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The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law

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Abstract

This paper endeavours to critically assess Article 33 of the Statute of the International Criminal Court on superior orders by comparing it with customary international law. The author notes that case law and the legal literature have never clarified the content of the customary rule on this matter. Two apparently conflicting approaches have emerged. The conditional liability approach, generally adopted by national legal systems, admits the plea as a complete defence, unless the subordinate knew or should have known the illegality of the order or unless the order was manifestly illegal. By contrast, relevant international instruments prior to the Rome Statute have invariably taken the absolute liability approach, according to which obedience to orders is never a defence. The author contends that close scrutiny of national legislation and case law shows that the divergences in international practice are more apparent than real and that the customary rule on superior orders upholds the absolute liability approach. By adopting the conditional liability approach with regard to war crimes, Article 33 of the Rome Statute has departed from customary international law without any well-grounded reasons. This departure is all the more questionable since it is basically inconsistent with the codification of war crimes effected through Article 8 of the Rome Statute. This Article lays down an exhaustive list of war crimes covering acts that are unquestionably and blatantly criminal. It would therefore appear to be impossible to claim that orders to perpetrate any of those acts are not manifestly unlawful or that subordinates could not recognize their illegality.

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1 Introduction

The plea of obedience to superior orders is certainly one of the most widely debated and controversial defences in international criminal law. The questions at issue are well known. Under national legal systems, soldiers are duty bound to obey the orders of their superiors and cannot dispute their legality. This situation, however, becomes problematic when a soldier is ordered to perform an act which constitutes a war crime or, more generally, an international crime. In this case, the duty of military obedience clashes with the need to preserve the supremacy of the rule of law, which proscribes the commission of criminal offences. The soldier is thus caught in a dilemma. Should he obey the order, at the risk of being held responsible for the commission of a crime, or should he ignore it and risk being punished for military disobedience? This dilemma takes on even more dramatic tones in situations where the order requires the performance of an action that is not branded as criminal by national law, but which constitutes a war crime under international law. In this scenario, the soldier who refuses to obey an order which is legal from the standpoint of national law may well find himself before a firing squad after being court martialled by his own state. Here the plea of superior order is often combined with that of duress.

In the Statute of the International Criminal Court, adopted in Rome on 17 July 1998, the response to this dilemma is embodied in Article 33, which provides:

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

Thus, Article 33 in effect entails three steps: (1) obedience to superior orders is not a defence; (2) unless the three requirements under (a), (b) and (c) are cumulatively met; (3) in any event, at least one of the three requirements — that under (c) — is never met in cases where the order was to commit genocide or crimes against humanity. To put it differently, the plea of superior orders is never a defence to a charge of genocide and crimes against humanity since it is *a priori* established that orders to commit these crimes are *always manifestly unlawful*. In contrast, superior orders may be successfully used as a complete defence in those situations where the charge is one of war crimes. Indeed, Article 33 allows for the possibility that orders to commit war crimes, as opposed to genocide and crimes against humanity, are not manifestly unlawful. If the requirements under (a) and (b) are met, then whenever an order is not manifestly illegal, it can be urged as a complete defence.¹

¹ The same holds true for the crime of aggression, assuming that a provision defining this crime and setting out the conditions for the exercise of the jurisdiction of the Court will be adopted in accordance with Articles 121 and 123 (see Article 5 of the Rome Statute). The question whether or not obedience to orders constituted a defence to a charge of war crimes was left unsettled in the Draft Statute, Article 32, para. 1.

By admitting, under certain circumstances, the defence of superior orders to a charge of war crimes, the drafters of the Rome Statute departed from the ‘Nuremberg model’, under which subordinates were *in any case* responsible for crimes committed while following orders.² This deviation is all the more striking since the Security Council, through the adoption of the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, recently reaffirmed the validity of the Nuremberg approach.

In view of the disparity between Article 33 of the ICC Statute and previous international legislation, it seems appropriate to assess the status of relevant customary international law in order to determine whether or not Article 33 is in keeping with that body of law. Such analysis is also important because, in consideration of Article 10 of the Rome Statute, it would seem that Article 33 — as much as the other substantive provisions of the Statute on the ‘General Principles of Criminal Law’ — intends to codify existing customary law.³

2 Two Approaches

The task of establishing the content of the international customary rule on superior orders is made difficult by the fact that two seemingly conflicting approaches have been advocated and followed in international practice: the first, which could be termed the *conditional liability* approach, is generally adopted by national legal

which provided as follows: ‘The fact that a person’s conduct was pursuant to an order of a Government or of a superior [whether military or civilian] shall [not] relieve the persons of criminal responsibility [[if] [unless] the order [was known to be manifestly unlawful or] appeared to be manifestly unlawful]’. The Draft Statute negated the defence only in relation to a charge of genocide and, in parentheses, of crimes against humanity (see Article 32, para. 2, of the Draft Statute, according to which: ‘The perpetrator or an accomplice in a crime of genocide [or a crime against humanity] [or a . . .] shall not be exempted from criminal responsibility on the sole ground that the person’s conduct was pursuant to an order of a Government or a superior, or pursuant to national legislation or regulations’).

² See Article 8 of the Charter establishing the Nuremberg Tribunal annexed to the London Agreement of 8 August 1945. The text of this Article is reported *infra*, note 16.

³ Article 10 provides that: ‘Nothing *in this Part* shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute’ (emphasis added). Hence, the drafters of the Rome Statute considered that only the provisions contained in Part One of the Statute, i.e. the Part to which Article 10 makes reference, were not intended to affect existing (or developing) customary law; namely, they were not, among other things, simply to codify existing customary rules. It could be argued *a contrario* that all the other Parts of the Statute, including Part Three concerning General Principles of Criminal Law, *inter alia* aimed at codifying existing rules of customary international law or, at least, at spelling out principles of *lex lata*, without however excluding the possibility of laying down laws that departed from established rules or principles.

systems; and the second, the so-called *absolute liability* approach, was consistently taken in international legislation prior to the Rome Statute.⁴

Within the *conditional liability* approach, the plea of superior order is, as a *general rule*, a complete defence. The subordinate may, however, be held responsible, together with his superior, under certain circumstances; namely, when he knew or should have known that the order was illegal, or when the illegality of the order was manifest. In national case law on war crimes, this principle was first proclaimed in a 1915 decision of the Austro-Hungarian Military Court and was subsequently reaffirmed in two renowned and much cited cases: *Dover Castle* and *Llandovery Castle*, brought before the Leipzig Court. The Austro-Hungarian Military Court took this approach by referring to the principle of *manifest illegality*. It stated that the subordinate is only responsible if the action ordered is 'manifestly in conflict not only with criminal law but also with the customs of war of civilized peoples'.⁵ Instead, the Leipzig Court made reference to the other standard, namely, more specifically whether the subordinate knew that the order was illegal. In both cases, the Court upheld the principle according to which subordinates cannot avoid criminal liability in cases where they

⁴ At present, the view according to which subordinates are never accountable for actions taken in execution of orders has been set aside. For many years this view, grounded on the principle of *respondeat superior*, prevailed in the international community. It gradually proved to be inadequate, mainly for two reasons: firstly, the increasing tendency in modern war for combatants at all levels to breach the international legal standards on the conduct of warfare and the protection of victims of armed hostilities. This trend has made it necessary to put a stop to those breaches by calling to account not only the higher authorities but also the actual perpetrators, even if they act upon superior orders. Secondly, in recent times it has been convincingly argued that acceptance of superior orders as an absolute defence would lead to a sort of *reductio ad absurdum*: to bring to book the persons responsible for gross breaches one would have to climb right up the military chain of command and even the political hierarchy, with the preposterous result that only the Supreme Commander or even the Head of State could be held criminally liable for those breaches. This rationale behind the demise of the principle of *respondeat superior* and the emergence of the contrary principle of subordinates' responsibility for the execution of illegal orders has been forcefully expressed by United States military tribunals at Nuremberg in the *High Command* case (see *Trials of War Criminals before the Nuremberg Tribunals under Control Council Law No. 10*, XI, at 507–508) and the *Einsatzgruppen* case (*ibid.*, IV, at 470) and has been more recently echoed by a United States court martial in *Calley* (22 U.S.C.M.A., at 534). On the *respondeat superior* doctrine, see Oppenheim, *International Law*, II (1912), at 264 *et seq.*

⁵ The relevant passage in German reads as follows: 'Dienststrafrechtliche Verantwortlichkeit des Untergebenen, den Fall der Überschreitung des erhaltenen Auftrages ausgenommen, ist nur auf jene Handlungen beschränkt, die klar und offenbar nicht nur gegen das Strafgesetz, sondern auch gegen die Kriegsgebräuche gesitteter Völker verstossen und durch eine Zwangslage nicht entschuldigt werden können ...'. See decision of 30 December 1915, in *Entscheidungen des k.u.k. Obersten Militärgerichtshofes*. Veröffentlicht von Dr Albin Schager, Vol. III, 1 (1920), No. 184, 17, at 20. Article 158 of the 1855 Military Penal Code of the Austro-Hungarian Monarchy provided: 'A subordinate who does not carry out an order is not guilty of a violation of his duty of subordination if (a) the order is obviously contrary to loyalty due to the Prince of the land; (b) if the order pertains to an act or omission in which evidently a crime or an offence is to be recognised.'

were aware of having obeyed illegal orders.⁶ Since that time, many states have made recourse to the conditional liability approach⁷ and it has been also upheld in some military manuals adopted after 1945, such as the 1990 Dutch Law on Military Discipline,⁸ the 1992 German Military Manual,⁹ the Israeli Military Manual,¹⁰ the

⁶ See Judgments of the Supreme Court of Leipzig of 4 June 1921 and 16 July 1921, in 16 *AJIL* (1922), at 706–708 and 721–723 respectively. The Court applied Section 47 of the 1872 German Military Code ('If through the execution of an order pertaining to the service, a penal law is violated, then the superior giving the order is alone responsible. However, the obeying subordinate shall be punished as accomplice (1) if he went beyond the order given to him, or (2) if he knew that the order of the superior concerned an act which aimed at a civil or military crime or offence.').

⁷ See Article 9 of the Danish Military Discipline Act ('He who by obeying the order of a superior has committed a punishable act, is not liable to punishment unless he knew that the order was given with malicious intent or if this was immediately obvious.' See *Collection of the National Reports related to the first part of the questionnaire on Investigation and Prosecution of Violations of the Law of Armed Conflict, XIV International Congress of the International Society for Military Law and the Laws of War*, Athens, 10–15 May 1997, at 93); Section 5, para. 1, of the 1957 German Criminal Military Code ('(1) A subordinate who, in compliance with a superior order, has violated the actual prohibition of a punishable offence will only be liable to punishment if it was known to him, or it was manifest from the circumstances known to him, that the act was unlawful.' Translation by Keijzeer, 'A Plea for the Defence of Superior Order', in *Israel Yearbook on Human Rights* (1978), at 98); Section 24 of the 1977 Israeli Law is also applicable to servicemen ('A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances, that is to say: (a) in execution of the law; (b) in obedience to the order of a competent authority which is bound by law to obey, unless the order is manifestly unlawful. Whether an order is or is not manifestly unlawful is a question of law.' *ibid.* at 99). See also Article 43 of the Dutch Criminal Code; Section 21 of the 1985 Spanish Military Penal Code; Article 18, para. 2, of the Swiss Military Penal Code; Section 24 of the Norwegian Military Penal Code. In other countries, where the relevant legislation provides that subordinates are *never* criminally accountable for crimes committed while following orders, the conditional liability principle has been affirmed by the case law. This holds true for Greece (see *Collection of National Reports, supra* this note, at 94) and in Italy, where Article 51, para. 4, of the Criminal Code ('*Non è punibile chi esegue l'ordine illegittimo, quando la legge non gli consente alcun sindacato sulla legittimità dell'ordine*') is applied to negate the defence when the order is manifestly illegal (the duty to disobey orders whose illegality is manifest is expressly established by Article 4, para. 5, of the Italian Law no. 382 of 1978, *Norme di principio sulla disciplina militare*, which replaced Article 40 of the Military Penal Code for Peace). The conditional liability approach has also been used in Brazil (*Collection of the National Reports, supra* this note, at 91) and Finland (*ibid.* at 94). As for common-law countries, this principle has been upheld in Canada (in a recent decision of the Supreme Court, *R. v. Finta*, 1994, 1 S.C.R. 701, the Court found that: 'The defence of obedience to superior orders . . . [is] available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. [This defence is] subject to the manifest illegality test. That is to say, the [defence] will not be available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior orders . . . will be available in those circumstances where the accused had no moral choice as to whether to follow the orders') and in the United States (see *infra* note 13).

⁸ Article 16 of this Law (*Wet Militair Tuchtrecht*), provides: 'The previous article [Art. 15: He who does not obey a duty order acts in violation of the military discipline] does not apply if the action ordered is unlawful or was in good faith considered to be unlawful by the soldier.'

⁹ Para. 144 of the Manual (*Humanitarian Law in Armed Conflicts — Manual*, DSK VV207320067) provides: 'A plea of superior orders shall not be acknowledged if the subordinate realized or, according to the circumstances known to him, plainly could have realized that the action ordered was a crime.'

¹⁰ According to Art. 10: 'The fact that the laws of war have been violated pursuant to an order of a superior authority, whether military or civilian, does not deprive the act in question of its character of a war crime, nor does it constitute a defence in the trial of an accused individual, unless it was not objectively clear and evident that the order was illegal. In any case, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.' (unofficial translation from Hebrew)

Italian Regulations for Military Discipline,¹¹ the Swiss¹² and the United States¹³ military manuals. In addition, the notion of conditional liability finds support in the case law on war crimes of many national courts and tribunals.¹⁴

¹¹ See Article 25, para. 2, whereby '[T]he soldier to whom an order is given which is manifestly against the State institutions or the execution of which at any rate manifestly constitutes a criminal offence, is duty bound not to execute such order and to report thereon as soon as possible to his superiors.'

¹² Rule 201, para. 2, of the 1963 *Manuel des Lois et Coutumes de la Guerre* provides: '*Le subordonné ou l'inférieur est aussi punissable s'il s'est rendu compte qu'en donnant suite à l'ordre reçu il participait à la perpétration d'un crime. Le fait que le subordonné a agi sur ordre peut être considéré comme une circonstance atténuante.*'

¹³ See the United States Department of the Army Field Manual (the 1956 *The Law of Land and Warfare*), para. 509 (a), which provides: 'The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defence in the trial of an accused individual, *unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful*. In all cases where the order is held not to constitute a defence to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment' (emphasis added). See also the Air Force Pamphlet *International Law — The Conduct of Armed Conflict and Air Operations*, 19 November 1976, at 15/5–15/6; the US Navy, *The Commander's Handbook on the Law of Naval Operations*, (1995), at 6/4–6/5, as well as the *United States Manual for Court-martial* (1951), para 197 B, at 351, which, discussing the defence at issue as a justification of homicide, states the following: '[T]he acts of a subordinate, done in good faith in compliance with his supposed duties or orders are justifiable. This justification does not exist, however, when those acts are manifestly beyond the scope of his authority, or the order is such that a man of ordinary sense and understanding would know it to be illegal.'

¹⁴ Admittedly, the circumstances under which obedience to orders cannot be urged as a complete defence have been formulated in varying terms, often depending on the wording of the relevant national provision on superior order that national judges were bound to apply. Nonetheless, they can easily be grouped under the two fundamental criteria indicated by the Austro-Hungarian Military Court and the Leipzig Court in the cases quoted above. The standard of *manifest illegality* has been upheld in the *Hoelzer, Weigel and Ossebach* case, brought before a Canadian Military Court (the Judge Advocate, in summing up the applicable law, stated that the order must not be 'obviously unlawful' for it to constitute a defence. See *Record of Proceedings and Evidence for the Trial of Robert Hoelzer et al.*, vol. 1, at 344). Among the other numerous cases, see the decisions handed down by the Belgian Court of Cassation on 4 July 1949 in the *M. et G.* case, in 9 *Revue de droit pénal et de criminologie* (1949), at 990 *et seq.*, and on 22 July 1949 in the *Strauch et al.* case, in *Pasicrisie Belge* (1949), Part I, at 562 *et seq.*; the decision of 31 January 1949 by the Military Court of Brussels and of 4 July 1949 by the Belgian Court of Cassation in the *Müller et al.* case, in *Journal des Tribunaux*, 2 Janvier 1949, at 242 *et seq.*, and in *Pasicrisie Belge* (1949) at 507 *et seq.*, respectively. See also the decision of 16 October 1948 of the Military Tribunal of Rome in the *Wagener* case, in *Rivista penale* (1950-II), at 45 *et seq.*, and the decision handed down in the same case on 13 March 1950 by the Supreme Military Tribunal, *ibid.*, at 745 *et seq.* For a more recent case where reference has been made to the manifest illegality standard, see the decision of the Rome Military Court of Appeal of 7 March 1998 in the *Priebke* case (still unpublished).

With regard to the other standard, i.e. whether the subordinate *knew or should have known* that the order was illegal, see *inter alia* the decisions of the German Supreme Court in the British Occupied Zone of 22 February 1949 in the *J. and A.* case, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. 1 (1949), at 312, and of 15 November 1949 in the *B. et al.* case, *ibid.*, vol. 2, at 274–277. See also the decision handed down by the Dutch Special Court of Cassation on 21 November 1949 in the *Zimmermann* case, where the Court upheld the view of the Appeals Court to the effect that the appellant's

A different approach has been taken at the international level. As pointed out above,¹⁵ Article 8 of the London Agreement establishing the Nuremberg Tribunal laid down the so-called principle of *absolute liability*, whereby obedience to orders is *never* a defence and can only be urged in mitigation of penalty.¹⁶ The rationale behind this principle is that a soldier is a reasoning agent, and is therefore capable of appraising the orders he receives. If an order is illegal, he is not duty bound to obey. If he elects to obey, he takes the risk of being punished, along with his superior, for committing a criminal act. Article 8 of the London Agreement inspired all the other international instruments dealing with the issue of obedience to orders. Thus, the principle of absolute liability was incorporated into the Charter of the Tokyo Tribunal¹⁷ as well as

reliance on superior orders was to be dismissed as 'it must have been clear to the appellant . . . that [his] actions were contrary to any conception of law, and that the criminal nature of the deportation by the German occupying forces of citizens of conquered and occupied Dutch territory to Germany as forced labour . . . must have been all too clear to the appellant' (in *Nederlandse Jurisprudentie* (1950), nos 9, 30 *et seq.*, at 31, unofficial translation) and the decision delivered by the same Court in the *Bellmer* case, *ibid.*, (1950) nos 305, 540 *et seq.*, at 543, and in *ILR* (1950), at 393; the Court held that the criminal character of all his acts must have been 'clear' to the defendant, the more so because he held a high rank. For other cases where reference has been made to the standard of the personal knowledge of the subordinate see the *Walter Griffen* case (see the instructions given by the law officer to the court martial as well as the Decision of the Board of Review of 2 July 1968: 39 *CMR*, 586 ff, at 587). The law officer who instructed the court martial stated among other things that: 'A soldier or airman is not an automaton but a reasoning agent who is under a duty to exercise judgment in obeying the orders of a superior officer to the extent that where such orders are manifestly beyond the scope of the issuing officer's authority and are so palpably illegal on their face that a man of ordinary sense and understanding would know them to be illegal, then the fact of obedience to the order of a superior officer will not protect a soldier for acts committed pursuant to such illegal orders. This is the law in regard to superior orders.' See also the Decisions handed down by the US Court of Military Appeals on 31 January 1969, in the *Keenan* case and on 21 December 1973, in the *Calley* case, in 18 *U.S.C.M.A.* (1969) 108 *et seq.*, at 118 and in 22 *U.S.C.M.A.* (1973) 534 *et seq.*, at 541, respectively. For more cases, see those reported in the *XIV Law Reports of Trials of War Criminals* (1949), at 155 *et seq.* and those quoted by L. C. Green, *Superior Orders in National and International Law* (1976), at 283 *et seq.*

¹⁵ See *supra* note 2.

¹⁶ Article 8 provided that: 'The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.'

¹⁷ Article 6 of the 1946 Charter of the International Military Tribunal for the Far East provided that: 'Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.'

the Statutes of the two ad hoc Tribunals recently instituted by the Security Council under Chapter VII of the United Nations Charter.¹⁸ In addition, the Four Occupying Powers in Germany affirmed it when, with a view to establishing a uniform legal basis in Germany for the prosecution of German alleged war criminals, they adopted Control Council Law No. 10.¹⁹

Arguably, one of the reasons why this principle was proclaimed and applied at the international level was that the relevant statutes of the various international criminal tribunals provided for the prosecution and trial of *non-nationals* of the states establishing those tribunals.²⁰ Instead, the absolute liability principle has had little following in national legal systems, and has been adopted as a general rule in the legislation of only a few states.²¹

Identifying the content of the customary rule on superior orders is made even more difficult by the fact that, at both the national and international levels, these two approaches are not always considered mutually exclusive. Some national legal systems adopt both approaches. More specifically, they use the conditional liability approach for offences committed by nationals or for those following orders based on national law. Instead, they opt for the Nuremberg model with respect to war crimes committed by *enemy* nationals or by those following orders based on a *foreign* legal system.²²

¹⁸ Article 7, para. 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) provides that: 'The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.' Almost identically, Article 6, para. 4, of the Statute of the International Criminal Tribunal for Rwanda establishes: 'The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her from responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.'

¹⁹ Article II, para. 4(b), provided that: 'The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.'

²⁰ The same holds true for the national courts applying Control Council Law No. 10.

²¹ It appears from the *Collection of National Reports*, *supra* note 7, that the absolute liability approach has been taken in Argentina, Austria, Iran, Romania and the United Kingdom.

²² In France, Article 3 of the 1944 Order on the punishment of war crimes committed during the Second World War by enemy citizens or by agents *non français au service de l'administration ou des intérêts ennemis* expressly established, as an exception to Article 327 of the Criminal Code, that '*Les lois, décrets ou règlements émanant de l'autorité ennemie, les ordres ou autorisations données par cette autorité ou par les autorités qui en dépendent ou qui en ont dépendu, ne peuvent être invoqués comme faits justificatifs au sens de l'article 327 du code pénal, mais seulement, s'il y a lieu, comme circonstances atténuantes ou comme excuses absolutoires.*' Article 327 of the Criminal Code in force at that time provided that: '*Il n'y a ni crime ni délit, lorsque l'homicide, les blessures et les coups étaient ordonnées par la loi et commandés par l'autorité légitime.*' Similarly, Article 3 of the 1947 Belgian Law provided that superior orders could not be urged as a defence in application of Article 70 of the Criminal Code whenever the act performed in following an order constituted '*une violation flagrante des lois et coutumes de la guerre ou des lois de l'humanité*'. In Norway, the

Similarly, attempts have been made at the international level to subject the absolute liability approach to the requirements of the conditional liability doctrine. Rather surprisingly, these attempts came not only from the defence of the accused but also from the prosecution. At the Nuremberg trial, three out of four members of the prosecution maintained an attitude that was inconsistent, in the opinion of one commentator,²³ with the spirit of Article 8 of the London Charter. Instead of asserting that Article 8 simply ruled out the defence of superior orders, the British, French and Russian prosecutors maintained that recourse to this defence was not possible due to the manifest illegality of the orders.²⁴ Attempts to qualify the principle of absolute

*doctrine of absolute liability has been accepted only in the event that the perpetrator is an enemy citizen, while for nationals the applicable rule admits the plea of superior order in cases where the order is not manifestly illegal (see Collection of the National Reports, supra note 7, at 95). In the Netherlands, the doctrine of absolute liability has been accepted only when the orders are based on foreign legal systems, i.e. when a foreign superior gives the order to a foreigner or to a Dutch subordinate. This principle, established by Article 10(1) of the 1952 War Crimes Act, constitutes an exception to the general rule laid down in Article 43 of the Criminal Code, according to which superior orders may, in given circumstances, be urged as a complete defence (see *ibid*). See also the American Regulations for the Trial of War Crimes, para. 9 (issued on 23 September 1945 by Headquarters, Mediterranean Theatre of Operations) and the American Regulations Governing the Trial of War Criminals in the Pacific Area, para. 16 (both rules can be read in *History of the UN War Crimes Commission and the Development of the Laws of War* (1948), at 283). Current Belgian legislation constitutes an exception, as the conditional approach seems to have been maintained even in a special law regulating the prosecution and trial of grave breaches to the Geneva Conventions and Additional Protocols. Under Article 4, para. 2 of the 1993 *Loi relative à la répression des infraction graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977*. 'Le fait que l'accusé a agi sur l'ordre de son gouvernement ou d'un supérieur hiérarchique ne dégage pas sa responsabilité si, dans les circonstances existantes, l'ordre pouvait manifestement entraîner la perpétration d'une infraction grave aux Conventions de Genève du 12 août 1949 et leur premier Protocole additionnel du 8 juin 1977'.*

²³ Y. Dinstein, *The Defence of 'Obedience to Superior Orders in International Law'* (1965), 125 *et seq.*

²⁴ The question of whether or not the Nuremberg Tribunal accepted this line of reasoning remains open to debate. By referring to Article 8 of the Statute, the Tribunal stated: 'The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of the war has never been recognised as a defence to such acts of brutality . . .'. That the rule embodied in Article 8, which barred the defence of obedience to orders, was 'in conformity with the law of all nations' is partially true. At that time (and also at present, as I will show *infra*) the legislation of most countries did not provide — as Article 8 did — that a soldier could not be freed from responsibility for crimes committed following superior orders. On the contrary, in national legal systems obedience to orders constituted a defence, with the only exception being in the event of manifestly illegal orders or (more generally) cases where the subordinate knew or should have realized (on account of the circumstances) the illegality of the order. Interestingly, the Tribunal supported its view on the conformity of Article 8 with national laws using examples concerning orders that were manifestly illegal. It referred to orders to commit 'acts of brutality', such as killing or torture in violation of the laws of war (namely to orders that even in national legal systems provide no defence, because of their obvious illegality). Hence, it can be contended that, albeit implicitly, the Tribunal considered that Article 8 of the Charter did not exclude the defence of superior orders in any case, but only in respect of orders that were manifestly illegal. This proposition does not seem to be undermined by the fact that, in respect of two defendants (i.e. Keitel and Jodl), the Tribunal declared that the plea of superior orders was 'prohibited by Article 8 of the Charter as a defence'. Undoubtedly, the orders that the accused claimed to have obeyed were manifestly illegal. Therefore, it is possible that when it ruled out the plea of superior orders on the strength of Article 8, the Tribunal was taking into account the particular gravity of the actions that the defendants were allegedly ordered to commit.

liability by resorting to the requirements typical of the conditional liability approach were also made by some national courts acting pursuant to Control Council Law No. 10; they thus applied a substantially identical provision (Article II, para. 4 (b)) to that laid down in the London Agreement. In several cases, American military courts applying that law took the position, put forward at trial by the prosecution, that superior orders could not constitute a defence for acts whose criminality was manifest or was known by the subordinate.²⁵ Similar attempts were made more recently within the Security Council following the adoption of the resolution establishing the International Criminal Tribunal for the former Yugoslavia (ICTY). During the course of the debate, the United States representative, Mrs Albright, forcefully advanced the opinion that the superior order plea should be ruled out only in the case of manifestly unlawful orders. She pointed out that:

It is, of course, a defence that the accused was acting pursuant to orders where he or she did not know that the orders were unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful.²⁶

This view seems to have been taken up by one of the judges of the ICTY Appeals Chamber in *Erdemović*.²⁷

A *The Asserted Incompatibility of the Two Approaches*

A leading authority on the question under discussion has forcefully argued that these two approaches are radically inconsistent and cannot be reconciled. His views are presented in detail in relation to the summing up, by the editors of the *Law Reports of the United Nations War Crimes Commission*, on the case law on superior orders.²⁸ Dinstein takes issue with the editors of the *Law Reports* because they deliberately

²⁵ See Dinstein, *supra* note 23, at 184 *et seq.*

²⁶ S/PV. 3217, 25 May 1993, at 16. No other member of the Security Council contested the interpretation of Mrs Albright regarding the content of the rule on superior orders in the Statute of the International Tribunal, even if it was not in keeping with the ordinary sense of the wording of Article 7, para. 4, of the Statute. Indeed, as pointed out above, this article clearly embodies the principle of absolute liability as it provides that superior order can never be urged as a defence.

²⁷ While in the joint separate opinion of two Judges (Vohrah and McDonald), the view is put forward that 'obedience to superior orders does not amount to a defence *per se*', in his separate opinion Judge Cassese, President of the Tribunal, seems to have taken a different position. He maintained that it is a soldier's duty to disobey only those orders that are manifestly unlawful under international law. Arguably, in the opinion of the President, a soldier is not duty bound to disobey orders whose illegality is not obvious (unless, of course, their illegality was known by the subordinate through other means). Hence, if an order is not obviously criminal, the soldier must execute it and may urge its duty of obedience as a defence. See Decision of 7 October 1997, *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, at 15.

²⁸ Dinstein, *supra* note 23, at 200 *et seq.*

ignored the incompatibility between the standpoint of national courts which assert the conditional liability approach and the principle of absolute liability reflected in the Statute of the Nuremberg Tribunal as well as in Control Council Law No. 10. The author in question harshly criticizes the passage where the editors, endeavouring to ‘reconcile the irreconcilable’, maintain that the principle of conditional liability is expressed ‘in numerous municipal and international law enactments, including the Charter of the International Military Tribunal and Law No. 10’. In his view, this assertion is fallacious, especially because the London Charter as well as Control Council Law No. 10 were ‘not ready to recognise obedience to orders as a defence, either as a certain defence or as one available in emergency’. According to this author, ‘the fallacy in the summing-up of the editors of the *Law Reports* lies in the vain attempt to lump together the notions of two distinct schools of thought into one coherent concept, and demonstrate that even the proponents of the [conditional liability principle] feel bound to apply the provision of Article 8 of the London Charter’.²⁹

Plainly, if one shares this author’s view that the two approaches are irreconcilable, it inevitably follows that it is impossible to establish the existence of a customary rule on the matter, due to the lack of *communis opinio* of states.

This alleged irremediable discrepancy between the Nuremberg model and the conditional liability approach would seem to find support in the legal literature. Commentators have generally sought to put forward arguments in support of one of the two approaches as the correct legal solution to the question of superior orders.³⁰ Their arguments are not convincing, precisely because they have not endeavoured to put into a coherent whole all the ambiguities and inconsistencies of international practice, and are thus unable to delineate the proper content of the customary rule on superior orders.

To identify the scope and purport of such a rule is an unavoidable task for international lawyers. As long as there is no cogent proof that a customary rule exists on this question, states may feel free to lay down in their national law the *respondeat superior* principle, i.e. that subordinates are never accountable for crimes perpetrated when following orders.

²⁹ He goes on to say: ‘The editors would have done much greater service had they made a clear distinction between the different schools of thought that are discerned in the cases dealing with the subject of obedience to orders, and had they illuminated the points in conflict between them.’ *Ibid.*, at 202.

³⁰ Among those commentators who are favourable to the conditional liability approach, mention can be made of M. Greenspan, *The Modern Law of Land and Warfare* (1959), at 409, and — in the more recent legal literature — Keijzer, *supra* note 7, at 102, and Eser, ‘“Defences” in War Crimes Trials’, *Israel Yearbook on Human Rights* (1994), at 209. By contrast, arguments in favour of the absolute liability approach have been advanced by Brand, ‘The War Crimes Trials and the Laws of War’, in *BYBIL* (1949), at 416. A different approach is taken by Dinstein. He argues that: ‘The fact of obedience to orders should not have any special significance in international law. In conjunction of the other circumstances of the case, it may contribute to the proof of lack of *mens rea* and consequently bring about the acquittal of the accused’ (*supra* note 23, at 90). In other words, the author maintains that obedience to orders is not a defence *per se*, but is a factual element that may be taken into account within the scope of other admissible defences, such as mistake and duress. It is worth noting that, in actual practice, the consequences of Dinstein’s views are the same as those following from the absolute liability approach.

One needs to ask whether it is really impossible to reconcile the two approaches and thus find a *communis opinio* among states?

B In Search of the Content of a Customary Rule

On close scrutiny, the alleged difference between the two approaches appears to be only apparent. Some considerations may serve to prove this point.

First, national laws laying down the conditional liability approach and international legislation taking up the Nuremberg rule have a *different scope*. Unlike international legislation, national laws do not apply specifically to war crimes or international crimes, but embrace very broad categories of offences, including ordinary crimes such as theft, military offences and minor violations of the laws of warfare.³¹ Hence, it would be incorrect simply to infer that those national laws, or national courts applying those laws, are not in line with the Nuremberg model. The two approaches cannot be compared precisely because they do not have the same scope. To understand the position of those national legal systems, it is necessary to examine how the conditional liability principle has been applied by national courts in specific cases involving charges of war crimes.

Secondly, a perusal of national case law on war crimes shows that courts have always denied the defence of superior orders on the ground that the crimes committed were so serious that the illegality of the order was manifest or should have been known by the subordinate.³² There have been cases where defendants have been

³¹ National rules on superior orders applicable to war crimes are included in 'ordinary' criminal codes (as is the case in Sweden, where the applicable rule is Chapter 22, para. 8, of the Swedish Penal Code) or in military criminal codes (as is the case in Germany, where the rule on superior orders is included in Section 5, para. 1, of the Military Criminal Code). In both cases those rules do not apply specifically to war crimes.

³² It is almost impossible to give account of all these cases. To mention only some of them, see the cases quoted *supra* note 7, as well as those reported in *Law Reports*, *supra* note 14. In addition, see the decisions of the Italian Court of Cassation in *Cappai* (decision of 25 July 1945, partially published in *Rivista penale* (1946), at 113) and *Ventimiglia* (decision of 30 October 1946, partially published, *ibid* (1947), at 155–156). According to Dinstein, 'only in one case among those published in the Law Reports of the United Nations War Crimes Commission was the use of the defence of obedience to orders successful in bringing about an automatic acquittal of the accused'; namely, the *Wagner* case where the plea of superior orders was upheld with regard to one defendant, the accused Luger. In the opinion of Dinstein, 'this is a unique case, and it seems to be an anomalous phenomenon and an historical anachronism, which does not fall into line with all the other post II world war cases' (*supra* note 23, at 196). In reality, the French Military Court sitting in Strasbourg which pronounced on this case (see *Law Reports*, vol. V, *supra* note 14, at 23–55) did not accept the plea of superior orders as a defence proper (that is, a circumstance excluding guilt), but rather as an *excuse absolutoire*, namely a circumstance justifying the exclusion of punishment for persons found guilty. Indeed, the Strasbourg Court applied Article 3 of the 1944 French Order (see text quoted *supra* note 22), which, while negating the defence of superior orders, allowed the admissibility of such orders either as an extenuating circumstance or as an exculpatory circumstance (in this regard, see Eisélé, 'Réflexions sur le procès de criminels de guerre en France', in *Revue de Droit pénal et de criminologie* (1950/51) 305, at 311). Defendant Luger, who had been charged with being an accomplice in the murder of 13 persons, was found guilty on this charge (see *Law Reports*, *supra* note 14, at 42); the Court, however, found that, in light of the specific facts of the case, his having acted on superior orders should entail that he was not to be punished. It is worth emphasizing that in other cases French military tribunals upheld the plea of superior orders as an *excuse absolutoire*, pursuant

acquitted, despite the manifest illegality of the orders they obeyed, when other possible defences (such as mistake of fact³³ or duress³⁴) have been argued. In other cases, the plea of superior orders has been successfully put forward either because it was not certain that the execution of the order implied the commission of an unlawful act, in that the content of the relevant international rule was unclear,³⁵ or because of lack of *mens rea*.³⁶

to Article 3 of the 1944 French Order. In this regard, reference can be made to the decision of 16 April 1946 by the French Military Tribunal of Toulouse in the *Ackermann et al.* case. The Military Tribunal of Toulouse tried a group of Germans who, on 20 August 1944, had been ordered by Major Schoepplein to set fire to the village of Rimont and kill all civilians over the age of 14. The unit headed by Lieutenant Helfer fulfilled the task. Helfer was tried *in absentia*; all the accused urged that they had executed Helfer's orders. The Tribunal sentenced Helfer to death, granted extenuating circumstances to four soldiers and imposed no penalty on another one (Materne) probably because, although he had participated in setting the village afire, he had saved the life of a French civilian rounded up by the unit. See also the decision of the Military Tribunal of Bordeaux of 7 September 1949 in the *Dammach et al.* case (with regard to the defendant Kies); the decision of the Military Tribunal of Paris of 19 January 1950 in the *Petersen et al.* case (with regard to the defendants Petersen and Schiel). Unpublished decisions; copies are on file at the Library of the ICTY, The Hague).

³³ See, for instance, the *Scuttled U-Boats* case, in *Law Reports*, vol. I, *supra* note 14, at 55 *et seq.*

³⁴ See, e.g., the decisions of the Italian Court of Cassation in the *Bernardi and Randazzo, Srà and Masetti* cases, quoted by Judge Cassese in para. 35 of his Separate and Dissenting Opinion to the Appeals Chamber Decision of 7 October 1997, in the case of *The Prosecutor v. Drazen Erdemović* (*supra* note 27) and several decisions handed down by German Tribunals during and after the occupation of Germany (*ibid.*, paras 36–38).

³⁵ See, e.g., the decision of 22 January 1964 handed down by the *Landgericht* of Munich, in the *D.* case, in *Justiz und NS-Verbrechen*, vol. XIX (1978) 688 *et seq.* Following the order of his superior Rauter, the accused had participated in the execution of 65 Soviet prisoners of war. Rauter had claimed that the execution was legally warranted as a reprisal against serious violations of the laws of warfare committed by the Soviet Union. The Court pointed out, among other things, that the Soviet Union was not a party to the 1929 Geneva Convention on Prisoners of War, which prohibited such reprisals. It then noted that it was doubtful that the execution was unlawful and that the accused could have been unaware of the possible unlawfulness of the order he had carried out (at 697–698). The judgment was confirmed on appeal by the *Bundesgerichtshof* (see decision of 28 July 1964, *ibid.*, 700 *et seq.*).

³⁶ See e.g. the decision of the Italian Court of Cassation of 10 May 1947, in the *Caroselli et al.* case (published in part in *Rivista penale* (1946), at 920–921). The Court found the defendants not guilty on the ground that, after having tried to oppose by all means the illegal order, they were put by their superior in such a mental state of confusion as to annihilate their free will ('... quando la manifestazione di volontà contraria all'azione delittuosa imposta da un superiore è tale da cagionare disturbi fisici da tutti rilevabili ed un disorientamento psichico che annulla la libertà di decisione dei dipendenti, è chiaro che non ricorre quella integrità di coscienza e di volontà onde deve essere materiato il dolo generico in ogni delitto...'). *Ibid.*, at 921).

Thirdly, it may be contended that it is not a coincidence that national courts handle the conditional liability principle in the same manner. Arguably, if the performance of an order by a superior implies the commission of a war crime, the order cannot but be considered manifestly unlawful, given the very serious nature of the conduct prohibited by the international rules on such crimes. The illegality of an order which constitutes a grave breach of the 1949 Geneva Convention (such as the order to kill, torture or treat inhumanely persons protected by the Conventions) is obvious. Similarly, orders to commit an action constituting a war crime under the Charter of the Nuremberg Tribunal or the Tokyo Tribunal are without doubt patently illegal. Moreover, as not *all* violations of international humanitarian law, but rather only *serious violations* of this body of law, fall into the category of war crimes,³⁷ it would seem contradictory to brand an illegal act as *serious* and then, at the same time, to maintain that its illegality could not be manifest.

Based on the above, it is fair to conclude that, in substance, the two approaches under discussion lead to the same result in cases where a war crime charge is at issue,

³⁷ The notion that war crimes do not embrace all violations of international humanitarian law, but only serious violations of such law, has been recently upheld by the ICTY, decision on Jurisdiction of 2 October 1995, the *Tadić* case (Case No. IT-94-1-AR72), paras 91–95. The same notion has been subsequently adopted by the ICRC, for which three classes of violations of international humanitarian law constitute a war crime. These are (a) grave breaches of international humanitarian law applicable in international armed conflict; (b) other *serious violations* of international humanitarian law applicable in international armed conflicts; (c) *serious violations* of international humanitarian law applicable in non-international armed conflicts. See *Working Paper Prepared by the ICRC for the Preparatory Committee for the Establishment of an International Criminal Court*, New York, 14 February 1997. An example of a minor violation of the laws of warfare not amounting to a war crime was adduced in the Closing Address for the Defence in the *Sandrock et al.* case, heard by a British military court sitting at Almelo, Holland. The defence counsel, while admitting that a spy may not be sentenced to death without trial, emphasized that 'if one is held and the sentence of death is passed, failure to carry out incidental provisions, such as sending information to the Protecting Power, or to the next of kin, need not necessarily be construed as a crime' (*The Almelo Trial*, in *Law Reports*, *supra* note 14, vol. I, at 39, emphasis added). As another example of 'not serious' violations of the laws of warfare, reference can be made to actions in breach of Article 124, para. 3, of the Fourth Geneva Convention of 1949, which provides as follows: 'Women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women.' Arguably, the illegality of an order to commit actions prohibited by the aforementioned rules of warfare cannot be considered 'obvious'; it follows that the defence under discussion can successfully come into play in those national legal systems which take the conditional liability approach. The same holds true for other minor violations of the laws of war.

thereby depriving subordinates of the defence of obedience to orders.³⁸ This is borne out by the fact that whenever special laws on war crimes have been enacted, national legal systems have taken up the absolute liability approach and derogated from the general rule to lay down the conditional liability principle.³⁹ The coexistence of the two approaches within the same national legal system can be explained only because the more lenient rule (i.e., that reflecting the conditional liability approach) embraces a very broad category of offences, including those ordinary offences for which the plea of superior order could be successfully raised. By contrast, special laws on war crimes *exclude* the defence of superior orders precisely because they deal with such serious offences that it would be pointless to adopt the more permissive rule. There is thus an implicit assumption that orders to commit war crimes, being manifestly unlawful, can never constitute a defence.

Is it then possible to contend that there exists *communis opinio* among states to the effect that superior orders can *never* amount to a *defence* in cases of war crimes? Given the various evidentiary elements adduced above, I submit that the answer must be in the affirmative. To be sure, the lack of support for this defence in cases of war crimes can be affirmed as long as the substantive rules of international humanitarian law prohibiting a certain conduct are well established and have a clear and well-defined scope. Whenever there are doubts about the existence of a substantive rule of international humanitarian law, or where the content and purport of such a rule is uncertain, it is *a fortiori* doubtful that the conduct envisaged in the asserted rule will be penalized as criminal by international law.⁴⁰ Subordinates who carried out orders under such a doubtful rule must therefore be acquitted. However, an acquittal must be the outcome under such circumstances not because the plea of superior order is accepted as a defence, but by virtue of the *nullum crimen sine lege* principle. In the case under discussion we are not faced with a problem of ‘manifest illegality’, because such a problem only arises when it is well established that the order was contrary to a rule of international humanitarian law and it must be finally ascertained whether there was a ‘manifest’ illegality. We are instead faced with the *preliminary* question of

³⁸ In this regard, the interpretation of the Danish rule on superior orders given by the competent national authorities certainly deserves to be mentioned. Article 9 of the Danish Military Discipline Act provides: ‘He who by obeying the order of a superior has committed a punishable act, is not liable to punishment unless he knew that the order was given with malicious intent or the illegality of this was immediately obvious.’ In spite of its general wording, this provision is read as ‘only be applicable to minor war rules’. In any case, it is considered that ‘the Nuremberg principle that being ordered does not justify a crime should cancel the rule in Article 9’ (*Collection of the National Reports, supra* note 7, at 93).

³⁹ See *supra* section 2 and note 22.

⁴⁰ As the Appeals Chambers of the ICTY rightly held in *Tadić*, the requirements to be met for an offence to constitute a war crime include the requirement that the violation of a rule of international humanitarian law be serious and that the violation of the rule entail, ‘under customary or conventional law, individual criminal responsibility of the person breaching the rule’ (see decision of 2 October 1995, *supra* note 37, at para. 94).

whether or not the order was illegal at all.⁴¹ In addition, it must be emphasized that the negation of the defence of superior orders does not exclude the possibility of recourse to other defences, such as mistake or duress.

Two objections can be raised against the above contention that the rule of customary international law excludes the defence of superior orders. First, as I have emphasized above, attempts have been made at the international level to water down the absolute liability principle imposed by the relevant international rules. This has been done by requiring that the order be manifestly illegal for the defence to be unavailable.⁴² These attempts do not affect, however, the contents of the customary rule, suggested above. Indeed those attempts, motivated by the natural inclination of prosecutors, judges and diplomats to rely upon their own national concepts, have never resulted in a disregard for the absolute liability principle in any specific case.

Secondly, it could be objected that states were unable to agree upon a rule on superior orders during the negotiating and drafting of multilateral treaties dealing with war crimes: the 1949 Geneva Conventions and the 1977 Additional Protocol I.⁴³ This proves, so the argument could run, that no universally accepted rule on superior orders exists in customary international law. This possible objection is also untenable. Both in 1949 and 1974–1977 the ICRC proposed a rule aimed at regulating the defence of superior orders and, in so doing, substantially upheld the conditional liability approach.⁴⁴ Numerous states opposed the proposed rule, substantially on

⁴¹ It would seem that in the *High Command* case, the United States Military Tribunal sitting at Nuremberg pursuant to Control Council Law No.10 acted upon this notion when it acquitted defendants who had executed orders based on international rules whose content was uncertain. Dealing with orders concerning the use of prisoners of war for the construction of fortifications, the Tribunal stated: ‘... [T]he legality of such use was by no means clear. The use of prisoners of war in the construction of fortification is a charge directed against the field commanders on trial here. This Tribunal is of the opinion that in view of the uncertainty of international law as to this matter, orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal upon their face, but a matter which a field commander had the right to assume was properly determined by the legal authorities upon higher levels’; see *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, 1946–49*, vol. 11 (1950), at 534). According to the Tribunal, military commanders in the field ‘cannot be held criminally responsible for a mere error in judgment as to disputable legal questions’ (*ibid.*, at 511). The present author cannot therefore share Dinstein’s view (*supra* note 23, at 187), according to which in this case the Tribunal applied the manifest illegality principle, in breach of the stringent language of Article II, para. 4(b) of Control Council Law No. 10, which ruled out the defence of superior orders.

⁴² See *supra* section 2

⁴³ With regard to the 1949 Geneva Conventions see, among others, Dinstein, *supra* note 23, 223 *et seq.* As for the 1977 Protocols, see A. Cassese, *Violence and Law in the Modern Age* (1988), 143 *et seq.*

⁴⁴ The 1949 proposed article provided that: ‘The fact that the accused acted in obedience to orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify.’ Under the 1974–1977 proposal: ‘(1) No person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol (2) The fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from penal responsibility if it is established that, in the circumstances at the time, he should have reasonably known

political and psychological grounds: they feared that the rule would lend legitimacy to insubordination in their own armed forces. On both of these occasions, this led some other states that had been favourable to the rule to refrain from insisting on its adoption for two reasons. First, there was a general apprehension that the adoption of the provision on superior orders by a slight majority could hamper ratification of the Conventions by many states. Secondly, there was a fear that if the provision were watered down to make it acceptable to a vast majority this would affect the customary law principle on superior orders.⁴⁵ However, this failure to agree on a treaty rule does not necessarily warrant the conclusion that states were against the proposed rule on its merits, the more so because the rule allowed for the availability of the plea under certain circumstances, and to a large extent took the same approach as most national laws. Rather, it shows that some states are so sensitive to the possible psychological and political effects on their military of an international treaty rule on superior orders that they opposed the drafting and adoption of such rule and preferred to rely upon their own national legislation. In other words, states, wary of encouraging military disobedience through international agreements, chose to let sleeping dogs lie and to not tamper with the *status quo*. It may thus be concluded that lack of agreement on a treaty rule leaves the existence and the contents of a customary international rule unaffected.

3 Article 33: A Critical Appraisal

These two approaches re-emerged at the Rome Conference. The absolute liability doctrine was strongly advocated, particularly by the German delegation; it argued that, having been laid down in the London Agreement, the principle according to which subordinates are always criminally liable for the execution of orders involving the commission of international crimes had become a customary rule of international law. The conditional liability approach was forcefully advanced by the United States delegation, which contended that the post-World War II national case law had superseded the Nuremberg standard. As a result, the delegation argued, the principle

that he was committing a grave breach of the Conventions or of the present Protocol and that he had the possibility of refusing to obey the order'. Plainly, the major difference between the two proposed articles is that in 1974–1977 the principle that subordinates have the duty and right to refuse to obey was spelt out.

⁴⁵ See Dinstein, *supra* note 23, at 224–225, and Cassese, *supra* note 43, 144 *et seq.* According to Cassese, another reason for the opposition to the proposed rule by some states in 1974–1977 was that para. 1 of this rule made patent the principle that subordinates have the right and duty to disobey when obedience to orders entails the commission of a grave breach. The author maintains that precisely because this principle was spelt out 'numerous governments rejected it firmly, in the belief that military discipline is one of the mainstays of the State and, consequently, it is one of the duties of a soldier to obey his orders without questioning them' (at 144–145).

whereby subordinates are only answerable for crimes committed in the execution of manifestly illegal orders had become part and parcel of customary international law.⁴⁶

The clash between these two doctrines proved to be so strong that the drafting of Article 33 became one of the major stumbling blocks in the negotiations on Part Three of the Rome Statute on 'General Principles of Criminal Law'. The tough and prolonged discussions eventually led to a compromise. In essence, the two opposing positions were reconciled simply by juxtaposing them in the same rule. The absolute liability approach was adopted for genocide and crimes against humanity, while the other approach was chosen with regard to war crimes and possibly the crime of aggression.⁴⁷ Thus, the two approaches were juxtaposed by attributing a different scope or field of application to each of them.⁴⁸

This compromise was eventually reached because it enabled states meeting in Rome to take account of the main concern of the United States delegation: namely, to protect servicemen on the battlefield from international criminal responsibility in the event that they obey orders, the legality of which they are not in a position to appraise, to carry out combat operations. The same concern did not arise with regard to genocide and crimes against humanity because such crimes, although they may be perpetrated by military persons, are always part of a widespread or systematic practice involving higher political and military authorities. Possibly the United States delegation felt that orders to perpetrate such large-scale and heinous crimes could only be issued by political and military authorities of non-democratic states. It therefore considered that the adoption of the absolute liability approach for genocide and crimes against humanity would not affect United States servicemen operating abroad.

What are the merits and the flaws of this compromise?

Article 33 is to be commended in at least three respects. First, it has ruled out the possibility of the plea of superior orders for the most odious and egregious

⁴⁶ The US proposal on superior orders provided: 'In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person's conduct: . . . (c) The person was a member of forces acting pursuant to the order of a Government or of a military commander, unless the person knew the order to be unlawful or that the order was manifestly unlawful' (A/CONF.183/C.1/WGGP/L.2, 16 June 1998, Proposal by the United States of America for Single Provision Covering Issues Currently Governed by Articles 31, 32, 33 and 34).

⁴⁷ *Supra* note 1.

⁴⁸ Current Article 33 of the Rome Statute has mainly retained the wording of Option B of the working paper on Article 32 of the Draft Statute, which provided as follows: '(1) The fact that a person's conduct was pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve the person of criminal responsibility unless the order did not appear to be manifestly unlawful. [(2) In respect of the commission of the crime of genocide or a crime against humanity, a person shall not be exempted from criminal responsibility on the sole ground that the person acted pursuant to an order of a Government or a superior, or pursuant to national legislation].' (As explained in a footnote, the text was bracketed because it was still to be discussed in 'informals'.) The other option contained in the working paper was Option A, which constituted an elaboration of the proposal of the US delegation. It provided: 'The fact that a war crime has been committed pursuant to an order of a superior authority, whether military or civil, does not deprive the conduct in question of its character as a war crime, nor does it relieve the person of criminal responsibility, unless the person did not know that the superior order was unlawful and the order was not manifestly unlawful.' See A/CONF.183/C.1/WGGP/L.9, 24 June 1998.

international crimes, i.e. genocide and crimes against humanity, offences which normally involve widespread attacks on innocent civilians. Secondly, Article 33 reverses the *presumption* generally made in all those national laws which take the conditional liability approach. National laws provide that, as a rule, the plea of superior orders is a defence, after which they set out the requirements which render the defence invalid. It is for the prosecution to demonstrate the absence of these requirements. By contrast, under Article 33, there is first the presumption that the plea of obedience to orders is not a valid defence, and then the requirements are laid down for the plea to be accepted. Hence, it is up to the defence to prove the existence of those requirements before the International Court, including the not manifest illegality of the order. Thirdly, the mere fact of reaching agreement on Article 33 constitutes a significant advance. This is all the more true because the lack of a treaty rule on this matter would have been inconsistent with the thrust of the Rome Statute: to translate general principles of international criminal law as much as possible into *lex scripta*, thereby better safeguarding the rights of the accused. Plainly, the failure of states to agree upon a rule on superior orders in the 1949 Geneva Conventions as well as the 1977 Protocols did not have a major negative effect. These treaties were not intended to establish an international mechanism for the prosecution and punishment of international crimes. They classified as criminal certain categories of action and left to national courts the task of trying persons allegedly responsible for those crimes. National courts were then to settle any possible legal uncertainty concerning the defence under discussion by relying upon national legislation. By contrast, it would have been extremely difficult to establish the International Criminal Court without laying down by treaty rule the applicable principle on superior orders. States would not have easily accepted the Court's jurisdiction without knowing in advance how the question of superior orders would be regulated, particularly because *their own servicemen* could be brought before the Court.

Despite its merits, Article 33 must be faulted, primarily because it departs from customary international law without any well-grounded motivation. This departure is even more questionable given that Article 33 is basically inconsistent with the codification of war crimes effected through Article 8 of the Rome Statute. On the one hand, Article 33 provides for the validity of the defence in cases of war crimes, on the assumption that orders to commit war crimes may be issued that are *not* manifestly unlawful and thus subordinates may be ignorant of their illegality. On the other hand, Article 8 sets out an exhaustive list of war crimes, which covers acts that are unquestionably and blatantly criminal. How would it be possible to claim that the order to commit one of those crimes is *not* manifestly unlawful or that subordinates cannot recognize its illegality? The contradiction is indeed striking because the Preamble to the ICC Statute makes it clear that the states gathered at the Rome Diplomatic Conference were 'determined to put an end to impunity for the perpetrators' of '*the most serious crimes of concern to the international community as a whole*'.⁴⁹ How could it be argued that the order to commit one such 'most serious

⁴⁹ Emphasis added.

crime' might relieve a subordinate of his criminal liability, thus giving him full impunity for that crime?

It is to be hoped that in its case law the International Criminal Court will gradually bring Article 33 in line with customary international law. It should not be difficult for the Court to hold that orders to commit any of the crimes enumerated in Article 8 are always manifestly illegal and consequently can never provide a defence for subordinates.