St Tr 1077, 1113; see further: Green 1970, above n 5, 69, 70.

⁸ *Axtell’s Case* (1660) 84 ER 1060; see further: Green 1970, above n 5; Mitchell Franklin “Sources Of International Law Relating To Sanctions Against War Criminals” (1945 – 1946) 36 J Crim L & Criminology 153, 161.

⁹ *R v James* 173 ER 429, 430; see further: Green 1970, above n 5, 71.

¹⁰ *R v Trainer* 176 ER 488, 491; see further: Green 1970, above n 5, 71.

If these men acted bona fide in obedience to the orders of a superior, conceiving that he had the right which he claimed, they are not within the Act of Parliament. But if either of these men knew that it was a malicious act on the part of his master, I think then that he would be guilty of the offence charged.

Although the defence of superior orders had generally a lot of support in England at that time, it had the clear limitation of manifest illegality.¹¹ This was later called the *ought to know* policy.¹² However, there was no binding law on the issue, so the judgments differed from each other. In 1866, Willis J took various views of whether superior orders can work as a defence. In *Keighley v Bell*¹³ he recognised an order as an absolute justification unless it was manifestly illegal, whereas in *Dawkes v Lord Rokeby*¹⁴ he rejected the defence entirely supporting the absolute liability doctrine.

After World War I the defence of superior orders became even more controversial. In preparation of the Treaty of Versailles the Commission on the Responsibility of Authors of the War and on Enforcement of War was convened, but was unable to reach a consensus on the issue.¹⁵ Therefore, they decided not to include the defence in the Treaty of Versailles and leave the courts to decide how to deal with the problem in each individual case.¹⁶ As a result of this, in some of the post World War I cases in Germany the defence of superior orders was fully accepted, while in others declined.¹⁷ The *Llandovery Castle* case is historically interesting, because the judgment provided a very

¹¹ Franklin, above n 8.

¹² Hilaire McCoubrey "From Nuremberg to Rome: Restoring the Defence of Superior Orders" (2000) 50 Int'l & Comp LQ 386, 392.

¹³ *Keighley v Bell* 176 Eng Rep 781 (1866) – cited in Leslie C Green "Fifteenth Waldemar A Solf Lecture in International Law – Superior Orders and Command Responsibility" (2003) 175 Mil L Rev 309 [cited as Green 2003], 316.

¹⁴ *Dawkes v Lord Rokeby* 176 Eng Rep 800 (1866) – cited in Green 2003, 317.

¹⁵ Lippman, above n 4, 164; Takemura, above n 4, 140.

¹⁶ Ibid.

¹⁷ See with further references: Takemura, above n 4, 140, 141 – defence accepted in the *Robert Neumann* case and the *Dover Castle* case.

similar approach to article 33 of the Rome Statute.¹⁸ In this case a German submarine had torpedoed the British hospital ship *Llandoverly Castle*. The submarine commander ordered his subordinates to open fire on the escaped survivors in the lifeboats. The Lieutenants carried out the order and were later charged with manslaughter. They raised the defence of superior orders but the Judge did not excuse them.¹⁹

It is certainly to be urged, in favour of the military subordinates, that they are under no obligation to question the order of their superior officer and they can count upon its legality. But no such confidence can be held to exist if such an order is universally known to everybody including the accused, to be without any doubt whatever against the law.

The international law scholar Lassa Oppenheim recognised it as an absolute defence.²⁰ Until 1944 the British Manual of Military Law and the American Rules of Land Warfare followed the same view.²¹ The British Manual read:²²

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

During World War II the general opinion shifted and the defence of superior orders was soon almost totally rejected.²³ The British Manual and the American

¹⁸ Judgment in the Case of Lieutenants Dithmar and Boldt: Hospital Ship 'Llandoverly Castle' (1922) 16 AJIL 708

¹⁹ Ibid, 722.

²⁰ Lassa Oppenheim *International Law, A Treatise Vol II* (Longmans, Green, London, 1906) 264 § 253 – Position changed with the 6th edition by the editor Professor Lauterpacht.

²¹ Chapter XIV, para 443 – quoted in: The United Nations War Crimes Commission *Law reports of trials of war criminals* (William S Hein & Co, Buffalo, New York, 1997) 18; Takemura, above n 4, 141.

²² Ibid, 18.

²³ McCoubrey, above n 12, 389.

Rules were redrafted²⁴ and in the Nuremberg Trials the plea, raised in almost every case, was declined every time.²⁵ The Tribunal hardly permitted it to be considered in terms of mitigation of punishment.²⁶ Article 8 of the Charter of the Nuremberg Tribunal provided that “[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that Justice so desires.”²⁷ According to the Tribunal it came down to the question of whether the perpetrator had had a “moral choice”,²⁸ which was usually assumed. In my opinion, the Tribunal did not separate the defence of superior orders distinctly enough from the defence of compulsion.

This principle of absolute liability²⁹ was upheld by the Tokyo Tribunal³⁰, the International Criminal Tribunals for the Former Yugoslavia³¹ and Rwanda³² (ICTY and ICTR) and the Special Court for Sierra Leone³³.

The Rome Statute of the International Criminal Court (Rome Statute) is the first international treaty to deal with the defence in a general manner. Concerning the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment there had been consensus before to exclude superior orders as a

²⁴ Ibid, 391; Takemura, above n 4, 141.

²⁵ See with further references: Green 1970, above n 5, 86; Lippman, above n 4, 181.

²⁶ See with further references: Green 1970, above n 5, 86.

²⁷ Charter of the International Military Tribunal (19 January 1946), full text available at <http://avalon.law.yale.edu/imt/imtconst.asp>

²⁸ (1946) 22 IMT 466.

²⁹ Paola Gaeta “The Defence of Superior Order: The Statute of the International Criminal Court versus Customary International Law” (1999) 10 EIJL 172, 178.

³⁰ Charter of the International Military Tribunal for the Far East, above n 27, Article 6.

³¹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (25 May 1993) UN Doc S/25704 [ICTY Statute], Article 7, para 4.

³² International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (8 November 1994) Annex to UN Doc S/RES/955 [ICTR Statute], Article 6, para 4.

³³ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (4 October 2000) Annex to UN Doc S/2000/915, Article 6, para 4.

defence.³⁴ Apart from that specific matter, states had been unable to agree upon a rule concerning superior orders previously in the Geneva Conventions or the Protocols.³⁵

III ARTICLE 33 OF THE ROME STATUTE

Article 33 of the Rome Statute reads:

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

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

A Presumption of Criminal Liability

The first sentence of the article establishes the presumption of criminal liability.³⁶ As a general rule, subordinates cannot defend themselves by pointing at their commander. The presumption of criminal liability has the effect that the prosecution does not have the onus of proving the absence of the exception, but that the defence has to prove the existence of the requirements.³⁷

³⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), art 2(3).

³⁵ Gaeta, above n 29, 190; Takemura, above n 4, 147.

³⁶ McCoubrey, above n 12, 392; Gaeta, above n 29, 190.

³⁷ Otto Triffterer *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck, München, 2008) at article 33 para 14; Gaeta, above n 21, 190.

1 Superior Orders vs Command Responsibility

The presumption of criminal liability of the subordinate seems to be contradictory to the principle of command responsibility. This maxim places responsibility for the misdemeanour of subordinates on their commanders.³⁸

Article 28 of the Rome Statute states that

“[a] military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces [...]”

This concept assumes the superior to be supposedly more advanced, more farsighted and – especially relevant in a military environment – to have more information and that they, therefore, have to supervise and exercise control over their subordinates.³⁹ Maybe, most important is that they must be prevented of misusing their power. They cannot condone or, even worse, order criminal acts and afterwards excuse themselves by claiming that they were not the ones committing them. They cannot even say that they did not know what their subordinates were doing because they are by law supposed to know.⁴⁰ As superiors, they are expected to enforce lawful behaviour and act in an exemplary manner.⁴¹ This seems to imply that subordinates might not be able to reflect on their actions sufficiently and, therefore, cannot be held responsible for them. Military commanders are expected to keep themselves informed about what is

³⁸ Arne Willy Dahl “Command Responsibility and the Defence of Superior Orders” www.uio.no (accessed 29 November 2009).

³⁹ James B Insko “Defense Of Superior Orders Before Military Commissions” (2003) 13 *Duke J Comp & Int’l L* 389, 391, Elies van Sliedregt *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press, The Hague, Netherlands, 2003), 339.

⁴⁰ Article 28(a)(i) of the Rome Statute reads: “[...] owing to the circumstances at the time, should have known [...]”

⁴¹ Jan-Geert Alexander Knoops *Defenses in Contemporary International Criminal Law* (2nd ed, Martinus Nijhoff Publishers, Leiden, 2008) 34.

going on, which is not a duty of a lower ranked soldier.⁴² They are expected to follow the lead of their superior because they have more information. In summary, if we suggest that military commanders are better informed, trained to lead and responsible for the behaviour of their subordinates, can we still hold those responsible for their actions, who were without information, trained to follow and misled by their superiors? Further, if so, does this responsibility not cause the danger to act as a “cloak behind which the responsibility of the state and its leaders or superiors can hide”⁴³?

International criminal law answers the first question in the affirmative and negates the second. Commanders and states have to take accountability for their subordinate's actions as well as individuals for their own. The concepts are not exclusive. On the contrary, they are reciprocal. Neither approach can relieve the other party from prosecution.⁴⁴ No side can excuse itself by shifting guilt to the other, because both have an obligation to think. There can be more than one person liable for a crime. International criminal law is governed by the notion of concrete and individual guilt.⁴⁵ Each wrongdoing has consequences for the perpetrator. This is a fair and important aspect of international criminal law and does not contradict the concept of command responsibility.

2 *The Order*

Paragraph 1 of article 33 of the Rome Statute already sets out two main conditions for the defence. Firstly, there must have been an order by the Government or a superior and secondly, the crime must have been committed pursuant to this order. An order is any oral, written or otherwise expressed demand.⁴⁶ The Oxford University Press dictionary defines an order as “(4)

⁴² Dahl, above n 38.

⁴³ Knoops, above n 41, 34.

⁴⁴ Ibid, 34.

⁴⁵ Ibid, 35.

⁴⁶ Dahl, above n 38; Triffterer, above n 37, at article 33 para 17; Sliedregt, above n 39, 323.

Instructions: something that sb is told to do by sb in authority".⁴⁷ This is in accordance with the use of the Rome Statute of the term. The order must be issued by the Government or a superior, but it must not necessarily be binding. Not every order creates a legal obligation to do, or omit to do a certain act.⁴⁸ The first sentence does not deal with the question of whether the order was binding or not, because it does not matter for the assumption of liability. The general idea is that the subordinate is always responsible for their own actions regardless of whether they are based on an enforceable order, a void order or their own ideas. The question whether the order has to have the force of law is relevant later, when analysing the preconditions for the exemption. Otherwise, the first requirement would be redundant. To raise the defence of superior orders, paragraph 1 further makes clear that the order must be causal for the crime.⁴⁹ This means that the subordinates must act on the order, not on their own discretion. The superior must set the cause for the action. Again, causing does not equal forcing.

3 *Availability of the Defence to Civilians*

Article 33 of the Rome Statute does not expressly include or exclude the availability of the defence for civilians. It accepts the binding effect of orders given by a civilian authority. Concerning the subordinate the Rome Statute only talks about the "person". Elies van Sliedregt states that "[i]n reality, the defence of superior orders is reserved for the military."⁵⁰ She argues that the superior-subordinate relationship should be interpreted in a narrow way to prevent an extensive use of the defence.⁵¹ Her argument, however, relates to the question of what civilian authorities are, not whether civilians shall be protected by the defence. Nevertheless, she concludes that civilian subordinates are excluded and

⁴⁷ Oxford University Press www.oup.com "order" (accessed 29 December 2009).

⁴⁸ Nico Keijzer *Military Obedience* (Sijthoff & Noordhoff, Alphen aan den Rijn, Netherlands, 1978) 22.

⁴⁹ Dahl, above n 38.

⁵⁰ Sliedregt, above n 39, 324.

⁵¹ *Ibid*, 324.

that they have to claim article 31(1)(d) of the Rome Statute.⁵² I tend to disagree with this conclusion as the defence of duress has quite different conditions from the defence of superior orders. Nothing about that issue can be found in the ICTY or ICTR Statutes.⁵³ Article 28(b) of the Rome Statute expressly includes non-military superior-subordinate relationships and highlights the “effective control”⁵⁴ as the important element. Transferring this classification to article 33 any superior-subordinate relationship which enables the superior to give legally binding orders to the subordinate is included in article 33. This is a logical and legally consequent conclusion.⁵⁵ Geert-Jan Alexander Knoops proposes a change of the wording of article 33(1)(a) to “the person was, considering the factual situation or circumstances, under an obligation to obey orders.”⁵⁶ Considering the fact, that, for example, rebel groups operate in military-like ways, or that military regimes use civilians to work for them, this seems a sensible suggestion. In a case, in which a soldier is able to effectually plead the defence there is no reason why a civilian, in the exact same situation under the same putative obligation to act, should be denied that defence. Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) reads: “All persons shall be equal before the courts and tribunals.”⁵⁷ As an international treaty the ICCPR is a valid source for an indication of how to interpret the wording of the Rome Statute.⁵⁸ As a consequence, the equality of members of the armed forces and civilians should be assumed if the Rome Statute expressly does not rule otherwise, which it does not. Another indication is the emphasis the Manual for the Ratification and Implementation of the Rome Statute puts on the *de facto* control the authority exercises.⁵⁹ I do not think that the explicit

⁵² Ibid, 339.

⁵³ Knoops, above n 41, 40.

⁵⁴ Rome Statute art 28(b).

⁵⁵ Knoops, above n 41, 41.

⁵⁶ Ibid, 42.

⁵⁷ International Covenant on Civil and Political Rights (23 March 1976) UN Doc A/6316 (1966)

⁵⁸ Rome Statute, art 25(1)(b)

⁵⁹ International Centre for Criminal Law Reform and Criminal Justice Policy *International Criminal Court - Manual for the Ratification and Implementation of the Rome Statute* (3rd ed, University of British Columbia, Vancouver, 2008) 88.

extension of the defence of superior orders to civilians would broaden the scope of the application of the defence in an unreasonable way. It will underline the intention of article 33 to protect those who trust their superiors.

B Exemption

Article 33 states three conditions for an exception to the rule, which need to be given cumulatively. On presentation of these requirements, the subordinate acted in good faith.⁶⁰ In this case the defence of superior orders applies. Firstly, the order must be issued by a formal authority of military or civilian nature. This is an objective requirement of the binding effect of the command.⁶¹ Here it is pointed out that the subordinate must have acted on an enforceable order within the scope of the authority of the superior. Otherwise the order would not be legally binding.⁶² Secondly, the subordinate does not recognise the unlawfulness of the order. This is a subjective condition that focuses on the insight of the individual. The subordinate must believe that the demanded behaviour is legal and within their duties.

An issue, one might consider in this context, are orders given in the heat of a battle where action is required immediately. Some courts argue for a conviction of a subordinate who raises the defence of superior orders that the order was not given on the battlefield and that, therefore, the person had time to realise the unlawfulness.⁶³ In *US v Calley* the Court of Military Appeals stated that “[i]n the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment [...]”⁶⁴ The *argumento e contrario* leads to the conclusion that the courts would recognise those orders given in the action of a battle as a valid defence. It has to be kept in mind that the “battlefield

⁶⁰ Sliedregt, above n 39, 324.

⁶¹ Dahl, above n 38.

⁶² Keijzer, above n 48, 23.

⁶³ *US v Calley* (1973) 22 USCMA 534, 543, 544; see for further references: Antonio Cassese *International Criminal Law* (Oxford University Press, Oxford, 2003) 239.

⁶⁴ *US v Calley*, above n 63, 543, 544 – This aspect did not apply to Calley.

reality is one of extreme chaos".⁶⁵ Military law, international humanitarian law, domestic law – there are many sources of law and even more ways of interpreting them. This can be a complex issue.⁶⁶ A commonly quoted comment by a US Army officer is: "I know that if I ever go to war again, the first person I'm taking is my lawyer."⁶⁷ It is a logical consequence to assume that the perpetrator must have had time to reflect on the situation to be criminally liable for any behaviour. However, a manifestly unlawful act is not something that can only be detected by legal experts. It is something extremely obvious. Accordingly, a battlefield aspect cannot be confirmed when looking at the judgments on the issue. The defence of superior orders has never been fully accepted in international criminal law regardless of the circumstances of the case.⁶⁸ What follows from the argumentation is not that criminal liability is grounded on a well-considered decision to obey the order. The fact that a subordinate had time to reflect on a command to commit a crime emphasises their liability, but it only means, that they are all the more culpable. The accountability follows purely from the crime itself. This is necessary and fair, because international criminal law deals with the most serious crimes, with the worst atrocities. The circumstances in which the order had been given can only be considered in terms of the measurement of guilt and punishment.⁶⁹ So did Judge Quinn in *US v Calley* continue that criminal responsibility, even in this battlefield-scenario, can only be waived "if [a member of the armed forces] guesses wrong on a question as to which there may be considerable disagreement."⁷⁰ A command that orders a subordinate to commit a crime codified in the Rome Statute whose lawfulness is debatable is not very common.

⁶⁵ Sliedregt, above n 39, 339.

⁶⁶ Martha Minow "Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence" (2007) 52 McGill LJ 1, 5.

⁶⁷ Colonel Patrick Finnegan "Operational Law: Plan and Execute" (1996) 76:2 Military Review 29, 32.

⁶⁸ See description of the history of the defence, chapter II, for further references see Cassese, above n 63, 239.

⁶⁹ Ibid, 240.

⁷⁰ *US v Calley*, above n 63, 544.

The third condition requires that the command was not manifestly unlawful, meaning that the subordinates cannot be regarded as having “*ought to know*” that it was actually unlawful.

Dr. Mohammed Saif-Alden Wattad finds the fact that these conditions are cumulative “perplexing”.⁷¹ He comments that if a person did not recognise an order as being unlawful, they clearly did not know it was manifestly unlawful. This is indeed true, however, it is not relevant. It is important to note that the non-manifest illegality of the order is another objective element which has nothing to do with the ideas of the perpetrators themselves, but purely with how the court evaluates the case and the degree of illegality.⁷² An order to commit a manifestly illegal crime is defective, because it is not within the authority of the superior (or anyone) to order such an act.⁷³ Therefore, the command loses the binding effect.⁷⁴ The court will classify the illegality of the crime. This depends on how the term *manifestly unlawful* is to be defined.⁷⁵

C *Manifest Illegality of Genocide and Crimes Against Humanity*

Subsection 2 of article 33 of the Rome Statute excludes acts of genocide and crimes against humanity from the scope of the defence. As crimes against humanity require a systematic and widespread attack,⁷⁶ and genocide the intent to destroy a certain group of people,⁷⁷ they are qualified as manifestly unlawful beyond doubt.⁷⁸ Proof that a certain command ordering these crimes in a concrete situation has not been manifestly unlawful is not valid. This shows which level of atrocity is qualified as obviously intolerable.

⁷¹ Dr Mohammed Saif-Alden Wattad “The Rome Statute and Captain Planet: What lies between ‘Crimes Against Humanity’ and the ‘Natural Environment’?” (2009) 19 *Fordham Env'tl L Rev* 265, 272.

⁷² Triffterer, above n 37, at article 33 para 28; Sliedregt, above n 39, 325.

⁷³ Keijzer, above n 48, 23, 25.

⁷⁴ *Ibid*, 25.

⁷⁵ See below.

⁷⁶ Rome Statute, Article 7.

⁷⁷ *Ibid*, Article 6.

⁷⁸ Sliedregt, above n 39, 325.

IV MANIFEST ILLEGALITY

The central question of article 33 is how manifest illegality is to be defined. First it is important to find out whether the *unlawfulness* of the order, the fact that the order is against the law, does refer to the domestic law under which the perpetrator acts or to international criminal law. The first option would create a situation in which certain behaviour could not be qualified as a crime when the domestic law permits or requires the subordinate to do so. This would make it very simple for a terror regime to prevent their commanders from being punished by the International Criminal Court. They would only have to pass laws with a content that protects them. The Nuremberg Tribunal did not recognise the cover of domestic law as an excuse.⁷⁹ Clearly, the article 33 of the Rome Statute did not intend to open that door either. As a consequence, international criminal law is the threshold for unlawfulness. This is essential to make the ICC work, otherwise the whole construction would fall apart in every case. By ratifying the Rome Statute, states accept this position. Nevertheless, the wording of the Rome Statute leaves room for doubt and debate on this term. It is my opinion that international criminal law needs to be as precise as possible. This matter of controversy could be easily eliminated with an explanation that *illegal* refers to a breach of international criminal law.

Next it is necessary to define when an act is manifestly illegal. This is especially important because, as just shown, in cases of a manifestly illegal order, subordinates are legally obliged to turn against their own legal system and to refuse to execute the command. They have to bear the possible legal consequences under their jurisdiction. As to whether such a thing as manifest illegality exists and if so what it means, there are various legal-philosophical theories.⁸⁰

⁷⁹ Trial of the Major War Criminals Before the International Military Tribunal, full text available at http://avalon.law.yale.edu/subject_menus/imt.asp.

⁸⁰ The following text briefly summarises the three main theories.

A *Natural Law*

Natural Law derives from Aristotle⁸¹, who distinguished between “human law” and “natural law”.⁸² Natural law is characterised by three main components, identified by Cicero.⁸³

True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting. ... It is a sin to alter this law, not it is allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. ... [God] is the author of this law, its promulgator, and its enforcing judge.

This means that a law beyond manmade rules exists regarding the core of right and wrong. This is also called “moral realism” or “moral truth”.⁸⁴ Significant is that natural law is discernible through reason.⁸⁵ That means that everybody should be able to recognise it, and accordingly, avoid a violation. According to Aquinas, people who do not follow their inclination for the good, choose to act contrary to their essential, better nature.⁸⁶ Because natural law is of a higher source than human law, it has greater authority.⁸⁷ Therefore, human law violating natural law is legally void.⁸⁸

The problem with this doctrine is that it is very abstract. It is hard to deduce an applicable legal rule from it.

⁸¹ Aristotle *Nicomachean Ethics* quoted in Max Salomon Shellens “Aristotle on Natural Law” (1959) 4 Nat LF 72, 85.

⁸² Henry Mather “Natural Law and Liberalism” (2000 – 2001) 52 S C L Rev 331, 332.

⁸³ Cicero quoted in Raymond Wacks *Philosophy of Law* (Oxford University Press, New York, 2006) 3.

⁸⁴ Mather, above n 82, 333.

⁸⁵ Wacks, above n 83, 3.

⁸⁶ St Thomas Aquinas *Commentary on Aristotle's Nicomachean Ethics* quoted in Mather, above n 82, 335.

⁸⁷ Mark Tebbit *Philosophy of Law – An Introduction* (2nd ed, Routledge, Abingdon, 2005) 12.

⁸⁸ *Ibid*, 12.

B Legal Positivism

Legal positivism usually rejects a connection between law and morals.⁸⁹ The law, as it is laid down, has to be separated from law how it should be.⁹⁰ Unwritten standards cannot be expected to provide guidance; legal validity is to be identified formally and must be morally neutral, because *morally abhorrent* does not equal *criminal*.⁹¹ This is in accordance with the maxim of *nullum crimen sine lege*. This concept is of great importance for legal certainty and recognised by almost every jurisdiction.⁹²

Legally, this principle is much easier to apply but it also carries much greater risk. If anything can be law, anything can be enforceable. This can be easily abused and has been abused in the past. The National Socialists aimed to bind soldiers and jurists by the doctrines “An order is an order” and “A law is a law”⁹³. Although the first principle did not apply to criminal conduct, the latter knew no restrictions.⁹⁴

C Radbruch

Gustav Radbruch developed a formula that created a middle way between Natural Law and Legal Positivism.

⁸⁹ Ibid, 18.

⁹⁰ Wacks, above n 83, 19.

⁹¹ Tebbit, above n 87, 36.

⁹² Susan Lamb „*Nullum Crimen, Nully Poena Sine Lege* in International Criminal Law“ in Antonia Cassese, Paola Gaeta, John R W D Jones (ed) *The Rome Statute of the International Criminal Court: A Commentary Volume I* (Oxford University Press, New York, 2002) 734.

⁹³ Quoted in Gustav Radbruch “Statutory Lawlessness and Supra-Statutory Law” printed in David Dyzenhaus, Arthur Ripstein, Sophia Reibetanz Moreau (ed) *Law and Morality: Readings in Legal Philosophy* (3rd ed, University of Toronto Press, Toronto, 2007) 127.

⁹⁴ Gustav Radbruch “Statutory Lawlessness and Supra-Statutory Law” printed in David Dyzenhaus, Arthur Ripstein, Sophia Reibetanz Moreau (ed) *Law and Morality: Readings in Legal Philosophy* (3rd ed, University of Toronto Press, Toronto, 2007) 127.

1 *Radbruch's Formula*

Radbruch united both approaches to a new legal rule.⁹⁵

The conflict between justice and legal certainty should be resolved in that the positive law, established by enactment, and by power, has primacy even when its content justice reaches an intolerable level that the law is supposed to give way as a 'false law' to justice. It is impossible to draw a sharper line between the cases of legalized injustice and laws which remain valid despite their false content. But another boundary can be drawn with the utmost precision. Where justice is not even aimed at, where equality is deliberately disavowed in the enactment of a positive law, then the law is not simple 'false law', it has no claim at all to legal status.

This usually means that positivistic law is to be followed. However, extreme injustice is no law and therefore, cannot have a binding effect.

Radbruch is laying out a ground rule here and breaking it at the same time. He tries to unite the exclusive models of natural law and positivism, working out the core ideas of both approaches and putting them in context. He tries to raise and maintain legal security up to a point where it is not bearable anymore.

2 *Berlin Wall Shootings*

A famous (though domestic) series of cases dealing with the issue are the *Mauerschützenprozesse* (Berlin Wall Shooting cases⁹⁶).

When Germany was separated in the Federal German Republic⁹⁷ (West Germany) and the German Democratic Republic⁹⁸ (East Germany), people from East Germany were not allowed to leave the country without permission. In

⁹⁵ Gustav Radbruch "Gesetzliches Unrecht und übergesetzliches Recht" (1946) in *Rechtsphilosophie* (5th ed, Koehler Verlag, 1956) 353, 354 quoted in English in: Giovannangelo De Francesco "Radbruch Formula and Criminal Law" (2003) 1 J Int'l Crim Just 728, 729.

⁹⁶ An English version of the first trial (BGHSt 39, 1) is available at <http://www.iuscomp.org/gla/judgments/bgh/s921103.htm> (accessed 20 February 2010). Parts especially interesting and relevant at para C II 2 (b).

⁹⁷ Bundesrepublik Deutschland

⁹⁸ Deutsche Demokratische Republik

section 213 of the German Democratic Republic Penal Code illegal border crossing was punishable with up to 5 years of imprisonment.⁹⁹ Nevertheless, hundreds and thousands tried to flee. The members of the border troops had to ensure that no one left or entered the country illegally by all means. Section 27 of the Borders of the German Democratic Republic Act [*Gesetz über die Staatsgrenze der Deutschen Demokratischen Republik*] allowed the use of fire arms as *ultima ratio* to prevent someone from committing a crime, which fleeing was. This was the so called *Schießbefehl*, the order to shoot. The border soldiers were supposed to shout first and give warnings, but eventually they had to shoot. According to subsection 4, the use of fire arms was not allowed against children, and young persons and women should be spared as far as possible. Subsection 5 stated that the life of the person should be spared as far as possible. The explanation of section 27 was part of the training of the border soldiers. The total number of deaths is unknown, historians estimate that around 1,100 people died trying to escape.¹⁰⁰

After the unification of Germany, 246 persons were put on trial, about half of whom were acquitted. The state leaders were indicted for giving the orders and passing the law, the subordinates were prosecuted for shooting. In these cases the Courts had to deal with the issue of superior orders. The shooters had only followed the law of their country and the orders of their superiors. Deadly force had explicitly been allowed if other means were not effective.

The prosecution argued that murder had been prohibited under the German Democratic Penal Code¹⁰¹ and that the justification of section 27 of the Border Act was void. The Judges of the first trial and the Court of Appeal¹⁰² affirmed

⁹⁹ StGB-DDR, text in German available at www.verfassungen.de/de/ddr/strafgesetzbuch74 (accessed 20 February 2010).

¹⁰⁰ Deutsche Welle "More Than 1,100 Berlin Wall Victims" (9 August 2005) www.dw-world.de (accessed 21 February 2010) – This number includes victims of mines and booby-traps.

¹⁰¹ Section 112.

¹⁰² The appellate court was here the High Court for Criminal Cases.

this view.¹⁰³ The Court argued especially that section 27 of the Border Act was incompatible with the ICCPR. The German Democratic Republic had ratified the convention and therefore, the standards of the ICCPR had been applicable to the law.¹⁰⁴

Because of the obvious, unendurable breach of basic dictates of justice and of human rights, which to protect is a duty of the German Democratic Republic as a ratifying party of the ICCPR, section 27 of the Border Act cannot justify the act.

The High Court for Criminal Cases applied Radbruch's Formula.¹⁰⁵ It explained that the Berlin wall shootings did not have the same gravity of inhumanity as the national socialist's mass murders. However, the extreme injustice Radbruch described was not limited to genocide, war crimes or crimes against humanity or limited to the acts prohibited under the Geneva Conventions. The Court derived the manifest illegality of the wall shootings from an overall appraisal of the border regime. The Court stated that the determination of human life to be worth less than the protection of the border was unacceptable. Further, it explored the motives for the orders to shoot, the living situation in the German Democratic Republic and concluded that the judgment of the first instance had been correct.

The cases of the convicted state leaders were brought before the German Supreme Court, which confirmed the legal interpretations of the first and second instances.¹⁰⁶ The order of the shootings had violated articles 12(2) and 6(1) of the ICCPR. The law of the border regime was extremely unjust and therefore, no law.

¹⁰³ BGHSt 39, 168, at para 13, 39.

¹⁰⁴ Ibid, at para 39 - „Wegen offensichtlichen, unerträglichen Verstoßes gegen elementare Gebote der Gerechtigkeit und gegen die Menschenrechte, die zu schützen sich die DDR als Vertragsstaat des Internationalen Paktes über bürgerliche und politische Rechte vom 19. Dezember 1966 (GBl. DDR 1974 II 57; BGBl. 1973 II 1533) verpflichtet hatte, konnte § 27 des Grenzgesetzes der DDR in der Auslegung, die durch eine solche Staatspraxis gekennzeichnet war, keine rechtfertigende Wirkung entfalten.“ - translation done by the author; BGHSt 41, 101, at para 11.

¹⁰⁵ BGHSt 41, 101, at para 17 - 21.

¹⁰⁶ BVerfGE 95, 96, at para 69, 76.

Of course, these decisions have been criticised. Susanne Walther reproaches the High Court with “dismissing in such short-cut fashion”¹⁰⁷ the possibility of a lack of intent of the defendants. However, the High Court mentioned that the border soldiers had been taught not to follow orders to act inhumanely.¹⁰⁸ They should have recognised the disproportionateness. The Supreme Court decision has been criticised for applying international criminal law doctrines, because only East German law should have been leading for the conviction.¹⁰⁹ However, the Court did not apply the ICCPR directly to the case but used it as a guidance for how the law of the German Democratic Republic had to be interpreted. This is convincing especially because the German Democratic Republic had ratified the convention. As there was no interpretation in accordance with human rights it could not be valid.

D Interim Conclusion

According to the naturalist *manifest unlawfulness* is given by nature. People are born with a sense of good and evil. If they choose to act against natural law, which is unchangeable, their behaviour goes against nature and is manifestly illegal. As long as domestic and international criminal law are analogous on such matters, a conviction is easy to justify. More legally challenging is to evaluate a situation where the order was consistent with the domestic law. Law is binding, that is a fundamental characteristic of law. It has to be enforceable to create legal security which is crucial for a functioning society. A legal term needs to be precise to guarantee fair trials and fair outcomes. That leaves us with Radbruch. His approach seems to be logically inconsequent and yet it works. A bottom line for lawfulness has to be set out. This is what the Rome Statute now calls *manifest unlawfulness*.

¹⁰⁷ Susanne Walther “Problems in Blaming and Punishing Individuals For Human Rights Violations: The Example of the Berlin Wall Shootings” (1993) 1 Eur J Crime Crim L & Crim Just 104, 116.

¹⁰⁸ BGHSt 39, 1, at para 81.

¹⁰⁹ Micah Goodman “After the Wall: Legal Ramifications of the East German Border Guard Trials in Unified Germany” (1996) 29 Cornell Int’l LJ 727, 765.

There have been several judgments dealing with this issue. One of the most cited ones today draws an excellent picture of manifest unlawfulness which is probably as close to a definition as it could be. It is the Israeli case *Chief Military Prosecutor v Melinki*.¹¹⁰

The identifying mark of a 'manifestly unlawful' order must wave like a black flag above the order given, as a warning saying: 'forbidden'. It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of 'manifest' quality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.

According to the judges in another case, a manifestly unlawful order must offend "the conscience of every reasonable, right-thinking person."¹¹¹ The court stated that an act of manifest illegality is something which goes against the very instincts of human beings.

While for some time, a very positivistic approach had been recognised in domestic and international law, and the Nuremberg Trials followed a very strict naturalistic view of law, the drafters of the Rome Statute implemented Radbruch's model that had been applied in the judgments mentioned above. The general presumption of criminal liability shows that an obligation to disobey orders to commit a crime is given. This is the approach of natural law, which excludes any justification of a breach of that law. Radbruch's idea on this issue can be found in the exception of article 33 of the Rome Statute as a conditional liability approach. If the subordinate had no intention of committing a crime and

¹¹⁰ *Chief Military Prosecutor v. Melinki* Appeal 279-283/58, 44 Psakim (Judgments of the District Courts of Israel) 362, cited in *R v Finta* 1994 CarswellOnt 61 (Supreme Court of Canada) at para 134.

¹¹¹ *R v Finta*, above n 110, at para 134.

the obligation to follow the order, they can exculpate themselves unless the conduct is extremely unjust. To keep the military a functioning body, soldiers must carry out orders.¹¹² Generally it is desirable that people follow the law. The Rome Statute recognises this up to a point from which it is not endurable anymore, outlined by subsection 2.

Still, manifest illegality is a normative term. It defines an action on grounds of morality, an estimation of good and evil. These values are formed by social heritage, customs, faith, education and many more factors. While even people from the same culture argue about this, the abyss between cultures seems insuperable. On the other hand, we are all human beings. It is as simple as that because there are matters in which respect every single person in the world is equal. Not only for bodily needs, such as food and sleep, but also on moral levels there is common ground. Parts of the ideologies of the five major world religions¹¹³ are identical. For example, the Christian and Jewish "Thou shalt not kill."¹¹⁴ reads as "And do not take any human being's life - that God willed to be sacred - other than in [the pursuit of] justice."¹¹⁵ in the Qur'an. This underlines the fact that some values, and consequently some law, is beyond manmade rules. It is something nearly every culture and society considers crucial for co-existence, something more than reason. *Natural law* is a well-fitting term for this phenomenon. This feeling of justice, of a bottom line, comes naturally to human beings and those who lack it, cannot be part of society. Radbruch gave this feeling a legal right to exist and the judges gave it the symbol of a black flag.

In consequence, the answer to the question whether one can be expected to break the law in extreme cases and (to a certain limit) bear the consequences is

¹¹² Insko, above n 39, 393.

¹¹³ Christianity, Islam, Hinduism, Buddhism, Judaism - Encyclopædia Britannica "The 2005 Annual Megacensus of Religions" Table 1 www.britannica.com (accessed 17 February 2010).

¹¹⁴ The Bible, Exodus 20:13.

¹¹⁵ Qur'an, 17:33.

“Yes”. The moral responsibility of every human being for others for the purpose of upholding the core of justice, forces one to recognise the illegality of certain conduct and resist it.

V *CURRENT LEGAL DEBATES*

The praxis shows that the solution the Rome Statute offers, leaves some open questions and although all contracting parties agreed on the current version, there are still several matters open to discussion.

A *Breach of Customary International Law*

It is criticised that article 33 of the Rome Statute is a breach of customary international law. Customary international law results from “a general and consistent practice of states followed by them from a sense of legal obligation [...]”.¹¹⁶ This means that it arises from first state practise (material element) and second opinio juris (psychological element). States must act according to a certain rule over an appropriate period of time and recognise this rule as binding.¹¹⁷ Customary international law is one of the most important sources for international law.

Paola Gaeta states that the rejection of the defence of superior orders has been practised in international law for long enough to establish a rule of customary international law.¹¹⁸ Therefore, according to Gaeta, the current version of article 33 is not consistent with customary international law.

It is true that no one ever challenged the sections of the statutes of the ad hoc tribunals dealing with superior orders as being contrary to customary

¹¹⁶ Boleslaw A Boczek *International Law: A Dictionary* (Scarecrow Press, Lanham, 2005), 30.

¹¹⁷ Ibid.

¹¹⁸ Gaeta, above n 29, 185.

international law.¹¹⁹ There seemed to be a universal understanding that the principle of absolute liability was the correct choice. Sliedregt counters this argument by stating that the absolute liability approach is grounded basically on the Nuremberg trials.¹²⁰ Nuremberg, however, was such an extraordinary and unique trial that it cannot provide standards for customary international law.¹²¹ Furthermore, she argues, there have been attempts to include the conditional liability approach in the 1949 Geneva Conventions and in the 1977 Additional Protocols to the Geneva Conventions.¹²² This proves that there has never been a general legal perception of the absolute liability doctrine.

Lastly, it has to be acknowledged that some jurisdictions, both civil and common law, have an equivalent to the conditioned liability concept in their criminal law. For example the French and the Italian penal codes have such provisions.¹²³ In the United States, Canada and Australia the manifest liability approach is commonly accepted, too.¹²⁴ In national war crime trials it has even been applied to non-nationals.¹²⁵ The question is, whether national practise is irrelevant for international law rules and can undermine state practise or not.

In my opinion, the application of the conditional liability approach in national cases conflicts with the concept of *opinio juris*. A criminal law concept is either valid for everyone, no matter what their nationality, or it is void. The notion to make a defence available to your own citizens but denying it to others is not acceptable and does not provide for state practise even when exercised. In my view, domestic and international handling of legal problems is linked and not

¹¹⁹ Takemura, above n 4, 163.

¹²⁰ Sliedregt, above n 39, 337.

¹²¹ With further references: *Ibid.*

¹²² *Ibid.*

¹²³ Massimo Scaliotti "Defences before the Internatinoal Criminal Court: Substantive Grounds for Excluding Criminal Responsibility – Part 1" (2001) 1 *Int'l Crim L Rev* 111, 127.

¹²⁴ *Ibid.*

¹²⁵ Sliedregt, above n 39, 337.

separable. Therefore, the absolute liability approach has not become customary international law.

B War Crimes

Since the day the Rome Statute came into force, the black flag of manifest illegality waves officially over genocide and crimes against humanity. Article 33 does not mention war crimes. This means that war crimes must reach a level of gravity comparable to genocide or crimes against humanity to be manifestly unlawful. This is one of the aspects most criticised about article 33. The ICC has jurisdiction over the most serious crimes of humankind and yet war crimes are not described as manifestly unlawful. This seems unreasonable to some as war crimes are grave violations of humanitarian law.¹²⁶ The detailed nature of article 8 of the Rome Statute indicates very clearly which acts are war crimes and therefore unlawful.¹²⁷ Paola Gaeta calls every order “which constitutes a grave breach of the 1949 Geneva Conventions” obviously illegal.¹²⁸ According to her point of view, one cannot qualify a crime as serious while at the same time deny the status of a manifest unlawfulness.¹²⁹ Antonio Cassese is in agreement with her and takes the matter further. According to Cassese the ICC Statute is very clear on the extent and illegality of war crimes.¹³⁰

[A]ny serviceman is expected and required to *know* whether the act he is about to commit falls under the category of war crimes and must be aware of whether or not the execution of a superior order involves the commission of such a crime.

Given the usual living conditions in the countries that were recently involved in or currently suffer under international and national armed conflicts, this statement must surprise. The average level of education in those countries is

¹²⁶ Gaeta, above n 29, 185; Cassese, above n 63, 241.

¹²⁷ Wattad, above n 71, 272; Gaeta, above n 29, 190.

¹²⁸ Gaeta, above n 29, 185.

¹²⁹ Ibid.

¹³⁰ Cassese, above n 63, 241

low. The availability of information is poor and the military training often basic. It is doubtful that many members of the Sudan Liberation Movement are lectured about the fact that they have the obligation to refuse to obey orders to commit a war crime. It is even more doubtful that in case of a new Rwandan rebellion, participants would know what war crimes are. Finally, it is highly doubtful that even a few Afghan soldiers have any idea of the existence of the Rome Statute at all. Therefore, Cassese's claim that anyone should know about both, the definition of the Rome Statute of war crimes and the duty to disobey such an order in this general extended form, seems unfair and unrealistic. The Rome Statute was written by highly educated people, who gave the wording a lot of time and thought. Therefore, the Rome Statute is an academic text, that cannot be easily understood by someone untrained in this area at all, who was raised in a country where human rights are not a matter of course. Assuming that all Afghan soldiers were able to read and were provided with a copy of the Rome Statute, it is highly unlikely that they would understand for example the meaning of article 8(2)(a)(vi): "Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;" How are they supposed to know what a "fair and regular trial" in this context means? In my opinion, Cassese's argument only applies to people with military, political or legal education.

Cassese argues further that the non-inclusion of war crimes might lead to unfair results.¹³¹ As cumulative charges are allowed,¹³² the prosecution might circumvent the defence of superior orders.¹³³ He fears that the punishment for a crime would depend on establishing whether the crime is qualified as a crime

¹³¹ Ibid 241; affirmative Sliedregt, above n 39, 326.

¹³² *Prosecutor v Akayesu* Case No ICTR-96-4-T (Chamber 1, Trial Judgment) (2 September 1998); see with further references in ICTR and ICTY trials: Hong S Wills „Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR“ (2003) 17 *Emory Int'l L Rev* 341, 358.

¹³³ Andreas Zimmermann "Superior Orders" in Antonio Cassese, Paola Gaeta, John R W D Jones (ed) *The Rome Statute of the International Criminal Court: A Commentary Volume I* (Oxford University Press, New York, 2002) 972.

against humanity or an act of genocide, in which case the defence of superior orders cannot be raised, or as a war crime, in which case the defence can be pleaded.¹³⁴ This would indeed be legally unacceptable.¹³⁵ However, there is no danger of that happening. As mentioned before, article 33(2) sets out a threshold for manifest illegality. If a war crime can also be qualified as a crime against humanity, it is without doubt manifestly illegal. As a consequence the defence of superior orders cannot be applied. If the defence of superior orders applies, the crime cannot be of such gravity as to qualify as a crime against humanity.

Regarding the argument that the Rome Statute has jurisdiction over the most serious crimes and that this choice of words indicates the manifest illegality of all crimes within this jurisdiction, it has to be noted that not all war crimes are of equal cruelty. It is true that most crimes described in article 8 of the Rome Statute are hideous and will surely be of manifest illegality. However, there is a clear ranking. "Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy [...] resulting in death or serious personal injury;"¹³⁶ is hardly as inhumane as torture¹³⁷. While anyone who can feel pain and fear, should recognise the intolerability of torture, it is not completely incomprehensible to use tricks to win a battle. The non-qualification of a crime as manifestly unlawful does not make it any less a crime punishable under and taken seriously by the Rome Statute.

Another aspect, why war crimes are not qualified as manifestly illegal *per se* might be the fact that they are typically (though not exclusively) committed by military or paramilitary persons who according to some scholars shall be protected further¹³⁸ to honour the extraordinary circumstances of the military. This results from a sociological concept Nico Keijzer calls *acceptance of*

¹³⁴ Cassese, above n 63, 241.

¹³⁵ Sliedregt, above n 39, 326.

¹³⁶ Rome Statute, art 8(2)(b)(vii).

¹³⁷ Ibid, art 8(2)(a)(ii).

¹³⁸ Triffterer, above n 31, at article 33 para 31.

power.¹³⁹ The fact that the *power-subjects* accept the influence the *power-holder* exercises without resistance as rightful leads to a relationship of trust. It is a circle¹⁴⁰: The subordinate wishes to follow the guidance which in turn strengthens the power of the commander. A military commander is presumed to give legal orders.¹⁴¹ The duty to obey them is based on that presumption.¹⁴² This makes their relationship special and should be reflected in the defence. A more lenient handling seems justified.¹⁴³

Finally, I agree with Sliedregt that the emphasis of crimes against humanity and genocide in paragraph 2 of article 33 of the Rome Statute causes more discussion than it is actually worth.¹⁴⁴ The manifest illegality approach alone would lead to the very same results, because crimes against humanity and acts of genocide are of such abomination that they are manifestly unlawful anyway. A differentiation between war crimes and crimes against humanity or genocide does not add any legal aspects and, therefore, was not strictly necessary. Sliedregt is of the opinion paragraph 2 should have been omitted.¹⁴⁵ I think it provides guidance to what is manifestly unlawful beyond doubt. It defines a threshold and therefore, is very useful. The scope of application of the defence of superior orders is narrow. Only a small portion of the crimes codified in the Rome Statute will not reach the level of manifest unlawfulness. After all, the Rome Statute deals with the most serious crimes. The ICC does not hold a trial for every single participant of an armed conflict, who may have stepped out of line, but it only deals with the most serious cases. So in reality, chances that someone is brought before the ICC, whose crimes may or may not have been manifestly illegal, are even smaller. Nevertheless, it has to deal with this question, when evaluating single incidents, but I daresay that a conviction will

¹³⁹ Keijzer, above n 48, 18.

¹⁴⁰ Ibid, 19, 20.

¹⁴¹ Keijzer, above n X, 282, 283.

¹⁴² Sliedregt, above n 39, 340.

¹⁴³ Ibid.

¹⁴⁴ Ibid, 338.

¹⁴⁵ Ibid, 341.

hardly ever stand or fall on that question. For this reason, I propose to concentrate on issues that will actually make a difference. The inclusion of war crimes in paragraph 2 of article 33 would make the defence redundant, because there would be nothing left to apply it to. So the hidden question in this discussion is the right of the defence to exist.¹⁴⁶

C Aggression

The fourth crime in the Rome Statute, which the ICC will gain jurisdiction over once it is defined¹⁴⁷, next to acts of genocide, crimes against humanity and war crimes is the crime of aggression. As war crimes it is not mentioned in paragraph 2 of article 33 of the Rome Statute. However, that does not imply that aggression is not manifestly illegal and can be object to the defence of superior orders.

It has to be said that evaluating the crime of aggression is challenging, as most people agree that it has yet to be defined.¹⁴⁸ Benjamin Ferencz has an opposing point of view and claims that "aggression has already been adequately defined."¹⁴⁹ Be that as it may, what we know about the crime of aggression is enough to determine two main points. Firstly, it definitely is manifestly unlawful. Without an official definition by the Rome Statute, this statement is not completely waterproof, but the main ideas are largely uncontroversial.¹⁵⁰ Based on the proposed definitions that have been considered in international discussions, I agree with Ferencz and the International Military Tribunal at

¹⁴⁶ This is discussed below.

¹⁴⁷ Rome Statute, art 5(2).

¹⁴⁸ Mark A Drumbl "The Push to Criminalize Aggression: Something Lost Amid the Gains" (2009) 41 Case W Res J Int'l L 291, 291; Sergey Sayapin "A Great Unknown: The Definition of Aggression Revisited" (2008-2009) 17 Mich St J Int'l L 377, 377; This might happen this year at the conference in Uganda.

¹⁴⁹ Benjamin B Ferencz "Ending Impunity for the Crime of Aggression" (2009) 41 Case W Res J Int'l L 281, 281.

¹⁵⁰ Takemura, above n 4, 175.

Nuremberg (IMTN) that aggression is the “supreme international crime”¹⁵¹. Article 6(a) of the IMT Charter defined crimes against peace as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”¹⁵². Article 1 of the annex to the General Assembly Resolution 3314 from 1974 reads: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations [...]”¹⁵³. The discussion paper on the crime of aggression of 2008 took up these formulations.¹⁵⁴ The bottom line of the crime is one state attacking another without being justified. Three main justifications are commonly considered: 1. self-defence, 2. defence of an ally, 3. liberation of oppressed people.¹⁵⁵ Attacking another state for no reason than wanting to do so has the black flag of unlawfulness waving and screaming over its head. It is, so to say, the core of all crimes just with more horrid consequences than most other crimes. I consider it especially dangerous, because it creates situations that provoke the commission of the other crimes of the Rome Statute. Crimes against humanity can happen without aggression, but aggression without crimes against humanity being committed is unlikely. An act that sets the cause for manifestly illegal crimes has to be manifestly unlawful itself. Important to note in this context is this proposal of the discussion paper:¹⁵⁶

4. Insert the following text after article 25, paragraph 3, of the Statute:

3 bis

¹⁵¹ The International Military Tribunal at Nuremberg, full text available at http://avalon.law.yale.edu/subject_menus/imt.asp, cited in Ferencz, above n 149, 281, 290.

¹⁵² IMT Charter art 6(a), full text available at <http://avalon.law.yale.edu/imt/imtconst.asp>.

¹⁵³ GA Res 3314 (XXIX) (14 December 1974), annex art 1.

¹⁵⁴ Discussion paper on the crime of aggression proposed by the Chairman (revision June 2008) (14 May 2008) ICC-ASP/6/SWGCA/2.

¹⁵⁵ Larry May “Aggression, Humanitarian Intervention, and Terrorism” (2009) 41 Case W Res J Int'l L 321, 324.

¹⁵⁶ Discussion paper on the crime of aggression proposed by the Chairman, above n 154.

In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

In the context of the defence of superior orders, more detailed information is not necessary to conclude that it cannot be a valid defence for the crime of aggression. Subordinates are “beyond the personal scope of this crime”¹⁵⁷. Aggression is a leader-crime, a crime of states, more precisely as individuals are criminally responsible¹⁵⁸, a crime of superiors not of subordinates. It is something that cannot be ordered. It is abstract, more an idea and a decision. What actually happens is war.

A case that underlines this perception is *US v Huet-Vaughn*.¹⁵⁹ Captain Yolanda Huet-Vaughn was a doctor enlisted in the US army reserves. She was called to go to Saudi-Arabia to serve in the 1991 Gulf war against Iraq. Huet-Vaughn did not follow the call and argued: “I am refusing orders to be an accomplice in what I consider an immoral, inhumane and unconstitutional act, namely an offensive military mobilization in the Middle East.”¹⁶⁰ In 1995 she was convicted for desertion “with intent to avoid hazardous duties and to shirk important service”¹⁶¹. In court, Huet-Vaughn raised the then so-called “Nuremberg” defence, based on resistance to manifestly unlawful orders. The Court rejected the defence by arguing this was a political question and non-justiciable. Huet-Vaughn had not been able to demonstrate that she had been specifically commanded to commit a war crime and, therefore, would not be excused. This reasoning shows clearly that the political decision to go to war, be

¹⁵⁷ Takemura, above n 4, 176.

¹⁵⁸ Takemura, above n 4, 173.

¹⁵⁹ *US v Huet-Vaughn* (28 December 1995) 43 MJ 105.

¹⁶⁰ Yolanda Huet-Vaughn “Statement Refusing to Serve in the 1991 Gulf War” (9 January 1991) printed in Howard Zinn, Anthony Arnove (ed) *Voices of a People's History in the United States* (Seven Stories Press, New York, 2004) 555, 556.

¹⁶¹ *US v Huet-Vaughn*, above n 159, at para 33.

it justified or not, is nothing that could be ordered. Therefore, it cannot be object to the defence of superior orders.

D Moral Dilemma

Some scholars who deal with the problem of manifest illegality and superior orders state that this problem is not purely academic, but that it causes a practical dilemma for the subordinate of whether to carry out an illegal order or not.¹⁶² The soldier wishes to follow their commander and feels bound to them. The obligation to disobey the superior might overstrain the subordinate.

This may have passed as a reasonable concern, if the Rome Statute had not been yet introduced and the *moral choice test* was still a matter of discussion. However, today this assumption is false. The non-recognition of the unlawfulness is one of the three conditions of the exemption in article 33. Had the subordinate detected the illegality of the act, the defence of superior orders could not be raised anymore. Therefore, the subordinates could not possibly find themselves in a situation of a moral dilemma because they must have been completely ignorant of the issue.

However, there is a situation that might cause a moral dilemma for the judges. The Rome Statute is clear on the point of manifest unlawfulness of crimes against humanity and genocide: The perpetrator is guilty and must be punished. As explored above, this is fair because a minimum degree of human compassion can be naturally expected from everyone. A question that occurs is whether everyone includes people who have been raised in the most horrible environment imaginable? If a child is recruited as a child soldier at a young age and learns to survive by playing by the rules, can it be criminally liable the day it turns 18 and is suddenly no more a child? Assumed, an 18-year old is on trial

¹⁶² For example: Ziv Bohrer "Clear and Obvious - A Critical Examination of the Superior Order Defense in Israeli Case Law" (2005 – 2006) 2 IDF LR 197, 197; Minow, above n 66, 5; Scaliotti, above n 123, 126.

for crimes against humanity. What if they could have walked away, but as it is the only life they have known, they just keep killing? Child soldiers kill because it is what they have been doing for the past ten years, because it is what they know and maybe what they are good at. The more they kill, the more power and appreciation they gain in the group, the better their life feels.¹⁶³

According to the Rome Statute they are criminally liable. They would not be able to raise the defence of superior orders because they were not obliged to carry out the orders of their superiors as they are not a legally binding authority. Neither can the *mens rea* be negated, because they know what they are doing. Lastly, if their doings are manifestly unlawful, the defence is suspended anyway. No other defence seems to be available either. There is neither duress nor mistake of fact or law. Possibly, one could argue the defence of mental disease or defect. However, Article 31(1)(a) refers to diseases and defects such as mental disorders or impairments rather than to lost childhoods.¹⁶⁴ A mental dysfunction causes the inability of the accused to recognise the consequences of their behaviour, limits their learning capability and restricts their understanding of their surroundings.¹⁶⁵ It is a clinical expression. Although growing up as a child soldier might cause such defects, it does not necessarily have to and it would be incorrect to conclude that every child soldier is mentally ill. This will definitely not apply to those who accept the life and try to function as a member of the group.

A case study in Mozambique showed that former child soldiers can return to normal lives, usually with the help of a rehabilitation program.¹⁶⁶ They have jobs, care for their children, are good spouses. Only few so far chose a violent lifestyle or were so profoundly disturbed that they could not return into

¹⁶³ Neil Boothby "What happens when child soldiers grow up? The Mozambique case study" *Intervention* 2006, Volume 4, Number 3, 244, 249

¹⁶⁴ Stanley Yeo "Insanity Defense in the Criminal Laws of the Commonwealth of Nations" (2008) 2008 *Sing J Legal Stud* 241, 246.

¹⁶⁵ *Ibid*, 247.

¹⁶⁶ Boothby, above n 163, 245.

society.¹⁶⁷ This shows that even a terrible childhood must not necessarily destroy the natural sense of values in a person forever. However, that is after these people had had help and gained a perspective.

I believe, this is a problem which has to be discussed under the heading of superior orders, because this is the defence that matches their legal and actual situation best. The defence of superior orders relieves one from criminal culpability if the person has been in a situation that they could not control and could not be expected to control. It focuses on the outer circumstances rather than on the state of mind. The *mens rea* is negated on grounds of the situation given. This is exactly what happened to the child soldier. The defence of defect on the contrary, focuses on an destroyed inner state of mind of the accused, which given the hideous extraordinary life surroundings of a child soldier is rather inappropriate.

Generally, growing up under a regime of injustice cannot work as a defence. This can be shown by looking at an example case from the Third Reich. Baldur von Schirach was born in 1907.¹⁶⁸ He joined a patriotic youth organisation at the age of ten. In 1925, age 17, he became member of the NSDAP, the social-nationalist party.¹⁶⁹ In the following year, he met Hitler at his parent's home.¹⁷⁰ On that day, he became an even greater admirer than he had been before. In 1931 von Schirach became Reich Youth Leader at the age of 24.¹⁷¹ He was also *Gauleiter* of Vienna. Under his power over 185,000 Jews were deported from Vienna to the ghettos of Poland. In 1946 he was sentenced to 20 years of imprisonment for crimes against humanity.¹⁷²

¹⁶⁷ Ibid.

¹⁶⁸ "Baldur von Schirach" www.annefrank.dk (accessed 23 February 2010).

¹⁶⁹ Robert Aitkne, Marilyn Aitken "Pride and Prejudice: The Dark Side of Henry Ford" (2005-2006) 32 *Litigation* 53, 58

¹⁷⁰ Eugene Davidson *The Trial of the Germans: an account of the twenty-two defendants before the International Military Tribunal at Nuremberg* (University of Missouri Press, Columbia, 1997) 286.

¹⁷¹ *Judicial Decisions Involving Questions of International Law--International Military Tribunal (Nuremberg), Judgment and Sentences* (1947) 41 *Am J Int'l L* 117, 332

¹⁷² Ibid, 127; Aitkne, Aitken, above n 169, 58.

The difference between a child growing up in the Third Reich and a child soldier lies in the education. Children who grew up in the Third Reich were taught to hate, fear and fight Jews. Aside from that, however, they led a normal life. They had family and friends they loved and were also loved. They went to school and made plans for their future. If one grows up in this way, the person is able to develop a sense of justice, and as an adult, this person should be able to reflect on their education. They should detect the flaw. Child soldiers on the other hand lost their family early. They grew up without love, without education. There is nothing they could reflect on and – most important – they might not even know that another kind of life exists. One cannot be expected to make a choice when one does not know the options. On the other hand, crimes against humanity cannot be tolerated by society.

Obviously, the Rome Statute cannot excuse unlawful acts because of an unhappy childhood, but growing up as a child soldier can (though it does not have to) numb the natural feeling for life. Therefore, I think that the Rome Statute does not offer a legally satisfying solution. I imagine that the problem could be practically solved by the prosecution not bringing charges, but that still leaves a gap in the law for this morally challenging situation.

VI NO NEED FOR THE DEFENCE OF SUPERIOR ORDERS?

People who have committed a crime codified in the Rome Statute shall go unpunished only in rare exceptions where there is a good reason. The scope of the defence of superior orders is very narrow, the conditions are strict. In cases of genocide and crimes against humanity the plea cannot be raised, because they are qualified as manifestly unlawful. Aggression cannot be a matter of the defence either. This limits the scope of application to war crimes. Additionally, the Rome Statute knows more instruments of law that are similar to the defence of superior orders mentioned and which might make it redundant.

A *Article 31(1)(d) - The Defence of Duress*

Having acknowledged the duty to bear the consequences of a resistance to superior orders, the defence of superior orders has to be distinguished from the defence of duress, circumscribed in article 31(1)(d) of the Rome Statute. In both cases, someone is forced by some degree of coercion or compulsion to behave in a certain way.¹⁷³ Law should not create a situation where the person “[may] be liable to be shot by a court-martial if he disobeys an order and to be hanged by a judge and jury if he obeys it.”¹⁷⁴

This is almost exactly what happened to Dražen Erdemović. Erdemović, a Bosnian Croat, was a soldier in the Bosnian Serb Army.¹⁷⁵ In July 1995, he found himself being a member of the firing squad who killed around 1,200 Bosnian Muslims in groups of ten. It is unsure how many were killed by Erdemović; he estimates 70 boys and men.¹⁷⁶ He said:¹⁷⁷

Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: “If you feel sorry for them, stand up. Line up with them and we will kill you too.” I am not sorry for myself but for my wife and son...

The defences of superior orders and duress were considered in all judgments but rejected by the first Trial Chamber¹⁷⁸, the Appeal Chamber¹⁷⁹ and the second Trial Chamber.¹⁸⁰

¹⁷³ Andrew Bowers “A Concession to Humanity in the Killing of Innocents - Validating the Defences of Duress and Superior Orders in International Law” (2003) 15 Windsor Rev Legal & Soc Issues 31, 32.

¹⁷⁴ K K Mathew “Right to Rebellion and Obedience to Superior Orders” in (1983) Three Lectures 44, 54, 55 quoted in: Insko, above n 39, 397.

¹⁷⁵ *Prosecutor v Erdemović* Case No. IT-96-22-T (29 November 1996) (Sentencing Judgement, ICTY Trial Chamber I) hereafter [Sentencing Judgement I] available at www.icty.org (accessed 1 December 2009) at para 2.

¹⁷⁶ *Ibid*, at para 78.

¹⁷⁷ *Ibid*, at para 10.

¹⁷⁸ *Ibid*, at para 16.

¹⁷⁹ *Prosecutor v Erdemović* Case No. IT-96-22-A (7 October 1997) (Sentencing Appeal, ICTY Appeal Chamber) available at www.icty.org (accessed 1 December 2009) at para 19.

Article 31(1)(d) of the Rome Statute provides a very different view on this issue. It reads:

(1) In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(d) 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.

This change is a much more radical one than for the defence of superior orders. No one can fairly be expected to resist a certain threat.¹⁸¹ The Statute hereby follows a common civil law principle.¹⁸² In contrast to the defence of superior orders a choice is not possible. Some national jurisdictions do not accept the defence in such a broad way. The New Zealand Crimes Act 1961, for example, excludes various crimes such as murder, wounding with intent or robbery from the scope of application of the defence of compulsion.¹⁸³ Other jurisdictions take the defence further than the Rome Statute, and allow for the defence not only when life or bodily integrity is endangered. Section 34 of the German Penal Code, for example, reads¹⁸⁴

Whoever, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon

¹⁸⁰ *Prosecutor v Erdemović* Case No. IT-96-22-Tbis (5 March 1998) (Sentencing Judgement, ICTY Trial Chamber I) available at www.icty.org (accessed 1 December 2009) at para 17 – Erdemović was finally sentenced to 5 years in prison.

¹⁸¹ Kai Ambos "General Principles Of Criminal Law In The Rome Statute" (1999) 10 *Criminal Law Forum* 1, 27, 28.

¹⁸² Gabrielle Kirk McDonald, Olivia Swaak-Goldman *Substantive and procedural aspects of international criminal law: the experience of international and national courts* Volume 2 Part 2 (Kluwer Law International, The Hague, 2000) 1456.

¹⁸³ New Zealand Crimes Act 1961, s 24.

¹⁸⁴ German Penal Code, s 34(1) – translation www.iuscomp.org (accessed 10 February 2010).

weighing the conflicting interests, in particular the affected legal interests and the degree of danger threatening them, the protected interest substantially outweighs the one interfered with.

This defence is very important, especially in the Rome Statute. In my opinion, a person cannot be expected to give their life or risk the lives of their beloved ones for the protection of another person's life. The wording of article 31(1)(d) honours the gravity of the crimes in the Rome Statute and offers a realistic evaluation about what can be expected from humans even in times of war, at the same time. If we accept that there is such a thing as manifest illegality, which is something superior than any human law, than we have to accept that in a situation of imminent threat to their life a person will defend it by all means. This is not a choice, it is beyond that. It is another aspect of natural law.

Once very similar, the defences developed very differently. Still, they are commonly raised together.¹⁸⁵ Possibly, that is because both situations cause a similar feeling of helplessness in the perpetrator.

B Article 32 – The Defence of Mistake

Article 32 of the Rome Statute describes the defences of mistake of fact or mistake of law.

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

¹⁸⁵ Cassese, above n 63, 246.

I Mistake of Fact and Superior Orders

The mistake of fact is an error about a descriptive element of a crime.¹⁸⁶ To have a guilty state of mind the accused must have knowledge of the factual elements of the crime.¹⁸⁷ The mistake cannot result from negligence, but must be based on the honest and reasonable belief that the circumstances are different from how they are in actuality.¹⁸⁸ Assumed, the reality was like the perpetrator imagined, they would not have committed a crime. As a consequence, the perpetrator has no criminal mind. This was affirmed in the case *Michael A Schwarz* before a US Court Martial.¹⁸⁹ Private Schwarz was relieved from guilt for murders he committed because he had honestly and reasonably believed, he and his patrol were under attack.¹⁹⁰

In the context of superior orders, the subordinate might not recognise the illegality of an order, because they err about the content. It is possible that someone acted on an unlawful order because they were mistaken about a factual element of the order, precisely, the element that made it illegal. For example, a soldier is ordered to blow up a building, which, unrealised by the soldier, had been turned into a civilian kindergarten.¹⁹¹ In the course of action children are killed. Then the soldier erred about his obligation to follow that order because he was wrong about the use of the building. At first sight this seems to be another problem of superior orders. However, firstly, that is not possible for systematical reasons. The error of the soldier is grounded on a mistake of fact and article 33 of the Rome Statute, as it is mentioned in paragraph 2 of article 32, belongs to the mistakes of law. Secondly, the accused cannot rely upon the defence of superior orders, because the manifest illegality of the crime, as it is

¹⁸⁶ Sliedregt, above n 39, 303.

¹⁸⁷ *R v Finta*, above n 110, at para 116.

¹⁸⁸ Cassese, above n 63, 251.

¹⁸⁹ See in Susan Bandes " 'We the People' and Our Enduring Values" (1997-1998) 96 Mich L Rev 1376 (Crime and Punishment), 1426, 1427; Cassese, above n 63, 251, 252.

¹⁹⁰ He continued killing civilians, though, after realising the mistake and was, therefore, sentenced to life imprisonment for the other murders.

¹⁹¹ Example is based on a case read at Sliedregt, above n 39, 303.

an objective element, suspends it. It is also not a mistake of law on grounds of the soldier's error about the binding effect of the order, because this mistake was only a consequence of a factual error. The accused would have to plead the defence of mistake of fact and claim that the mistake negated the *mens rea* of the crime.¹⁹²

Another possibility is a factual mistake about the authority of the superior. For example, a person presents themselves as an officer and the subordinate has honest reason to believe them to be a superior. If, as a consequence, they obey the order, which is illegal, but not manifestly illegal, and whose illegality they do not recognise, they have made a factual mistake. However, neither article 32(a) nor article 33 of the Rome Statute offer a defence.¹⁹³ They did not err about a factual element of the crime nor where they under an obligation to obey the command. The German Penal Code solves this problem with an instrument called *Erlaubnistatbestandsirrtum*.¹⁹⁴ This is insofar different from the mistake of fact as the perpetrator does not err about any factual element of the crime itself, but errs about the factual elements of a justification.¹⁹⁵ If the situation were like they honestly and reasonably believe, their behaviour would be justified or excused. In this case the justification would be the order. Sliedregt only mentions the defence of duress as a possible solution for such a situation.¹⁹⁶ However, without any form of compulsion, it cannot be raised. The Rome Statute does not address this problem further. In my opinion, article 32(1) should include this mistake because the accused has no more criminal intention than the one that is mistaken about facts of the crime itself.

¹⁹² Gary D Solis "Obedience to Orders" (2004) 2 J Int'l Crim Just 988, 997.

¹⁹³ Sliedregt, above n 39, 325.

¹⁹⁴ An explanation of the word: Error (Irrtum) about facts (Tatsachen) that would allow (Erlauben) the action = putative justification.

¹⁹⁵ Kai Ambos "Toward a Universal System of Crime: Comments on George Fletcher's Grammar of Criminal Law" (2006-2007) 28 Cardozo L Rev 2647, 2661.

¹⁹⁶ Sliedregt, above n 39, 325.

The mistake of law is an error about a normative element of a crime.¹⁹⁷ Generally, it is not accepted as a defence, because no one should be able to hide behind ignorance of law.¹⁹⁸ Practically all jurisdictions know the principle *ignorantia legis non excusat*.¹⁹⁹ However, in special cases in which there is a lack of *mens rea* the criminal responsibility shall be excluded. Not all states accept an exception from that rule, the defence of the mistake of law.²⁰⁰ The Rome Statute allows for the consideration of such an excuse if the accused can prove that they have not "been aware of the social meaning of the material elements of the crime"²⁰¹. The test, whether this is such a case or not, is similar to the one used to evaluate manifest illegality. The sense of an ordinary person is the lowest benchmark.²⁰² If an average person understands the legal situation, the perpetrator should have too. However, international criminal law sets the threshold slightly differently and evaluates how the accused according to their education, training and intelligence should have judged the situation.²⁰³ This is necessary, because of the seriousness of the crimes dealt with. An important issue in this context is the question, what exactly can be expected of people. People are supposed to know the laws that rule the country. This makes sense, because otherwise non-compliance with the law would always be excused with ignorance.²⁰⁴ Yet, it is debatable whether people can be expected to know international law regulations as well. As mentioned above, there is no need for an explicit prohibition in domestic law of manifestly illegal crimes. Anyone has to understand that those acts are intolerably atrocious and, therefore, anyone has to refrain from committing them. However, as shown, there are acts, though few, which are not as obviously illegal. Further, there is no duty for ratifying

¹⁹⁷ Ibid, 303.

¹⁹⁸ Ibid.

¹⁹⁹ For example New Zealand, Crimes Act 1961 s 25.

²⁰⁰ Examples for the defence: Germany, Penal Code section 17; France, Criminal Code art 122-3; Austria, Criminal Code s 9.

²⁰¹ Sliedregt, above n 39, 305.

²⁰² Ibid, 304.

²⁰³ Ibid; Cassese, above n 63, 263.

²⁰⁴ Cassese, above n 63, 256.

states to include the principles of international law in their own codes. As shown above, there is no practicable alternative. The Rome Statute sets the standards for international criminal trials. Therefore, a defence cannot be based on ignorance of the code alone. Nevertheless, when international criminal law differs from national law and the defendant has acted accordingly to the law of their state, this should be an indication for the honest belief of the accused that the action was allowed. In that case depending on further circumstances, the defence of superior orders might apply. The wording of article 32(2) of the Rome Statute makes clear that the defence of superior orders is a subcategory of the mistake of law. Chances that this actually happens are low, because most jurisdictions punish the crimes listed in the Rome Statute in some variation or the other anyway.

In the case of a subordinate following a superior command which orders them to commit an illegal crime, there are different aspects that the subordinate can err about. Firstly, they might recognise the illegality of the ordered act but think that it was within the authority of their superior to order such a conduct, so that they are still bound by it and need to obey. This is a mistake of law regarding the binding effect of orders. Secondly, they might think that the ordered act was legal, because, for example, they think in times of war this particular behaviour is allowed. This is a mistake of law regarding the prohibition of the act. In both cases the conviction would depend on the reasonableness of the belief and on the degree of illegality of the crime. A criminal mind cannot be negated for manifestly illegal crimes.

All of the defences mentioned, concentrate on a lack of *mens rea*. *Mens rea* is an evil state of mind or criminal intent.²⁰⁵ To be criminally liable the actor must have a criminal mind, which means they acted “purposely” (intention to cause the criminal consequence of the action), “knowingly” (conscious awareness of

²⁰⁵ Encyclopædia Britannica “mens rea” www.britannica.com (accessed 20 February 2010).

the result), “recklessly” (conscious disregard of the risk) or “negligently”²⁰⁶ (inadvertence to the foreseeable danger).

C Interim Conclusion

As shown above, the Rome Statute offers various defences. The question is, whether article 33 closes an otherwise unlawfully open gap. The scope of application of the defence of superior orders is narrow. Are cases imaginable, in which article 33 is the only defence available for the accused? Those who argue for an inclusion of war crimes in article 33 could just as well argue for the abolishment.

Yet, the defence is as old as law itself. In my opinion, that is, because law is more than just a catalogue of general rules. The Rome Statute does not only forbid murder, but murder as a war crime, murder as a crime against humanity and murder as genocide. Law reflects the sense of justice of society. This is, how it developed and what it should continue to be: a making of the people, at least in the widest sense. This is why customary international law is of such great importance. So to speak, the right of the defence of superior orders to exist is based on the custom of the defence. People feel that they are not guilty of a conduct because they were ordered to do so. This negates the *mens rea* as well, but it focuses more on the objective situation of the accused. If in case of a mistake of law there is no evil mind, in case of superior orders there is no mind at all. The superior-subordinate relationship is special, which is reflected in the defence. In my opinion, it is generally very important that law responds to the “legal needs” of people.

In the creating process, the inclusion of article 33 in the Rome Statute was highly controversial. Especially New Zealand, Germany and the United

²⁰⁶ Ibid.

Kingdom argued against it.²⁰⁷ Their delegates took the view that subordinates can only be excused for following orders in cases that fall under the categories of duress or mistake of law. This is probably true. However, even if there is no strict legal need for the defence of superior orders, it still needs to be included in international criminal law. Firstly, it should exist for the reasons mentioned above and secondly, apart from being a defence to a situation common in times of war, it defines a person's obligation to not give up thinking and follow orders blindly, but to apply a minimum of thought and humanity. Article 33 of the Rome Statute is part of the military education. It makes both, superiors and subordinates think about a possible future situation. A prepared soldier will be much more confident about refusing to obey an order. These aspects justify the existence of the defence.

VII JUSTIFICATION OR EXCUSE

A question the Rome Statute does not answer is whether the defence of superior orders works as a justification or an excuse. A justified action is regarded lawful, whereas an excused action remains illegal.²⁰⁸ In the first case the accused acted lawful, in the second case they acted unlawful but without guilt.

The nature of the defence becomes important in the context of complicity.²⁰⁹ One cannot be an accomplice to or aid and abet a crime when the action was lawful, because then no crime exists.²¹⁰ However, an excuse leaves the conduct unlawful and only affects the culpability of the accused alone.²¹¹ In that case the accomplice to the crime would still be punishable.

²⁰⁷ Johan D van der Vyveer "The International Criminal Court and the Concept of Mens Rea in International Criminal Law" (2004) 12 U Miami Int'l & Comp L Rev 57, 79.

²⁰⁸ Takemura, above n 4, 160.

²⁰⁹ Ibid.

²¹⁰ Cassese, above n 63, 952.

²¹¹ Takemura, above n 4, 161.

Slidregt writes that the defence of superior orders has to be an excuse because otherwise an inconsistency would occur.²¹² Justifying an unlawful order would make the conduct lawful. In her opinion, an act "cannot be illegal in ordering and legal in execution."²¹³

In my opinion, the defence of superior orders has to be qualified as an excuse because it refers to a very specific situation of the accused. The conduct is illegal but considering the circumstances the perpetrator is not culpable. Especially considering the sort of crimes the Rome Statute deals with, a strict interpretation of the law is necessary. The defence of superior orders can only be raised for the commission of war crimes and even the non-manifestly illegal war crimes cannot be qualified as lawful under any circumstances. That would not be acceptable. Therefore, the defence must work as an excuse.

VIII CONCLUSION

This essay showed that the debate about how to deal with the defence of superior orders is over hundreds of years old. Surprisingly, courts in the Middle Ages provided a very modern view on the issue, the concept of manifest illegality (although argued a little bit differently). Historically, many different and extreme points of view can be found that are all based on various philosophical ideas. The reason why this topic is so heavily argued till today, is that it goes to the core question: What is law? Many aspects influence the answer to this question and it is hard to reach a consensus. This paper only mentioned those relating to superior orders.

In my opinion, the wording of article 33 is not clear enough. The term *unlawful* means that the order has to contradict law. This could mean that as long as the

²¹² Slidregt, above n 39, 335.

²¹³ *Ibid.*

domestic law allows the atrocity, the conduct is not criminal. This is not consistent with the true meaning of the article.

With article 33 the creators of the Rome Statute made a statement. They codified a doctrine in international criminal law that had only been applied to national trials for many years. For too long, on conferences, delegations from several countries had been strictly against this defence in international criminal law while applying it happily at home to their own people. Finally, this double standard has been eliminated. The defence of superior orders is now available to accused before the ICC. The fact that it has been exercised in domestic law refutes the assumption that the absolute liability approach is *opinio juris*, and as a consequence, the Rome Statute contrary to customary international law. Those who criticise the non-inclusion of war crimes in paragraph 2 of article 33 have a point, because it is imprecise. Some war crimes are as manifestly illegal as crimes against humanity. Still, paragraph 2 does not deny war crimes the status of manifest unlawfulness, it only provides guidance for the recognition of the threshold. I agree with the idea that one cannot be allowed to not recognise genocide and crimes against humanity as what they are – the most serious crimes against the core of justice and nature. That war crimes are not manifestly unlawful *per se* seems logical, as not all war crimes are as abhorrent and therefore not as evidently criminal. Paragraph 2 is no exhaustive catalogue of the manifest illegal crimes. Aggression, though manifestly unlawful, cannot be object to the defence of superior orders. This has nothing to do with the degree of the unlawfulness of the crime, but relates to the fact that it cannot be ordered. Aggression is more an abstract decision and less an act.

The scope of application for the defence is rather limited. For child soldiers it might be too limited. It is desirable that the creators of the Rome Statute give that problem some thought. The legal practice of the ICC will show if there is any room left for application of the defence at all. There are other defences that might take over. Yet, I consider article 33 a valuable part of the Rome Statute. It gives clear instructions on how to deal with a situation that according to the

frequency of it being raised, is common in times of war or rebellion. It prepares superiors and subordinates in an important way.

It could be said that low rank soldiers are not well placed to prevent atrocities²¹⁴, however, there is a nice saying from Carl Sandburg “Sometime they'll give a war and nobody will come.”²¹⁵ To imagine that people just refuse to participate in war or other crimes is a sweet utopia, but that is what law does. It creates rules which – if followed – create a peaceful, functioning society. Overall, regarding the defence of superior orders, the Rome Statute has set out a rule which protects those who have an innocent mind, but otherwise signals: If someone orders war: Just don't go.

²¹⁴ Martha Minow “Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence” (2007) 52 McGill LJ 1, 35.

²¹⁵ Carl Sandburg *The People, Yes* (Harcourt, Brace & Co, Michigan, 1936) 43.

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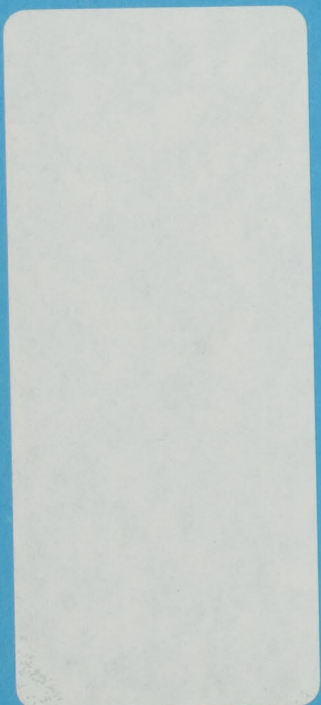
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