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SUPERIOR ORDERS AS A DEFENSE TO VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

By Alan M. Wilner*

I.

INTRODUCTION

Some twenty years ago, there began in Nuremberg, Germany, a series of trials which some writers have hailed as a milestone in the development of international law. These trials — the major war criminals were tried by the International Military Tribunal and the subordinate officials under Allied Control Council Law No. 10 — were the subject of considerable controversy in Germany and in the West. The controversy has not substantially lessened in the last two decades.

Much of the debate concerned the question whether a military tribunal composed of representatives of victorious powers had jurisdiction to try individuals previously employed in the service of a defeated power. The old maxim of *nullum crimen sine lege, nulla poena sine lege* was much discussed as a bar to the prosecutions, the theory being that the acts in question were not crimes when committed. These may be termed general or organic defenses, independent of the particular charge or indictment, and it is not the purpose of this article to discuss these questions. Neither is it the purpose to debate whether the trials can be justified on some theory of natural law which would supersede the positive municipal law under which some of the alleged criminal acts were committed.

Rather, it is the function of this article to examine what was probably the most popular personal (as opposed to organic) defense offered by the various defendants, i.e., that the acts charged to them were committed under orders from military or civilian superiors to whom a duty of obedience was owed. This defense is a timeless one which can arise in almost any type of situation, both in peace and in war, and it bears some study. This article will consider, in an historical context, how the defense of superior orders has been treated by the various nations of the world and what its future is likely to be.

II.

NATURE OF THE DEFENSE OF SUPERIOR ORDERS

"Superior orders" as a defense evolves from the duty of obedience which soldiers of all nations owe to their superior officers. The essential question is not the existence of such a duty, which cannot be denied, but rather its quality, i.e., how absolute is the duty. The scope of the duty (and therefore its availability as a defense) requires consideration of two factors:

1. To what actions, if any, can it intrinsically be inapplicable?
2. What consequences would flow in any given situation if the duty is violated?

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The first factor involves the question of whether certain actions, such as deliberate murder or pillage, or other actions clearly in violation of known criminal law (either municipal or international) can ever be subjected to the duty of obedience, and if so, under what circumstances. Or, to paraphrase the International Military Tribunal at Nuremberg, do individuals have international duties which transcend the national obligations of obedience imposed by the State? This is not an easy question to answer, because in addition to the moral conflict involved in the question itself, there must also be considered the problem of mens rea — did the subordinate know that the act in question was illegal? A specific problem here is whether the act, ordinarily illegal, could be legal as a reprisal.

The second factor is equally important. How far must one sacrifice himself in violating his national duty of obedience? Is the defense of superior orders affected by the greater or lesser degree of duress? The interaction of these two factors and the multitude of situations which can be developed therefrom is the subject of this article.

III.

TREATMENT OF SUPERIOR ORDERS BY THE VARIOUS NATIONS

Since the development of international law as we know it is comparatively recent, it is quite understandable that "superior orders" received its first judicial consideration in a national context. The earliest modern cases occurred in the United States in which the defense was generally rejected.

In 1804, the Supreme Court in Little v. Barreme held that the captain of a U.S. frigate who wrongfully captured a neutral ship pursuant to an unauthorized order from the President was liable for civil damages. After determining that the capture was, in fact, unlawful, Chief Justice Marshall, reversing his earlier thoughts on the matter, concluded, "that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." 2

In 1813, a federal circuit court again considered and rejected this defense. 3 There, the crew of an American privateer was charged with piracy for stopping a neutral vessel, assaulting her captain and crew and stealing certain merchandise. To the claim that the crew acted pursuant to orders of the captain, the court stated:

This doctrine, equally alarming and unfounded . . . is repugnant to reason, and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify the act . . . We do not mean to go further than to say, that the participation of the inferior officer, in an act which he knows, or ought to know to be illegal, will not be excused by the order of his superior. 4

1. 6 U.S. (2 Cranch.) 170 (1804).
2. Id. at 178.
4. Id. at 657.
Almost four decades later, the Supreme Court again had the question before it in the case of *Mitchell v. Harmony*. There, the plaintiff left Missouri with considerable livestock and merchandise, intending to trade in Mexico at a time when such trade was legal. While en route, war with Mexico was declared; the Army was sent to overtake him, which it did. After trailing along behind the Army for some time, the plaintiff wished to go his own way, but the defendant, a colonel acting under orders, refused to let him leave, as a result of which his goods were eventually lost. In holding the defendant liable for damages, the court stated:

Consequently, the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person to whom it was executed. . . . And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify.

The plain implication of *Mitchell v. Harmony* appears to have been overlooked in *McCall v. McDowell*. There, in response to a general order from his commanding officer, the defendant arrested the plaintiff and had him escorted under guard to a military post, where he was imprisoned. The order was part of an attempt to quell an outbreak of riots in California following President Lincoln's assassination. In awarding judgment for the defendant in plaintiff's suit for false imprisonment, the court stated:

Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander.

Without citing *Mitchell v. Harmony* or the other cases noted above, the court accepted superior orders as a defense except where the order is "so palpably atrocious as well as illegal, that one must instinctively feel that it ought not to be obeyed, by whomever given." 10

The conclusion of *Mitchell v. Harmony* was reasserted, however, in *Dow v. Johnson*. There, though voiding a judgment obtained against a military commander for want of jurisdiction in the lower court, the Supreme Court stated, "We do not controvert the doctrine of *Mitchell v. Harmony*, . . . ; on the contrary, we approve it." 11

Criminal liability for outrageous acts in direct violation of the laws of war was declared in the trial of Henry Wirz, the commandant

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5. 54 U.S. (13 How.) 115 (1851).
6. Id. at 136.
8. Id. at 1240.
9. Id. at 1241.
10. 100 U.S. 158 (1880).
11. Id. at 169.
of the infamous Confederate prison at Andersonville. The fact of superior orders was relied upon by Wirz, but does not appear to have been set forth as a formal plea. The Court Martial mentioned it only inferentially in announcing Wirz's guilt.

In later cases, the courts tended to be somewhat more lenient in their rejection of the defense, but only on the basis that the acts in question were not clearly known to be illegal, rather than as a change in attitude towards the intrinsic nature of the defense. In Freeland v. Williams, for example, the Supreme Court struck down a judgment entered against a former member of the Confederate Army for taking cattle from the plaintiff under orders from his superior officer.

Later, a federal circuit court acquitted a corporal of manslaughter when, on orders from his sergeant, he killed a fugitive who had escaped from detention. The basis of the court's decision was:

The illegality of the order, if illegal it was, was not so much so as to be apparent and palpable to the commonest understanding. If, then, the petitioners acted under such order in good faith, without any criminal intent, but with an honest purpose to perform a supposed duty, they are not liable to prosecution under the criminal laws of the state.

Aside from the effect of administration and statutory regulations, discussed infra, there does not appear to have been any substantial change in the attitude of American courts as expressed in the above cases. It can be stated with some degree of authority that, even in time of war, "superior orders" was not a defense to a clearly illegal act in American law.

The law in Great Britain was quite similar. In the early case of Ensign Maxwell, who, under orders, killed a French prisoner during the Napoleonic Wars by firing into a cell, the Scottish court rejected the plea of superior orders, declaring:

If an officer were to command a soldier to go out to the street and to kill you or me, he would not be bound to obey. It must be a legal order given with reference to the circumstances in which he is placed; and thus every officer has a discretion to disobey orders against the known laws of the land.

In 1900, the doctrine of rejection was restated in a modified form in Regina v. Smith. There, a soldier fighting in the Boer War, on

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12. For a discussion of the trial, see Hesseltine, Civil War Prisons 237-45 (1930).
13. 131 U.S. 405 (1889).
15. Id. at 155 (emphasis added).
17. II Buchanan, Reports of Remarkable Trials 3, 58 (1813).
18. 17 Cape Reports 561 (S. Africa 1900).
orders from his superior officer, killed a native for failing to perform some menial task. Though acquitting him, the court stated:

I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer.19

This decision would seem to be in accord with the American position as expressed in the Fair case. Paradoxically, however, what the United States and Great Britain refused to accept into their municipal law, they countenanced in their international law.

In 1863, after observing the horror of the first years of the American Civil War, Dr. Francis Lieber drafted a code of conduct for the United States Army, which later became the basis for the codified laws of war and the various international conventions relating thereto.20 Although it set out rules of warfare dealing with prisoners, the wounded, civilians, etc., it was silent on the question of whether superior orders could justify a violation of any of the rules. If the subject occurred to him at all, Lieber no doubt assumed that the rules previously announced by the courts would apply.

In 1913, the British introduced the concept of superior orders as a defense in their military manual21 in apparent opposition to the attitude previously taken by their courts. As expressed later in the 1929 edition, the manual provided:

It is important, however, to note that members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress which are dealt with in this chapter [i.e., reprisals].22

The basis for this change appears to have been the influence of Professor Oppenheim, one of the recognized authorities in international law and a co-author of the manual. In the second edition of his treatise on International Law, published in 1912, he stated:

Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations by order of their Government, they are not war criminals and may

19. Ibid.
not be punished by the enemy. . . . In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.23

Following the British lead, the United States amended its Manual in 1914, so that for the first time it read:

Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.24

The force of these administrative regulations was somewhat uncertain, being in apparent conflict with the municipal law of the respective countries. Lauterpacht pointed out that, at least as to the British part, it had no statutory force, "is not believed to represent a sound principle of the law of war, and is in no sense binding upon Great Britain in the international sphere."25 If this be the case, then the regulation was of no force or value at all, since (a) as to a British soldier tried in Great Britain, the rules adopted by the British courts would presumably apply; (b) as to an enemy soldier tried in Great Britain, it would have no force; (c) as to a British soldier tried in an enemy country, it would not be binding; and (d) as to an enemy soldier tried in his own country, it would not be applicable.

Curiously, in Imperial Germany and Austria, where the duty of obedience was thought to be absolute, a different rule was in effect. The Prussian Military Code of 1845 stated that a subordinate would be punished if he executed an order knowing that it "related to an act which obviously aimed at a crime."26 Such liability was extended to Saxony in 1867, to Bavaria in 1869, and to Baden in 1870. Finally, the Reichstag in 1872 adopted Article 47 of the German Military Code, which established liability on the part of the subordinate for committing an act under orders "(2) if he knew that the order of the superior concerned an act which aimed at a civil or military crime or offense."27

The Military Penal Code of Austria-Hungary, Article 158, formulated in 1855, excused a subordinate from his duty of obedience if "the order pertains to an act or omission in which evidently a crime or an offense is to be recognized."28

II Oppenheim, International Law 310 (2d ed. 1912).
27. Ibid.
28. Id. at 471–72.
The French position was somewhat unclear. Article 64 of the French Criminal Code provided that an act committed by a person constrained by force was not a crime. Whether or not superior orders constituted such a constraint was the subject of divided opinion. Garner was inclined to believe that the French rejected the defense, stating:

This is the view adopted by the great majority of French jurists who have discussed the question. They maintain that every person who had any share in the commission of a criminal act during war, the private soldier who commits it, the officer who delivers the order to him, the commander from whom it emanates, and even the chief of state who is ultimately responsible, may be tried and punished if found guilty.

During the First World War, the Allies began to think in terms of punishing members of the German forces who had violated the recognized rules of warfare — from conscripted privates to the Kaiser. This required a second look at the problem of superior orders. Professor Bellot signified the change in thinking by urging the abolition of superior orders as a defense. His view was that the authors and perpetrators of war crimes should be tried for the deterrent effect.

The French courts — whatever interpretation may be given to their municipal law — apparently rejected the defense when dealing with captured Germans. As stated by Garner, “In every case where the plea of superior command was invoked, the courts made short shrift of it, and if the evidence established the guilt of the accused, he was condemned even when he produced conclusive proof that he acted under orders.”

When the Preliminary Peace Conference met in Paris, it created a commission to study the problem of responsibility for the war. On March 29, 1919, the commission presented its report to the Conference. It recommended that those persons (Germans) accused of perpetrating war crimes be brought to trial before the International Court. As to superior orders, the commission stated in Chapter III of its report:

We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offense. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility.

Acting upon the commission’s recommendation, the Allies inserted Article 228 into the Versailles Treaty, by which Germany recognized
"the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." Although the treaty was silent on the question of superior orders as a defense, it would appear, in view of the commission's recommendation and the attitude of the Allied powers, that it was not intended to be considered as an absolute defense, but rather one which could be recognized in individual cases.

Garner summarized the effect of Article 228 in the following terms:

This appears to be the first treaty of peace in which an attempt has been made by the victorious belligerent to enforce against the defeated adversary the application of the principle of individual responsibility for criminal acts during war by members of his armed forces against the persons or property of the other party.

The treaty required that the German Government deliver up to the Allies all persons accused of committing war crimes for trial in accordance with Article 228. When the demand was made, however, Germany became reluctant to perform her duty; after some negotiation, a "compromise" was reached whereby the accused persons were tried by the German Supreme Court, sitting in Leipzig.

The Leipzig trials, as a whole, were declared to be a farce. Of the 896 persons initially accused by the Allied powers, twelve were actually tried, and six of these were acquitted. The longest sentence given was four years' imprisonment, and the defendant receiving it "escaped" after a few months and fled in safety to Sweden. As a result of these events, the Allied representatives withdrew, and further charges were not pressed.

Two of the cases decided at Leipzig are of interest, however, as they established, at least academically, that there are certain areas in which the doctrine of superior orders is inapplicable. In The Llandovery Castle, the defendants were lieutenants aboard a U-boat which torpedoed a Canadian hospital ship, allegedly in contravention of the Hague Convention. After the ship sank, the U-boat fired on the survivors' lifeboats, apparently sinking two of them. The firing was on orders from the captain, the defendants' participation being in observing the lifeboats and maintaining lookout so as to permit the firing to continue without danger to the U-boat. Relying on Paragraph 47(2) of the German Military Penal Code, the court stated:

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

38. Id. at 437.
Upon this principle the defendants were convicted. However, in a companion case, *The Dover Castle*, a different result was reached. There, a U-boat torpedoed a British hospital ship which was escorted by two destroyers. There was no firing on survivors as in *Llandovery Castle*; in fact, the U-boat stayed in the area until all survivors were rescued, and did not actually sink the ship until rescue operations had been concluded. The captain claimed that he acted on orders from the German Admiralty in firing on the hospital ship. The orders were based on the supposition that the British were using hospital ships for military purposes; and warnings of the orders had previously been communicated to Great Britain. They were thus in the nature of reprisals. On these facts, the defendant captain was acquitted, the court holding that the orders were not, in the defendant's mind, so patently illegal as to fall within the purview of Paragraph 47(2).

As a result of the disappointment at Leipzig where, in addition to the cases noted above, all of the top admirals were exonerated on the basis of superior orders, the doctrine was the subject of much discussion among students of international law during the postwar years. Lord Cave, in an address to the Grotius Society in 1922, urged a return to the standard of *Regina v. Smith*, which, he held, "limits the impunity of the soldier to cases where the orders are not so manifestly illegal that he must or ought to have known that they were unlawful." Finch, quoting Stephens, urged that a soldier should be protected "by orders for which he might reasonably believe his officer to have good grounds." The theory that superior orders should be an absolute defense, said Finch, "would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the orders of his immediate superior." Finally, he concluded:

The unqualified acceptance of the principle that a subordinate is not responsible for what he does under orders of his superiors will make it practically impossible to enforce proper penalties for violations of the laws of war designed to humanize, if such be possible, that grim recourse.

This view was not universally held, however. The field manuals remained unchanged, and the numerous treaties of the 1920's were silent on the subject. The one exception to this was the Washington Treaty of 1922, dealing, *inter alia*, with submarine warfare. After setting out certain rules relating to such warfare, Article III provided:

Any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a

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40. 17 Cape Reports 561 (S. Africa 1900).
41. VIII TRANSACT. GROT. SOC'Y xxiii (1923).
43. Ibid.
44. Finch, supra note 42, at 445.
governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy. . . .\textsuperscript{46}

This treaty was ratified by the United States, Great Britain, Italy and Japan. It was rejected by France. Thus, wrote Manner:

It appears to be equally admitted that the defenses of act of state and superior orders . . . condition any prosecution for war crimes. The very fact that one writer suggests a reappraisal of these orthodox principles is only further proof of their general acceptance in positive law.\textsuperscript{47}

Similarly, Cohn, in a paper presented to the Grotius Society, stated that "in international law the defence of superior orders would appear to hold good. Any other attitude would be highly impracticable."\textsuperscript{48}

With the commencement and progression of World War II, however, the existence of war crimes was presented on a scale theretofore considered unbelievable; once again, plans were made for punishing those who committed them.\textsuperscript{49} It was immediately recognized that, if the results of Leipzig were not to be repeated, some changes in the doctrine of superior orders would have to be considered. As noted by Lauterpacht in 1944:

It is clear that, unless the scope of prosecutions for war crimes is to be drastically and unduly curtailed, any British enactment relating to the prosecution of war crimes by British courts, military and other, will have to free them, by means of an express provision from the shackles of the rule as at present formulated.\textsuperscript{50}

One of the first steps in changing the doctrine was the amendment of the American and British field manuals which, as noted, had accepted superior orders as a defense since 1914. Thus, in April, 1944, Amendment No. 34, which read as follows, was added to the British manual:

The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders


\textsuperscript{49} The many declarations, statements, resolutions and conferences relating to these plans, too numerous to enumerate, are printed in the Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, Dept. of State Publication 3080 (1947) (hereinafter cited as Report).

\textsuperscript{50} Lauterpacht, supra note 25, at 58, 69 et seq.
adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity.\(^{51}\)

Following suit, the United States, on November 15, 1944, amended its field manual by adding Section 345(1):

Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.\(^{52}\)

Though willing to amend its position somewhat, the United States was unwilling to make such a complete reversal as the British — at least with regard to the field manual. The reason for this recalcitrance is somewhat curious, particularly in view of the strongly worded statements of Congress and the President concerning the punishment of war criminals,\(^{53}\) and the established attitude of the American courts toward this defense.

In an attempt to be consistent with her allies, and to clear up any ambiguities in her own municipal law, France enacted an ordinance on August 28, 1944, to the effect that superior orders cannot be pleaded as justification but can be admitted as “extenuating or exculpating circumstances.”\(^{54}\) The Canadians, too, amended their practice by promulgating new regulations holding that superior orders are not an absolute defense, but may be considered as a defense or in mitigation if justice so requires.\(^{55}\) Extensive research has not, to the author's knowledge, been done on the position of the U.S.S.R. relating to superior orders. Greenspan has described the Soviet law as follows:

Under Soviet Russian military law, a soldier carrying out the unlawful order of an officer incurs no responsibility for the crime, which is that of the officer, except where the soldier fulfills an order which is clearly criminal, in which case the soldier is responsible together with the officer who issued the order.\(^{56}\)

51. I War Crimes Trials, Appendix II, at 150 (1948).
53. REPORT, op. cit. supra note 49.
55. Art. 15, CANADIAN WAR CRIMES REGULATIONS OF 1945.
IV.

NUREMBERG AND AFTER

Near the end of the war, more detailed plans were made for the post-bellum trial of war criminals. In contrast to its position on its own field manual, the United States presented a draft agreement for war crimes trials to a Conference of Foreign Ministers in San Francisco in April, 1945, which contained a provision relating to superior orders almost identical with the Canadian regulation cited above. The final agreement was concluded in London on August 8, 1945, by which the International Military Tribunal was created to try the "top" leaders of the German State, Government and Armed Forces. Annexed to the London agreement was the Charter of the Tribunal, which provided, in Article 8, "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."\(^{57}\)

In his opening address before the Tribunal, Mr. Justice Jackson, Chief Prosecutor for the United States, defined Article 8 in the following terms:

Of course, we do not agree that the circumstances under which one commits an act should be disregarded in judging its legal effect. A conscripted private on a firing squad cannot expect to hold an inquest on the validity of the execution. The Charter implies common sense limits to liability just as it places common sense limits upon immunity.\(^{58}\)

The defense raised the question of superior orders, and argued:

The functionaries had neither the right nor the duty to examine the orders of the monocrat to determine their legality . . . that an order by the Fuhrer was binding — and indeed legally binding — on the person to whom it was given, even if the directive was contrary to international law or to other traditional values.\(^{59}\)

To this defense the Tribunal replied:

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 war has never been recognized as a defense to such acts of brutality, though, so the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations is not the existence of the order, but whether moral choice was in fact possible.\(^{60}\)

The Tribunal, of course, was limited by its Charter, which rejected superior orders as defense. Thus, the only consideration was the degree

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59. Id. at Vol. XXIII, p. 489.
60. Id. at Vol. XXII, p. 466 (emphasis added).
of duress exerted. The factor of *mens rea* — how illegal was the act, and to what extent was the illegality known to the defendant — did not seem to be in point on the question of guilt.

While the trial of the major war criminals was in progress, preparations were made for the trial of the subordinate officials. These preparations culminated in Allied Control Council Law No. 10 (December 20, 1945), which authorized the four Occupation Zone commanders to establish tribunals for these subsequent trials. Article II, Section 4(b) of Law No. 10 repeated almost verbatim Article 8 of the IMT Charter, quoted above, rejecting superior orders as a defense but permitting its consideration in mitigation.61

The American tribunals were created under Ordinance No. 7, October 18, 1946, by order of the Military Government. These tribunals conducted twelve trials involving 185 defendants, most of whom raised the question of superior orders. The treatment of the defense in these cases is significant, since the defendants here were not high officials charged with formulating policy, but were the subordinates charged with executing the previously established policy.

In the trials known as the *Einsatzgruppen* case,62 where the defendants, charged with committing the worst atrocities of the war, raised the defense of superior orders, the Tribunal stated:

The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offense. If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance to the criminality of the order.63

It would appear from the above statement that, despite the provisions of the Charter and Law No. 10, if the defendant acted on his own malice, though in accordance with a superior order, such order may not be used even in mitigation. Though such a conclusion is a rational and understandable one, particularly in view of the evidence adduced in the *Einsatzgruppen* case, it introduced that very difficult element of malice which previously had been omitted.

It will be recalled that the first impetus to consider superior orders as a defense came from Professor Oppenheim in the second edition of his book.64 It is ironic, then, that in the sixth and seventh editions, published after World War II, Oppenheim (then edited by Lauterpacht) made a complete reversal. The text now states:

The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character

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62. IV Trials, op. cit. supra note 26, at 471 (1949).
63. Id. at 470 (emphasis added).
64. II Oppenheim, op. cit. supra note 23.
as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. A different view has occasionally been adopted in military manuals and by writers, but it is difficult to regard it as expressing a sound legal principle.66

Upon this history, it might be thought that the defense of superior orders had at last been scrapped. But such is not the case — at least not unequivocally.

In November, 1947, the United Nations General Assembly requested the International Law Commission, a subsidiary body of the U.N., to formulate the principles of international law recognized in the Charter and Judgment of the Nuremberg Tribunal and to prepare a draft code of offenses against the peace and security of mankind, indicating the place to be accorded the said principles.66 In 1951, the Commission completed a draft code which it submitted to the General Assembly. Article 4 thereof provided, "The fact that a person charged with an offense defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him."67

The General Assembly postponed consideration of the draft code in order to give the member governments an opportunity to consider it.68 Even after the responses from various governments had been received, however, the matter was deleted from the agenda for two years. The Commission, meanwhile, considered the responses, and revised its draft, which it submitted to the General Assembly in 1954. Article 4 then read:

The fact that a person charged with an offense defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.69

The change, according to the Commission, was prompted by the criticism of some governments of the expression "moral choice." Thus, physical duress became the test. Unmentioned in the Commission's report, however, was the inclusion of the words "in international law" in the revised draft. Presumably, this limitation would leave the various nations free to treat disobedience to orders in their own way, and could only weaken the practical effectiveness of the code.

In reality, however, the changes are of no importance, because the code was never adopted by the General Assembly. It was instead shelved, probably permanently, on the theory that it could not be enacted until the term "aggression" was adequately defined;70 it does

65. II OPPENHEIM, op. cit. supra note 54, at 568.
not appear likely that a suitable definition of that word will be found in the near future. Thus, the one attempt to perpetuate the principles of Nuremberg has failed.

The question of superior orders arose again, with only slightly better success, in connection with the Genocide Convention. The original resolution, introduced into the General Assembly by Cuba, India and Panama, recommended that genocide and related offenses be dealt with in the same manner as piracy and other international crimes (for which superior orders was no defense). Great Britain and France offered amendments to the resolution, declaring genocide to be an international crime for which principals and accessories, individually, could be held responsible. Saudi Arabia introduced a draft protocol, which provided in Article III: "An allegation that any act of genocide is political or has been committed under order of a superior authority shall not be available as a defence." With the numerous proposals before it, the Sixth Committee referred the question to a subcommittee for consideration. In subcommittee, the Arabian proposal regarding superior orders was discarded, and attempts to reintroduce it failed. In the final Convention, adopted by the General Assembly on December 9, 1948, and declared effective as of January 12, 1951, there is no specific reference to superior orders. Article IV provides: "Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." It is noted that the United States has not ratified or acceded to the Convention, and could therefore hardly rely upon it in any prosecutions for its infringement.

The United States itself has apparently softened the position taken in 1944. In July, 1956, Rule 345(1) of the U.S. Manual (renamed The Law of Land Warfare) was revised to provide that superior orders is not a defense "unless he [the accused] did not know and could not reasonably have been expected to know that the act ordered was unlawful." This leaves open the loophole of evading punishment for acts represented by superior officers as reprisals. The 1956 amendment makes this clear when it states further:

In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal.

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72. Id. at 244–45 (A/C.6/86).
74. 78 U.N. Treaty Series 278, 280.
At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders (e.g., UCMJ, Art. 92).\textsuperscript{76}

This equivocal statement could serve as authority for the commission of almost every type of atrocity against the military forces of a belligerent nation as well as, in many cases, against civilians. The failure of the United Nations to enact a clear statement on superior orders and the equivocal statement of United States policy raise a serious question of whether the principles announced at Nuremberg can legitimately be relied upon in the future as a true expression of existing international law. The doubt is strengthened when consideration is given to the tacit or express rejection of clauses containing clear statements on the subject.

V. Conclusion

The development of superior orders as a defense seems to have been in general conformity with the trend of political and social philosophy since the 18th century. At first, the emphasis placed on the rule of law rather than of men made the idea that a superior order could justify a clearly illegal act an abhorrent one. Later, as the neo-chivalry of military minds came into its own during the decade preceding the First World War, the concept of obedience overshadowed the possibility of a few isolated abuses of command. The author can only picture this philosophy as emanating from the naive thought that atrocity as a large-scale operation was something no civilized state would condone, and no military officer would permit.

The abuses of World War I aroused some persons to re-examine their thinking, but it took the wholesale slaughter of innocent persons during World War II to shock the world's population completely out of its complacency. With a repetition of such killing being made more, rather than less, likely by the advance in technology, it would be a tragic thing indeed if the world were now to revert to the unrealistic policy of the first decade of the 20th century. Having once recognized that the duty of obedience to superiors has some reasonable and prescribed limitations, that standard, in the name of all humanity, cannot logically or morally be abandoned.

The real danger, however, is not that superior orders would be successful as a defense to the commission of future war crimes, although the possibility of it exists. Rather, it is the failure to create a solid and unimpeachable basis for rejecting the defense as a matter of law — and not for reasons of political or emotional expedience — which is so unfortunate. By enunciating the rule now in unmistakable terms, the nations of the world can be rid of almost all of the so-called "organic" defenses raised at Nuremberg and not have any half-doubts about whether subsequent trials are in the nature of political executions.

\textsuperscript{76} Ibid.