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The History of the Defence of Superior Orders and its Intersection with International Human Rights Law

Hitomi Takemura[*]

18.1. Introduction

The defence of superior orders is claimed by a subordinate who commits a violation of international humanitarian law by following an order that was given by his or her superior. International crimes are not isolated offences that are committed by lone individuals. Rather, due to their scale and systematic nature, international crimes are committed through organisational structures. Thus, the question of whether individuals bear criminal responsibility when they execute an order is a critical issue that is related to international crimes. With the exception of the Rome Statute of the International Criminal Court ('ICC Statute'), international criminal legal instruments are normally silent on the topic of defence. However, they deal explicitly with the defence of superior orders.[1]

Today, the debate surrounding defence seems to be almost settled. If the defence of superior orders in the context of international criminal law can theoretically be claimed by a subordinate with regard to an international crime, then there remains almost no possibility to successfully claim such a defence before international criminal tribunals and the Inter-

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[1] Kai Ambos, *Treatise on International Criminal Law*, vol. 1: *Foundation and General Part*, Oxford University Press, Oxford, 2013, p. 376.

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national Criminal Court ('ICC'). This is because the seriousness of the subject-matter jurisdiction and the seniority of the personal jurisdiction of the international criminal tribunals contribute to the absolute denial of the defence of superior orders. In a similar vein, the ICC is supposed to deal with only the most serious violations of international humanitarian law. Therefore, an *a priori* judgment is made that the crime of genocide and crimes against humanity are *always* manifestly unlawful under Article 33(2) of the ICC Statute, as elaborated below. Moreover, the seniority of the defendants before these international criminal tribunals and courts generally prevented them from pleading the defence of superior orders.

Nevertheless, this chapter seeks to introduce the concise history and current legal situation surrounding the defence of superior orders, and this will be presented, for the most part, in chronological order. Such a historical approach is in line with aspirations of the fundamentally important Historical Origins of International Criminal Law ('HOICL') research project. A historical survey of the defence of superior orders can be regarded as a good example of serving the purpose of the HOICL – that is, constructing common ground and transcending the disagreements surrounding the contentious issues of international criminal law. The defence of superior orders used to be one of the most intensely debated problems in international criminal law; however, this debate seems to have been settled, at least in the realm of international criminal jurisdiction. The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ('ICTY') claimed that individuals even have a duty to disobey manifestly illegal orders under international law in tandem with the restriction of the defence of superior orders in international criminal law.[2]

In concert with the emergence of the individual's duty to disobey manifestly illegal orders, claims of selective conscientious objection have also arisen recently.[3] This chapter attempts to correlate the individual's

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2 International Criminal Tribunal for the Former Yugoslavia ('ICTY'), *Prosecutor v. Dražen Erdemović*, Trial Chamber, Sentencing Judgment, IT-96-22-T, 29 November 1996, para. 18 (http://www.legal-tools.org/doc/eb5c9d/).

3 While the right to conscientious objection to military service in general (absolute conscientious objection) has now become established, the right to selective conscientious objection is admittedly not well established under national laws. See Peter Rowe, "Members of the Armed Forces and Human Rights Law", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, p. 541.

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duty to disobey manifestly illegal orders under international law with the human right to selective conscientious objection. The argument is simple. If one wants to have a narrow defence of superior orders, one needs to further develop the human right to conscientious objection. Recent state practices illustrate that individuals tend to claim their human right not to participate in or become involved with an armed conflict that is contrary to international law against their own states. First, this chapter focuses on the history of superior orders in international criminal law. It then explores the current international law situation with regard to the issue of conscientious objectors. Finally, there has been an emergence of state practices concerning the individual's right to refuse to contribute to manifestly illegal wars and the issue of the state's duty to protect its nationals from participating in a manifestly unlawful war under international law. These state practices may endorse an emerging vertical relationship between individuals and their duties under international law by means of underscoring the importance of human dignity as an overarching imperative for states.

This chapter necessarily involves an aspect of the study of international human rights law, and it focuses on its interplay with the individual's duties with regard to international criminal law. It is arguably safe to describe this approach as interdisciplinary even though it falls within the realm of a common field of public international law. This interdisciplinary approach is directed toward the spirit of the HOICL project, which questions both the paradigm of the historical narrative of international criminal law and the existing stereotypical approach to issues of international criminal law.

18.2. History of the Development of Superior Orders

The history of the defence of superior orders is as old as the history of international criminal trials. One of the earliest medieval attempts at international criminal justice took place in 1474.[4] This was the *ad hoc* re-

[4] Military Government for Germany, USA, United States of America vs. Wilhelm von Leeb et al., 28 October 1948, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, October 1946–April 1949, vol. 11, US Government Printing Office, Washington, DC, 1949, p. 476: "We also refer to an article from the Manchester Guardian of 28 September 1946, containing a description of the trial of Sir Peter of Hagenbach held at Breisach in 1474. The charges against him were analogous to 'Crimes

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gional trial of the Governor of Breisach, Peter von Hagenbach, who raised the plea of obedience to the orders of his superior at his trial for murder, arson and rape.[5] Despite his plea of superior orders, Hagenbach was convicted and was deprived of his knighthood for crimes he had owed a duty to prevent.[6] He was found to have "trampled under foot the laws of God and of man".[7]

Having acknowledged this experimental, medieval, transregional criminal justice, the issue of superior orders has been recognised as an issue of public international law only since the twentieth century, and especially since the First World War. Practically speaking, prior to the First World War the problem of superior orders did not play a major role because the so-called act of state doctrine had reigned until that time.[8] Under this doctrine, only states could be held liable in international law, while the responsibility of individuals was essentially irrelevant. Nevertheless, some jurisprudence exists from the period after the First World War. The Treaty of Versailles, signed on 28 June 1919, called for the trials of the former German Kaiser, Wilhelm II, and persons accused of having committed acts in violation of the laws and customs of war.[9] However, the treaty failed to include a provision on the defence of superior orders and left the matter for the tribunal to decide,[10] and, as is well known, the international tribunal never took place because of the refusal of the Netherlands to extradite Wilhelm II.

By the time the United Nations War Crimes Commission was established on 20 October 1943 to undertake the prosecution of war crimes

against Humanity' in modern concept. He was convicted" ('High Command case') (https://www.legal-tools.org/doc/c340d7/).

5 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. 2: The Law of Armed Conflict, Stevens and Sons, London, 1968, pp. 462–66.

6 William H. Parks, "Command Responsibility for War Crimes", in *Military Law Review*, 1973, vol. 62, p. 5.

7 Schwarzenberger, 1968, p. 466, see *supra* note 5; Leslie C. Green, "Fifteenth Waldemar A Solf Lecture in International Law", in *Military Law Review*, 2003, vol. 175, p. 311.

8 Albin Eser, "'Defences' in War Crime Trials", in Yoram Dinstein and Mala Tabory (eds.), *War Crimes in International Law*, Kluwer Law International, The Hague, 1996, p. 254.

9 Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919, Arts. 227–28 ('Versailles Treaty') (https://www.legal-tools.org/doc/a64206/).

10 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, reprinted in *American Journal of International Law*, 1920, vol. 14, p. 117.

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committed by Nazi Germany and its allies, the debate on the issue of obedience to superior orders converged on the subjective criteria for considering it a general principle of criminal law, *mens rea*, and the objective criterion for considering the obedience to superior orders, which is manifest illegality of conduct. Ultimately, Article 8 of the Charter of the International Military Tribunal ('IMT Charter') adopted a severe position for the defence of superior orders – that is, the so-called absolute liability principle. Acquittal is not mentioned in Article 8; there is reference only to the mitigation of punishment as a possibility. The provision of Article 6 of the Charter of the International Military Tribunal for the Far East ('IMTFE Charter') is also similar to the IMT Charter, though technically its wording gave the judges of the IMTFE some leeway to take into account the fact of obedience to superior orders in the context of other defences, such as duress or a mistake of law.[11]

Broadly speaking, the defence of superior orders is not an available defence at *ad hoc* international tribunals.[12] Articles 7(4) of the ICTY Statute, Article 6(4) of the International Criminal Tribunal for Rwanda ('ICTR') Statute, Article 6(4) of the Special Court for Sierra Leone ('SCSL') Statute, Article 29 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia ('ECCC') for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Article 3(2) of the Statute for the Special Tribunal for Lebanon ('STL'), and Section 21 of the Law of the Special Panels for East Timor are derived almost verbatim from Article 8 of the IMT Charter and categorically deny superior order as a defence. Even though the SCSL Statute, the STL Statute, the Law on the Establishment of the ECCC and the Law of the Special Panels for East Timor were all adopted after the ICC Statute, they did not follow its provision of the defence of superior orders. Suzannah Linton and Caitlin Reiger suggest that the drafters of Section 21 of Regulation 2000/15 of the Special Panels for East Timor obliged the special pan-

[11] Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law*, A.W. Sijthoff, Leiden, 1965, p. 157; Elies van Sliedregt, The Criminal Responsibility of Individuals for Violation of International Humanitarian Law, TMC Asser, The Hague, 2003, p. 320.

[12] Alexander Zahar, "Superior Orders", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 525.

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els to examine customary international law to determine the contents of the legal rules of superior orders.[13]

In national jurisdictions, the principle of manifest illegality before national tribunals has become mainstream since the end of the Cold War.[14] The defence of superior orders in the national context is a complete defence if the superior's order is not manifestly unlawful and the defendant did not know of the order's illegality.[15] In contrast, at the international level, the absolute liability approach towards the defence of superior orders has been preferred by international criminal tribunals.

The negotiation of the provision of the defence of superior orders was controversial throughout the drafting of the ICC Statute. The provision in the ICC Statute eventually took a middle position between the histories of international and national legislations and jurisprudences. Under Article 33(1) of the ICC Statute, the defence may be invoked under three cumulative conditions: 1) the person was under a legal obligation to obey the orders of the government or the superior in question; 2) the person did not know that the order was unlawful; and 3) the order was not manifestly unlawful. Article 33(2) further provides that "[f]or the purpose of this article, orders to commit genocide or crimes against humanity are manifestly unlawful". Since the resolution adopted in Kampala to amend the ICC Statute and introduce the crime of aggression to the jurisdiction of the

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[13] Suzannah Linton and Caitlin Reiger, "The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders", in *Yearbook of International Humanitarian Law*, 2001, vol. 4, p. 198.

[14] According to the International Committee of the Red Cross Rules on Customary International Humanitarian Law, Rule 154, Obedience to Superior Orders: "In finding that superior orders, if manifestly unlawful, cannot be a defence, several courts based their judgements on the fact that such orders must be disobeyed. Besides the practice related to the defence of superior orders, practice specifying that there is a duty to disobey an order that is manifestly unlawful or that would entail the commission of a war crime is contained in the military manuals, legislation and official statements of numerous States. This rule is confirmed in national case-law". See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. 1: *Rules*, Cambridge University Press, Cambridge, 2009, pp. 563–64.

[15] See Paola Gaeta, "The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law", in *European Journal of International Law*, 1999, vol. 10, p. 176, fn. 7. Gaeta enumerates national/military laws, such as in Denmark, Germany, Israel, the Netherlands, Spain, Switzerland and Norway. Even in countries like Greece and Italy, which have legislation of the absolute liability principle, the conditional liability approach has been affirmed by case law.

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ICC is silent on the issue of the defence of superior orders, the availability of the defence to the crime of aggression is debatable. Still, the Elements of the Crimes of Aggression require that the act of aggression, by its character, gravity and scale, constitute a manifest violation of the Charter of the United Nations ('UN Charter') and that the perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter.[16] Therefore, it would be difficult for perpetrators to claim the order to commit a crime of aggression that was not manifestly unlawful by definition.[17] The leadership nature of the crime also, by definition, becomes an obstacle to applying the defence of superior orders to the perpetrators of the crime of aggression.[18]

18.3. Models of the Defence of Superior Orders Adopted in its Historical Development

Reflecting on the history of the defence of superior orders, five schools of thought concerning this problem are discernible. The first, and the theory which is mostly in decline, is the doctrine of *respondeat superior*.[19] According to this doctrine, obedience to superior orders is automatically and *a priori* an absolute defence to a criminal prosecution. The person who bears the responsibility must be the superior and not the subordinate. In 1906 one of the most prominent international law scholars at the time, Lassa Oppenheim, published the first edition of his treatise on international law, which advocated this doctrine.[20] However, the doctrine did not gain ground at the time of the post-Second World War trials.

Second, as an antithesis to *respondeat superior*, the doctrine of absolute liability has come into being. This doctrine claims that the fact of obedience to orders does not create a defence *per se*. In other words, orders from a superior do not justify an unlawful act but can be considered in mitigation. Generally speaking, the absolute liability doctrine is said to

[16] Resolution RC/Res.6 on the Crime of Aggression, Review Conference of the Rome Statute, adopted on 11 June 2010, Depositary Notification C.N.651.2010 Treaties-8.

[17] See, for example, Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2013, p. 198.

[18] *Ibid*., p. 197.

[19] This doctrine is sometimes also termed the "doctrine of passive obedience" or "*Befehl ist Befehl*".

[20] Lassa Oppenheim, *International Law: A Treatise*, 2 vols., Longman, Green and Co., London, 1905.

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have been supported by international legislation and jurisprudence prior to the ICC Statute, while the conditional liability doctrine is generally adopted by national legal systems.[21] The absolute liability doctrine is used, though not by many states, on several national levels,[22] whereas the conditional liability doctrine now appears in Article 33 of the ICC Statute.

Third, the absolute liability doctrine may have been a suitable instrument, specifically for trying the major war criminals whose acts were, by nature, manifestly unlawful.[23] Recently, the general tendency of the treatment of the defence of superior orders is that the illegality of orders is subject to the manifest illegality test. This approach, which is called the manifest illegality principle, is taken by the ICC Statute. Although this approach is primarily an objective test for soldiers who obey illegal orders, many advocates think that the ultimate objective of this test is to ascertain the subjective knowledge of the defendant regarding the illegality of the order.[24] They believe that the subordinate can be acquitted if he or she believed honestly or in good faith that he or she had to obey the order. This is known as the *mens rea* principle. Even though obedience to superior orders may not be a defence *per se*, it may be acknowledged in conjunction with the other circumstances of a given case within the ambit of a defence that is based on a lack of *mens rea*, such as the result of compulsion or mistake.

Fourth, in drafting instruments of international tribunals, there is a preference to follow the doctrine of superior orders as a ground of mitigation. This position holds that obedience to a superior order is not a defence *per se* and should be regarded as a factual detail or, at least, as grounds for mitigation. This approach is derived from the absolute liability principle. This position was recognised by the IMT Charter at Nuremberg and was subsequently affirmed by the statutes of *ad hoc* international criminal tribunals.

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[21] Gaeta, 1999, pp. 174–75, see *supra* note 15. See also van Sliedregt, 2003, pp. 329, 332, see *supra* note 11.

[22] According to Gaeta, the absolute liability approach has been taken in Argentina, Austria, Iran, Romania and the United Kingdom. Gaeta, 1999, p. 179, fn. 21, see *supra* note 15.

[23] See Sarah T. Cornelius, "The Defence of Superior Orders and Erich Priebke", in *Patterns of Prejudice*, 1997, vol. 31, no. 1, p. 10.

[24] See, for example, Annemieke van Verseveld, *Mistake of Law: Excusing Perpetrators of International Crimes*, TMC Asser, The Hague, 2012, p. 98.

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Fifth, some international criminal lawyers claim that, notwithstanding a clear rejection of obedience to superior orders as an absolute *justificatory* defence for an accused acting under military authority in armed conflict, this substantive defence to war crimes by virtue of a legal *excuse* ought to be maintained.[25] This school of thought could be termed "the doctrine of justification and excuse".

In the case of justification, an action that would *per se* be considered contrary to law is regarded as lawful and does not amount to a crime. However, in the case of excuse, an action contrary to the norm remains unlawful. Nonetheless the wrongdoer is not punished because of a lack of *mens rea* and/or special circumstances approved by law and society. In other words, superior orders to commit a crime can never *justify* the committal of a crime in executing the order. However, there remains the possibility of using this defence *not by itself* but when the order is considered within the framework of other defences, such as duress or coercion, as an *excuse*.[26]

18.4. The Actuality of the Defence of Superior Orders Based on Recent International Practice

After Nuremberg and until the adoption of the ICC Statute, it may be no exaggeration to say that the rejection of the defence of superior orders had been regarded as customary international law since the relevant provisions of the defence of superior orders of the statutes of these tribunals adopted the absolute liability doctrine, as noted earlier. The defence of superior orders became a problem as early as the first case of conviction and sentence before the ICTY – the *Erdemović* case. In its Appeals Judgment, the judges independently dealt with the issue of the defence of superior orders. For instance, Judge Cassese held that

> there is no necessary connection between the two. Superior orders may be issued without being accompanied by *any*

[25] Mordechai Kremnitzer, "The World Community as an International Legislator in Competition with National Legislators", in Albin Eser and Otto Lagodny (eds.), *Principles and Procedures for a New Transnational Criminal Law*, Max Planck Institute, Freiburg im Breisgau, 1992, p. 345; and see also Geert-Jan Alexander Knoops, *Defenses in Contemporary International Criminal Law*, Transnational Publishers, Ardsley, NY, 2001, p. 170.

[26] Otto Triffterer, "Article 33 Superior Orders and Prescription of Law", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, Nomos, Baden-Baden, 1999, pp. 580–81.

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> threats to life or limb. In these circumstances, if the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order. If, following such a refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised, and superior orders lose any legal relevance.[27]

The Joint Separate Opinion of Judges McDonald and Vorah allegedly supported the *mens rea* principle,[28] though the primogenitor of the doctrine, Yoram Dinstein, complained that his work was not directly cited and that no approbation was made in their joint separate opinion.[29] After the *Erdemović* case, the ICTY distinguished between duress and the defence of superior orders, since the latter is absolutely denied in Article 7(4) of its Statute. For instance, in *Bralo*, the Trial Chamber of the ICTY recognised that "[d]uress and superior orders are separate, but related concepts and either may count in mitigation of sentence".[30]

As a consequence of following the provision of the IMT Charter with minor alterations, the ICTY does not regard superior orders as a defence. Moreover, the fact of the existence of manifestly unlawful superior orders has not been easily taken into consideration in the mitigation of sentences, even though the fact of following superior orders is one of the mitigating factors explicitly referred to in both the ICTY and the ICTR Statutes. If the nature of the order is manifestly unlawful, then the fact that the individual obeyed such orders, as opposed to acting on his or her own initiative, does not merit the mitigation of punishment.[31] In 2010 the Appeals Chamber of the ICTY held that the fact that the accused was or-

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27 ICTY, *Prosecutor v. Dražen Erdemović*, Appeals Chamber, Judgment, Separate and Dissenting Opinion of Judge Cassese, IT-96-22-A, 7 October 1997, para. 15 (emphasis in original) (https://www.legal-tools.org/doc/a7dff6/).

28 ICTY, *Prosecutor v. Dražen Erdemović*, Appeals Chamber, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, IT-96-22-A, 7 October 1997, para. 34 (https://www.legal-tools.org/doc/f91d89/).

29 Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law*, repr. ed., Oxford University Press, Oxford, 2012, p. xix.

30 ICTY, *Prosecutor v. Miroslav Bralo*, Trial Chamber, Judgment, IT-95-17-S, 7 December 2005, p. 19, para. 53 ('Bralo case') (https://www.legal-tools.org/doc/e10281/); ICTY, *Prosecutor v. Miroslav Bralo*, Appeals Chamber, Judgment on Sentencing Appeal, IT-95-17-A, 2 April 2007, p. 11, para. 22 (https://www.legal-tools.org/doc/14a169/).

31 ICTY, *Prosecutor v. Darko Mrđa*, Trial Chamber, Sentencing Judgment, IT-02-59-S, 31 March 2004, p. 17, para. 67 (https://www.legal-tools.org/doc/d61b0f/).

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dered to lead the operation did not exonerate him from criminal responsibility if, in the execution of the order, he or she, in turn, instructed other persons to commit a crime.[32] The manifestly unlawful nature of superior orders influenced considerations of the mitigation of the sentence, and the Trial Chamber of the ICTY stated: "The Chamber also finds that any orders given to Bralo to kill civilians and destroy homes would have been manifestly unlawful, such that they have no mitigatory value in the determination of sentencing the present case".[33] In addition to the manifestly unlawful nature of superior orders, the senior status of the accused in the army and the repeated execution of crimes all contributed to no consideration of the existence of superior orders in regard to mitigating factors in *Bagosora* before the ICTR.[34]

The SCSL appears to be even stricter than the ICTY with regard to mitigating circumstances. Although Kanu raised superior orders as one of the mitigating circumstances, the Trial Chamber treated it as a question of duress. On rejecting the fact of obedience to superior orders as a mitigating factor, the Trial Chamber II of the SCSL held that "[t]here is no evidence that Kanu acted under duress. The fact that Kanu voluntarily reiterated criminal orders previously issued by Brima cannot be considered as mitigation".[35]

The ECCC treated the defence of superior orders and duress separately when it considered them as defences and mitigating circumstances.[36] Neither the Trial Chamber nor the Supreme Court Chamber of the

[32] ICTY, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Appeals Chamber, Judgment, IT-04-82-A, 19 May 2010, p. 63, para. 167 (https://www.legal-tools.org/doc/54398a/).

[33] Bralo case, Trial Chamber, Sentencing Judgment, p. 20, para. 54, see *supra* note 30.

[34] International Criminal Tribunal for Rwanda, *Prosecutor v. Théoneste Bagosora et al.*, Trial Chamber, Judgment and Sentence, ICTR-98-41-T, 18 December 2008, p. 573, para. 2274 (https://www.legal-tools.org/doc/6d9b0a/). In *Bagosora*, whereas the Trial Chamber recognised that Nsengiyumva and Ntabakuze were at times following superior orders in executing their crimes, given their own senior status and stature in the Rwandan army, the Chamber was convinced that their repeated execution of these crimes as well as the manifestly unlawful nature of any orders they received to perpetrate them reflected their acquiescence in committing them, and no mitigation was warranted on this ground.

[35] Special Tribunal for Sierra Leone, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Barbar Kanu*, Trial Chamber, Sentencing Judgment, SCSL-04-16-T, 19 July 2007, p. 32, para. 122 (https://www.legal-tools.org/doc/e912c3/).

[36] Extraordinary Chambers in the Courts of Cambodia ('ECCC'), *Co-Prosecutors v. Kaing Guek Eav alias Duch*, Trial Chamber, Judgment, 001/18-07-2007/ECCC/TC, 26 July 2010, para. 608: "Though often pleaded in conjunction with superior orders, duress may

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ECCC in *Duch* recognised the defence of superior orders and superior orders as a mitigating circumstance, since Kaing Guek Eav alias Duch was found to have known that the orders were unlawful.[37] However, the approach taken by the Trial Chamber should be noted. It examined whether the accused knew the unlawfulness of following orders to commit war crimes in accordance with Article 33 of the ICC Statute, though Article 29(4) of the ECCC law adopts an absolute liability approach by providing for "the fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility".[38]

Since the international community and international criminal tribunals have limited resources, they tend to focus on the senior perpetrators of systematic criminality of the gravest international crimes. Consequently, for such senior leaders, there is a limited possibility of obedience to superior orders, since they usually belong to the top of the system criminality. However, there seems to be no customary international law governing how to handle cases concerning a subordinate's obedience to superior orders of a nature that is not manifestly unlawful.[39] The fact of obedience to superior orders may be considered in defences other than the defence of superior orders. These include mistakes of law, mistakes of fact and/or duress, as set forth in Articles 32 and 31(1)(d) of the ICC Statute, respectively, though the conditions of these defences are again very rigid and limited.

While the constitutional texts of the international criminal tribunals, with the exception of the permanent ICC, presuppose the manifest illegality of their subject matter crimes and categorically deny the defence of superior orders, national courts appear to maintain conditional responsi-

also serve as an independent mitigating factor" ('Duch case') (https://www.legal-tools.org/doc/dbdb62/).

[37] *Ibid*., paras. 552, 606-608. ECCC, *Co-Prosecutors v. Kaing Guek Eav alias Duch*, Supreme Court Chamber, Appeal Judgment, 001/18-07-2007/ECCC/SC, 3 February 2012, para. 365 (https://www.legal-tools.org/doc/681bad/).

[38] The footnote of the Trial Chamber Judgment cited Article 100 of the 1956 Penal Code, the relevant national law during the 1975 to 1979 period, which stipulates: "In the case of illegal orders given by a lawful authority, the judge shall determine, on a case-by-case basis, the criminal responsibility of those executing the orders" (unofficial translation). Duch case, Trial Chamber, Judgment, fn. 962, see *supra* note 36.

[39] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2014, p. 251, para. 667.

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bility under the manifest illegality principle and presume the manifest illegality of orders involving crimes under international law.[40]

The denial of the defence of superior orders is also seen in international human rights instruments, such as Article 2 of the Convention against Torture and Article VIII of the Inter-American Convention on the Forced Disappearance of Persons.[41] General Comment No. 20 by the Human Rights Committee in relation to Article 7 – the prohibition of torture – of the International Covenant on Civil and Political Rights states that "no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority".[42]

18.5. How the Right of Conscientious Objection May Be Relevant

The next question is how the influence and growth of a particular human rights norm may alter the legal understanding of superior orders – namely, the right of conscientious objection. Considering the intersection between human rights law and international criminal law as they have historically developed is important given their shared aims of protecting the individual and important public values. This is also important for practical, on-the-ground reasons. The manifest illegality test of the defence of superior orders ultimately demands reasonable pre-consideration on the part of the individual when he or she follows an order from his or her superior. In reality, however, the feasibility of such a pre-consideration may be seriously circumscribed due to the environment surrounding those who must obey orders. No law should compel any individual to observe a norm that is practically unreasonable.

In this context, the system of conscientious objection may assist soldiers to defend their judgments on each war and each order that is giv-

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40 *Ibid.*, para. 668, p. 251.

41 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 39/46, Annex, 39 UN GAOR Supp. No. 51, UN doc. A/39/51, 10 December 1984; Inter-American Convention on Forced Disappearance of Persons, OAS Treaty Series No. 68, 33 ILM 1429, 9 June 1994.

42 Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc. HRI/GEN/1/Rev.1, 1994.

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en. Of course, the defence of superior orders and the notion of conscientious objection are two different concepts. Yet, the duty to disobey manifestly illegal orders may be legally fulfilled by means of the human rights system of conscientious objection. The corollary of denying the defence of superior orders in the context of manifest illegality may be not only deny a legitimate defence when soldiers are prosecuted but also demand that soldiers abstain from obeying manifestly illegal orders altogether. The duty to refuse to obey a manifestly illegal order was clearly established by the President of the ICTY in the *Erdemović* case. As Rule 154 of the customary international rules enumerated by the International Committee of the Red Cross demands, "[e]very combatant has a duty to disobey a manifestly unlawful order" today.[43]

Despite this duty of the individual to uphold international humanitarian law, it is not clear how he or she can fulfil this duty within his or her own nation by means of claiming conscientious objector status. Such a duty of the individual under international criminal law and international humanitarian law would be efficiently performed only if the international community recognises and supports the right to conscientious objection in the normative body of international human rights law. In modern history, conscientious objection is regarded as being as old as the history of conscription. The waning of conscription in European countries is proportional to the rise of conscientious objectors. While the supervising bodies of international and regional human rights law have witnessed numerous individual cases of conscientious objection, there is no "international" human rights treaty that clearly sets out the individual's right to conscientious objection. Consequently, the right to conscientious objection under international law has remained somewhat obscure.

The Charter of Fundamental Rights of the European Union is the first regional and, therefore, to some extent, international human rights instrument that recognises explicitly the right to conscientious objection as a part of the right to freedom of conscience. In addition, Article 12(1) of the Ibero-American Convention on Young People's Rights, which entered into force on 1 March 2008, recognises that youths have the right to make a conscientious objection to obligatory military service.

[43] Henckaerts and Doswald-Beck, 2009, p. 563, see *supra* note 14.

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Both Article 8(3)(c)(ii) of the International Covenant on Civil and Political Rights[44] ('ICCPR') and Article 4(3)(b) of the European Convention on Human Rights ('ECHR'),[45] on the one hand, relate to freedom from slavery and forced labour, respectively, and both categorically preclude military service and any national service required by the law of conscientious objectors in countries in which conscientious objection is recognised.[46] On the other hand, both Article 18 of the ICCPR and Article 9 of the ECHR enshrine freedom of thought, conscience and religion without referring explicitly to the right to make a conscientious objection to military service. Therefore, the long-standing positions of both the Human Rights Committee of the ICCPR and the ECHR initially took the view that their human rights conventions did not provide for the right to conscientious objection, especially taking into account Articles 8 (3)(c)(ii)[47] and 4(3)(b), respectively.[48] However, their positions have gradually changed over the last three decades.

The Human Rights Committee of the ICCPR adopted the General Comment No. 22 on Article 18 of the freedom of thought, conscience and

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44 International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN doc. A/6316, 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.

45 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, entered into force 3 September 1953.

46 Article 8(3)(c) of the International Covenant on Civil and Political Rights stipulates: "(c) For the purpose of this paragraph the term 'forced or compulsory labour' shall not include: […] (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors". Article 4(3)(b) of the European Convention on Human Rights stipulates: "(3) For the purpose of this article the term 'forced or compulsory labour' shall not include: […] (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service".

47 Human Rights Committee, *L.T.K. v. Finland*, Communication no. 185/1984, UN doc. CCPR/C/25/D/185/1984, 9 July 1985.

48 *Grandrath v. Germany*, no. 2299/64, Commission report of 12 December 1966, Yearbook ECHR, 10, p. 626; *G.Z. v. Austria*, no. 5591/72, Commission decision of 2 April 1973, Collection 43, p. 161; *X. v. Germany*, no. 7705/76, Commission decision of 5 July 1977, Decisions and Reports (DR) 9, p. 201; *Conscientious Objectors v. Denmark,* no. 7565/76, Commission decision of 7 March 1977, DR 9, p. 117; *A. v. Switzerland*, no. 10640/83, Commission decision of 9 May 1984, DR 38, p. 222; *N. v. Sweden*, no. 10410/83, Commission decision of 11 October 1984, DR 40, p. 203; *Autio v. Finland*, no. 17086/90, Commission decision of 6 December 1991, DR 72, p. 246; *Peters v. the Netherlands*, no. 22793/93, Commission decision of 30 November 1994, unreported; *Heudens v. Belgium*, no. 24630/94, Commission decision of 22 May 1995, unreported.

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religion on 30 July 1993. It recognised that the right to conscientious objection may be derived from the article by holding that "[t]he Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief".[49]

In 2012 the Human Rights Committee of the ICCPR recognised the violation of Article 18(1) of the ICCPR by Turkey in a communication with regard to conscientious objectors who were Jehovah's Witnesses. In this case, the committee

> reiterates that the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if the latter cannot be reconciled with the individual's religion or beliefs. The right must not be impaired by coercion. A State party may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside of the military sphere and not under military command. The alternative service must not be of a punitive nature, but must rather be a real service to the community and compatible with respect for human rights.[50]

The Human Rights Committee thus interprets Article 18 of the ICCPR and recognises the right to conscientious objection to military service independent from Article 8(3)(c)(ii).

In recent cases, the Human Rights Committee has treated the right to conscientious objection to military service as part of the absolutely protected right to hold a belief, although the committee had analysed the applicants' rights to conscientious objection to military service as an instance of the manifestation of belief in practice until the cases of 2010, which are subject to limitation under Article 18(3).[51]

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[49] Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc. HRI/GEN/1/Rev.1 at 35, 1994, para. 11.

[50] *Cenk Atasoy and Arda Sarkut v. Turkey*, Communication nos. 1853/2008 and 1854/2008, UN doc. CCPR/C/104/D/1853-1854/2008, 29 March 2012.

[51] See Joint Opinion of Committee Members Yuji Iwasawa, Gerald L. Neuman, Anja Seibert-Fohr, Yuval Shany and Konstantine Vardzelashvili (concurring), *Young-kwan Kim et al. v. Republic of Korea*, Communication no. 2179/2012, UN doc. CCPR/C/112/D/2179/2012, 15 October 2014.

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Likewise, Strasbourg's attitudes toward the right to conscientious objection to military service have softened. On 7 July 2011 the Grand Chamber of the European Court of Human Rights made a break with the past decisions of the Commission and held that "article 9 should no longer be read in conjunction with article 4 § 3 (b). Consequently, the applicant's complaint is to be assessed solely under article 9".[52] Although the Court did not explicitly read the right to conscientious objection to military service into Article 9, it held that

> article 9 does not explicitly refer to a right to conscientious objection. However, it considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of article 9.[53]

In this case, the applicant, who was a Jehovah's Witness, complained that his conviction for refusing to serve in the army had violated Article 9, and the Court found that the applicant's conviction constituted an interference, which was not necessary in a democratic society within the meaning of Article 9 of the ECHR.[54]

There are two categories of conscientious objector (conscientious objection): one is an absolute conscientious objector (absolute conscientious objection), and the other is a selective conscientious objector (selective conscientious objection). Selective conscientious objectors are opposed to certain military actions. Taking account of individuals' duties to disobey manifest illegal orders under international law, the *jus ad bellum* and *jus in bello* violations should be relevant to selective conscientious objection. The international community once supported selective conscientious objection by means of a UN General Assembly resolution. In its resolution 33/165, the General Assembly recognised "the right of all persons to refuse service in military or police forces which are used to enforce *apartheid*".

[52] European Court of Human Rights, *Bayatyan v. Armenia*, Grand Chamber, Judgment, no. 23459/03, 7 July 2011, para. 109.

[53] *Ibid.*, para. 110.

[54] *Ibid.*, para. 128.

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The *jus in bello*-based claim of conscientious objection is likely to fail due to the practical difficulties of presenting evidence of *jus in bello* before obeying an order. In the context of asylum seekers, the "real risk" of participating in illegal acts (Norway) or the likelihood of being closely involved in actions that offend the basic rules of human conduct (the United Kingdom) has to be proved in order to claim the status of refugee as a conscientious objector. Another difficulty in relation to the *jus ad bellum* and *jus in bello* basis may be that the relationship between the two is sometimes very obscure. This may be even more so in the case of foot soldiers.

After all, despite the clear existence of the individual's duty to observe international humanitarian law, including both *jus ad bellum* and *jus in bello*, in reality it may be very unlikely for a conscientious objector to claim his or her status successfully on the sole basis of duties under international humanitarian law before domestic courts. In addition, the international community does not have the capacity and resources to adjudicate claims of the apparent illegality of the use of force and the means of warfare.

The coexistence and historical development of both the duty of disobeying manifestly illegal orders under international law and the right of conscientious objection to military service may sound illogical; however, the two should not necessarily be seen as mutually exclusive. The system of conscientious objection may sometimes be the only resort for soldiers who are facing manifestly illegal orders under international law. The United Nations Human Rights Commission encouraged "States, as part of post-conflict peace-building, to consider granting, and effectively implementing, amnesties and restitution of rights, in law and practice, for those who have refused to undertake military service on grounds of conscientious objection" in its resolution 2004/35 in April 2004.[55] Respect for the individual's right to conscientious objection to military service by both states and the international community may provide the cornerstone of peace and stability in situations which outrage the conscience of mankind, such as any that involve a serious violation of international humanitarian law.

[55] Human Rights Commission, 2004/35, 19 April 2004, para. 4. Adopted without a vote. See chap. XI – E/2004/23 – E/CN.4/2004/127.

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18.6. State Practices Concerning Individuals' and States' Duties Not to Participate in Manifestly Illegal Armed Conflict under International Law

Domestic cases dealing with an individual's or state's duty not to participate in manifestly illegal armed conflict under international law have emerged. The case of *Germany v. N.* dealt with the question of whether a soldier may refuse to participate in a military software project supporting Operation Iraq Freedom, the so-called Iraq War, which he believed to be illegal under international law.[56] The soldier had engaged in an information technology project that aimed to improve co-operation between Germany and other North Atlantic Treaty Organization ('NATO') countries in their operations. When Operation Iraqi Freedom began in March 2003, he told his captain and the medical officer of his unit about his legal and moral concerns regarding Germany's role in the conflict. Thereafter, he found himself unable to comply with military duties, and he was released from his post. Disciplinary proceedings were subsequently initiated against him on charges of disobedience. Although the military court (*Truppendienstgericht*) found him guilty, the Federal Administrative Court (*Bundesverwaltungsgericht*) discharged him based on its finding that the military duty of obedience and loyal service does not demand blind or unconditional devotion to superiors.[57] The Court found that "an order is not binding if it functions as part of a war of aggression that would disturb the peaceful coexistence of nations, or if it contravenes fundamental rules of international law such as the UN ban on the use of force", although the Court did not decide whether this was such a case.[58] Upon examining the soldier's expression of conscience, the Court considered both the soldier's personal convictions and the legal uncertainties surrounding the military intervention in Iraq under the UN Charter without valid Security Council resolutions authorising the use of force by NATO.[59] In the Court's opinion, "when the major decided not to obey the

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[56] German Federal Administrative Court (*Bundesverwaltungsgericht*), *Germany v. N.*, Decision No. 2 WD 12.04, 21 June 2005. Ilja Baudisch, "German Federal Administrative Court Decision on a Soldier's Right to Refuse to Obey Military Orders for Conscientious Reasons: Germany v. N. Decision No. 2 WD 12.04", in *American Journal of International Law*, 2006, vol. 100, no. 4, p. 911.

[57] Ibid.

[58] *Ibid.*, p. 912.

[59] Ibid.

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order, he faced the danger of being entangled in an illegal conflict and therefore could lawfully demand another employment without violating his duties as a soldier".[60]

In the United Kingdom House of Lords' case of *R v. the Prime Minister and others*, the appellants alleged that the government had failed to exercise due diligence to satisfy itself of the legality under international law of the military action when the government decided to take part in the military operations in Iraq and then begin the British occupation of Iraq in light of Article 2 of the ECHR (as set out in Schedule 1 of the Human Rights Act 1998). It was also alleged that Article 2 of the ECHR obliged the government to establish an independent public inquiry into the legality of the invasion of Iraq in 2003 under international law.[61] The members of the House of Lords unanimously dismissed the appeal.[62] The leading judgment by Lord Bingham stated that "article 2 has never been held to apply to the process of deciding on the lawfulness of a resort to arms, despite the number of occasions on which member states have made that decision over the past half century and despite the fact that such a decision almost inevitably exposes military personnel to the risk of fatalities".[63] Bingham raised three main reasons for his decision: 1) the lawfulness of military action has no immediate bearing on the risk of fatalities;[64] 2) the draftsmen of the ECHR could not have envisaged that it could have provided a suitable framework or machinery for resolving questions about the resort to war;[65] and (3) subject to limited exceptions and specific extensions, the application of the ECHR is territorial, and the rights and freedoms are ordinarily to be secured to those within the borders of the state and not outside.[66]

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60 *Ibid*., p. 914.

61 United Kingdom House of Lords, *R (Gentle) v. The Prime Minister and others*, Judgment, 9 April 2008, [2008] UKHL 20, [2008] 1 AC 1356 (HL).

62 *Ibid*.

63 United Kingdom House of Lords, Judgments – R (on the application of Gentle (FC) and another (FC)) (Appellants) v. the Prime Minister and others (Respondents), Session 2007–2008 [2008] 1 AC 1356, pp. 1366–67, para. 8.

64 *Ibid*., p. 1367, para. 8.

65 *Ibid*., p. 1369, para. 13.

66 Ibid., pp. 1383–84, para. 66. R (Gentle) v. The Prime Minister and others, 2008, see supra note 61.

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Although Baroness Hale found that neither the state nor the European Court of Human Rights can rule upon the legality of the use of force against Iraq because it is beyond their competence,[67] she wished that "we could spell out of art 2 a duty in a state not to send its soldiers to fight in an unlawful war. States should protect their soldiers from the consequences of having in practice to obey orders whether or not they are lawful".[68] Whereas Hale thought that "it might reasonably be expected that they would decline to commit their troops to an unlawful war",[69] she thought the European Court of Human Rights would not construct out of Article 2 a duty not to send soldiers to fight in an unlawful war.[70] In her view, the lawfulness of war is an issue between states – not between individuals or between individuals and the state – and the ICC Statute has not changed this relationship, since the ICC's jurisdiction over the crime of aggression did not exist at the time of delivery of judgment even before the Review Conference of the Statute of the International Criminal Court.[71]

Nonetheless, Hale at least recognises that when a state expects its soldiers to obey their superiors' orders irrespective of their own views on the lawfulness of those orders, then, under the ICC Statute, there will be a correlative duty of the state to its soldiers to ensure that those orders are lawful.[72] Her judgment suggests that this would be a state duty under the ICC Statute and probably not an individual human right to disobey orders from a state to take part in an illegal war nor a state duty under the right to life of the ECHR.

Even though the duty of a state to ensure the individual human right to life by not engaging in the illegal use of force under international law has not yet been found in state practices, it would be an overstatement that states have no responsibility at all. In *Al-Skeini v. UK*, the European Court of Human Rights found that the state has a duty to investigate effectively any death arising out of the use of force by that state, even in overseas situations in which the state officials exercise "control and authority" over

[67] *Ibid*., p. 1381, para. 58.

[68] *Ibid*., p. 1381, para. 55.

[69] *Ibid*., p. 1381, para. 56.

[70] *Ibid*., p. 1381, para. 57.

[71] *Ibid*.

[72] *Ibid*., para. 50.

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foreign nationals.[73] The emerging awareness of the state's obligation to protect the right to life in an extraterritorial jurisdiction in which the state in question exercises authority may be recognised through such an international practice.

It may be true that "[t]he standard of responsibility of the state is not to protect the lives of its soldiers under all circumstances. War is, after all, a dangerous business".[74] This is all the more reason for states to refrain from becoming involved with the illegal use of force at the level of *jus ad bellum*. For consideration of *jus in bello*, states owe a great responsibility to the chain-and-command structure which enables them to make sure that military orders are in conformity with international humanitarian and human rights laws. Eventually, soldiers' concerns would be cleared. At the same time, under such circumstances, the right to life of civilians would be duly respected.

18.7. Conclusion

Since the Iraq War of 2003 selective conscientious objection has attracted increasing attention. Since modern soldiers are more educated than their predecessors, they have begun to raise a voice of conscience when they have doubts about a cause and/or means of a war.[75] Recent studies have shown that "national authorities deal very differently and often inconsistently with" selective conscientious objection.[76] The United Kingdom, Israel and Germany do not recognise selective conscientious objection in law. However, the United Kingdom and Germany "acknowledge that conscripted or professional service members may object to participation in specific operations on grounds of conscience" subject to case-by-case considerations.[77]

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73 European Court of Human Rights, *Al-Skeini and others v. the United Kingdom*, Grand Chamber, Judgment, Strasbourg, Application No. 55721/07, 7 July 2011.

74 Rowe, 2014, p. 539, see *supra* note 3.

75 Andrea Ellner, Paul Robinson and David Whetham, "Introduction: 'Sometime they'll give a war and nobody will come'", in Andrea Ellner, Paul Robinson and David Whetham (eds.), *When Soldiers Say No: Selective Conscientious Objection in the Modern Military*, Ashgate, Farnham, 2014, p. 5.

76 Andrea Ellner, Paul Robinson and David Whetham, "The Practice and Philosophy of Selective Conscientious Objection", in Ellner *et al*., 2014, p. 239, see *supra* note 75.

77 *Ibid*.

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Even though the right to selective conscientious objection to military service has not yet been widely recognised, international practices at least show that the Human Rights Committee of the ICCPR and the European Court of Human Rights are more attentive to conscientious objectors to military service, demanding that an alternative service be provided for conscientious objectors in lieu of military service. The trajectory of the restriction of the defence of superior orders under international criminal law and the duties of individuals to disobey manifestly illegal orders as its corollary or prerequisite benefit from an emerging history of selective conscientious objection and vice versa.

International legal practices absolutely deny the availability of the defence of superior orders and the existence of obedience to superior orders as mitigating circumstances, or they at least tend to presuppose the manifest illegality of superior orders to commit a serious violation of international law. Under such circumstances, each soldier should be regarded as a moral agent rather than "the obedience of an automaton".[78] In this respect, the developments of international criminal law, especially the principle of the conditional liability doctrine, the principle of the manifest illegality of the defence of superior orders, seemingly enhance norm consciousness among individuals and states.

This chapter attempts to infuse new life into the no longer contentious problem of the defence of superior orders by forming a bridge between individuals' obligations under international criminal law to disobey manifestly illegal orders and the international human right to disobey orders that contravene international law. This attempt would invite a fresh perspective on the history of the defence of superior orders and eventually contribute to the HOICL project. International society is becoming increasingly individual-centric; thus, a vertical relationship is emerging between international society and individuals.[79] The exercise of state sover-

[78] See Mark W.S. Hobel, "'So Vast an Area of Legal Irresponsibility'? The Superior Orders Defense and Good Faith Reliance on Advice of Counsel?", in *Columbia Law Review*, 2011, vol. 111, p. 583, fn. 45. "Any limited acceptance of a superior orders defence must hold the individual accountable for examining the contents of an order given, even if such an examination is quick and completed in accordance with the contingencies of the moment", *ibid*., p. 592.

[79] Kai Ambos, "Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law", in *Oxford Journal of Legal Studies*, 2013, vol. 33, no. 2, pp. 293–315.

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eignty is constantly and severely checked through the lenses of international criminal law and international human rights law by treaty bodies or international society in general. Individuals are becoming increasingly visible, even in the field of international law, though they have traditionally been covered by the veil of state sovereignty. The defence of superior orders teaches human beings a fundamental lesson about fostering the ability to think about even the complex issues of international law, such as the legality of the use of force, on their own.

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Historical Origins of International Criminal Law: Volume 3

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

This volume carries on the "comprehensive and critical mapping of international criminal law's origins" started by the previous two volumes. Twenty-seven authors investigate the evolution of legal doctrines and pertinent historical events, many in an attempt to inform contemporary theory and practice. Contributors include Narinder Singh, Eivind S. Homme, Manoj Kumar Sinha, Emiliano J. Buis, Shavana Musa, Jens Iverson, Gregory S. Gordon, Benjamin E. Brockman-Hawe, William Schabas, Patryk I. Labuda, GUO Yang, Philipp Ambach, Helen Brady, Ryan Liss, Sheila Paylan, Agnieszka Klonowiecka-Milart, Meagan Wong, Marina Aksenova, Zahra Kesmati, Chantal Meloni, Hitomi Takemura, Hae Kyung Kim, ZHANG Binxin, Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping.

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