
NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
RWANDA GENOCIDE PROSECUTION

MEMORANDUM FOR
OFFICE OF THE PROSECUTOR

**ISSUE # 10:
DEFENCE OF SUPERIOR ORDERS-
A LEGAL REVIEW OF ARTICLE 6(4)
OF THE ICTR STATUTE**

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2. Statute of the International Criminal Tribunal for the Former Yugoslavia, S/RES/827, 25 May 1993.
3. MANUAL FOR COURTS-MARTIAL, Rule 916(d), *Prescribed by Exec. Ord. No. 12473 as amended by E.O. Nos. 12484, 12550, 12586, 12708, 12767, 12888, 12936 and 12960* (1995).

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4. *Statement of Ambassador Albright, Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, U.N. Doc. S/PV.3217, 25 May 1993, reproduced in Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. 2 (1995), pp. 185-189.
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18. Barry E. Carter & Phillip R. Trimble, *International Law*, (2ed. 1995).
19. John R.W.D. Jones, *The Practice Of The International Tribunals For The Former Yugoslavia And Rwanda*, (1998).
20. 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, (1998).
21. MICHAEL P. SCHARF, *BALKAN JUSTICE*, (1997).

I. Introduction and Summary of Conclusion

A. ISSUE

This research memorandum examines the following topic:

Defence of Superior Orders- A Legal Review of

Article 6 (4) of The International Criminal

Tribunal For Rwanda Statute.¹

B. SUMMARY OF CONCLUSIONS

Article 6 (4) of the Statute of the International Criminal Tribunal for Rwanda states, “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.”² As a general proposition, established through the charters of previous international tribunals, through various national military codes and regulations and through the study of general principles of law, the defense of superior orders is not a viable defense which allows a defendant to escape all culpability.³ Notwithstanding these

¹ See United Nations International Criminal Tribunal for Rwanda, Office of the Prosecutor, Legal Research Topics No. 10, Facsimile dated 12 January 1999. The scope of the paper will include a legal review of the defense of superior orders as well as discussion about the possibility of the “back door” defenses of duress and negation of mens rea.

² Statute of the International Criminal Tribunal for Rwanda, S/RES/955, 8 Nov. 1994. Reproduced at Tab 1.

³ See IMT Charter, Article 8, 59 Stat. at 1589, 82 U.N.T.S. at 288. See also Charter of the International Military Tribunal for the Far East, art. 6, 19 Jan. 1946. See also Statute of ICTY, S/RES/827, 25 May 1993. See also Statute of the International Criminal

authorities, the United States has taken the position that there is defense of superior orders, which may eliminate all culpability, as long as the person did not know the orders were unlawful or a person of reasonable sense would not know the orders were unlawful.⁴ The accused may attempt to use negation of *mens rea* as a “back door” defense of superior orders based on the legislative history of Article 7(4) of the International Criminal Tribunal for the Former Yugoslavia.⁵

The best view on the doctrine of superior orders is the one asserted by Professor Dinstein and the one followed by the United States. Dinstein proposes that the issue of superior orders should not become a defense per se, rather the superior orders should be considered as a factual element to the case, which may or may not lead to mitigation of the sentence.⁶

The remainder of this memorandum discusses the application of duress as an excuse, which may be asserted as a “back door” defense of superior orders. As a general principle of law, duress has been allowed as an excuse in all situations including the killing of innocent people.⁷ Anglo-American law has traditionally allowed duress as a defense in all situations except the killing of innocent people.⁸ However, the traditional

Tribunal for Rwanda, S/RES/955, 8 Nov. 1994.

⁴ See M. Cherif Bassiouni, *The Law of International Criminal Tribunal for the Former Yugoslavia*, 388 (1996). Reproduced at Tab 17.

⁵ See *infra* note 34.

⁶ See M. Cherif Bassiouni, *The Law of International Criminal Tribunal for the Former Yugoslavia*, 388 at notes 115 and 118 (1996). See also *infra* at note 57. Reproduced at Tab 17.

⁷ See *infra* note 65.

⁸ See *infra* note 67.

view of duress has changed in recent years in the United States due to statutory reform.⁹ The majority of U.S. jurisdictions now allow duress as a defense even in the case of homicide under an excuse philosophy.¹⁰ The ICTY and ICTR follow a different view of duress by applying a justification philosophy, which has been upheld by the common Appeals Chamber serving both the Tribunals.

II. Factual Background

On April 6, 1994, a plane carrying President Juvenal Habyarimana of Rwanda was shot down, killing everyone on board.¹¹ The Hutus immediately accused the Tutsis for assassinating the President.¹² The Hutu soldiers, the Presidential Guard, and the militia began to hunt down and kill Tutsi civilians as well as Hutus opposing the extremist policies.¹³ The responsibility for the Rwandan genocide is shared in varying degrees by three categories of individuals: (1) the planners, (2) the “military” superiors and subordinates, and (3) the unwilling accomplices.¹⁴

⁹ Joshua Dressler, *Article: Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. Cal. L. Rev. 1331 July (1989). Reproduced at Tab 13.

¹⁰ See generally *Id.*

¹¹ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 53 (1998). Reproduced at Tab 20.

¹² See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 53 (1998). Reproduced at Tab 20.

¹³ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 53 (1998). Reproduced at Tab 20.

¹⁴ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for*

Over 500,000 Tutsis and moderate Hutus were killed before the Rwanda Patriotic Front gained control.¹⁵ In May of 1994, the United Nations Commission on Human Rights held a special session, to address the Rwanda crisis, during which the High Commissioner for Human Rights submitted a report which stated, “the authors of the atrocities must be made aware that they cannot escape personal responsibility for criminal acts carried out, ordered or condoned.”¹⁶ On 8 November 1994, the Security Council adopted Resolution 955 providing for the establishment of the Rwanda Tribunal and the adoption of its statute annexed thereto.¹⁷

III. Legal Discussion

A. INTERPRETATION OF SUPERIOR ORDERS: A LEGAL REVIEW FROM NUREMBERG THROUGH YUGOSLAVIA

Rwanda 55 (1998). Reproduced at Tab 20.

¹⁵ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 47 (1998). Reproduced at Tab 20.

¹⁶ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 61 (1998). See also Report of the United Nations High Commissioner for Human Rights, Mr. Jose Ayala Lasso, on his mission to Rwanda 11-12 May 1994, at para. 32, U.N. Doc. E/CN.4/S3/3 (1994). Reproduced at Tab 20.

¹⁷ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 72 (1998). See also Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., at 15, U.N. Doc. S/INF/50 (1996). Reproduced at Tabs 20 and 1.

1. The Nuremberg Tribunal And The Tokyo Tribunal

Justice Jackson, Chief Prosecutor at the Trial of the Major War Criminals, Nuremberg, asserted in his opening statement: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹⁸ Under the International Military Tribunal Charter (hereinafter IMT Charter), which governed the Nuremberg Tribunal, the defense of superior orders was addressed for the first time in positive international law.¹⁹ Article 8 of the IMT Charter provides: “The fact that the Defendant acted pursuant to orders 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 Justice so requires.”²⁰

¹⁸ See 1 TRIAL OF MAJOR WAR CRIMINALS BEFORE INTERNATIONAL MILITARY TRIBUNAL 34 (1947).

¹⁹ See M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 392 (1996). Reproduced at Tab 17.

²⁰ IMT Charter, Article 8, 59 Stat. at 1589, 82 U.N.T.S. at 288. See also M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 392 n. 149 (1996):

The IMT Charter’s formulation on this issue resulted as a compromise between the Allies. The original US position was: “The fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute an absolute defense but may be considered either in defense or in mitigation of punishment if the Tribunal before which the charges are being tried determines that justice so requires.” *American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS* 24 (United States Gov’t Prtg. Office 1949) [hereinafter JACKSON’S REPORT].

The Soviet proposal, on the other hand, stated that, “[t]he fact that the accused acted under orders of his superior or his government will not be considered as justifying the guilt circumstance. *Aide-Memoire from the Soviet Government, June 14, 1945, in JACKSON’S REPORT.*

The International Military Tribunal, Nuremberg, further stated:

That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as 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.²¹

In other words, the Nuremberg Charter may consider superior orders as a mitigating factor if Justice so requires. However, the fact that superior orders exist does not necessarily constitute a mitigating factor in sentencing.²² The responsibility of individual defendants was acknowledged by the Nuremberg Tribunal as follows: “Superior Orders, even to a soldier, cannot be considered in mitigation where crimes have been committed consciously, ruthlessly and without military excuse or justification....Participation in such crimes as these has never been required of any soldier

The US insisted that superior orders be admissible for purposes of mitigation of punishment and offered another proposal: “The fact that a defendant acted pursuant to order of a superior or to government sanction shall not constitute a defense *per se*, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” *Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945, in JACKSON’S REPORT.*

Reproduced at Tab 17.

²¹ See Barry E. Carter & Phillip R. Trimble, *International Law* 1431 (2ed. 1995). (*citing* Judgement of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, Sept. 30 and Oct. 1, 1946.) Reproduced at Tab 18.

²² 1 Virginia Morris & Michael Scharf, *The International Criminal Tribunal for Rwanda*, 264. See also *Id.* at n. 965. “The mere existence of superior orders will not automatically result in the imposition of a lesser penalty. A subordinate is subject to a lesser punishment only when a superior order in fact lessens the degree of his culpability.” *Draft Code of Crimes Against the Peace and Security of Mankind*, commentary to art. 5 (Order of a Government or a superior), at 33. Reproduced at Tab 20.

and [they] cannot now shield [themselves] behind a mythical requirement of soldierly obedience at all costs as [their] excuse for commission of these crimes.”²³

Similar to the IMT Charter was the Charter of the International Military Tribunal for the Far East (IMTFE), issued at Tokyo on 19 January 1946, by General MacArthur in his capacity as the Supreme Commander for the Allied Powers in the Far East.²⁴ Article 6 of the IMFTE Charter provides:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to the order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.²⁵

In the case of General Yamashita,²⁶ who was tried and hanged on a doctrine of command responsibility, the court held, “It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose [**348] to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the

²³ Lara Leibman, Note, *From Nuremberg to Bosnia: Consistent Application of International Law*, 42 Clev. St. L. Rev. 705 (1994) (quoting from the Nuremberg judgment). Reproduced at Tab 14.

²⁴ See M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 396 (1996). Reproduced at Tab 17.

²⁵ Charter of the International Military Tribunal for the Far East, art. 6, 19 Jan. 1946.

²⁶ *In re Yamashita*, 327 U.S. 1 (1947). Reproduced at Tab 8.

operations of war by commanders who are to some extent responsible for their subordinates.”²⁷ The court ruled that commanders would be responsible “to some extent” for the actions of their subordinates. In other words, the subordinate and the commander are jointly responsible for the act committed. The doctrine of superior orders may mitigate sentencing but will not allow for complete elimination of a subordinate’s culpability.

2. Control Council Law No. 10

Immediately following the IMT at Nuremberg and the IMTFE, each Allied Power also conducted trials of accused German war criminals. These trials are known as the “Subsequent Proceedings.” The Subsequent Proceedings were conducted under Control Council Law No. 10, promulgated on 20 December 1945 by the Control Council of the four Occupying Powers in Germany.²⁸ In Article 2(4)(b) Control Council Law No. 10 states that “[t]he fact that any person acted pursuant to the order of his Government or of a superior officer does not free him from responsibility for a crime, but may be considered in mitigation.”²⁹

In the Einsatzgruppen Case,³⁰ the Court held that it is a fallacy of widespread consumption that a soldier is required to do everything his superior officer orders him to

²⁷ In re Yamashita, 327 U.S. 1 (1947). Reproduced at Tab 8.

²⁸ See M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 397 (1996). Reproduced at Tab 17.

²⁹ Control Council Law No. 10, Art. 2(4)(b), *supra* note 3.

³⁰ See M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 398 (1996). (*citing Einsatzgruppen Case*, 4 SUBSEQUENT PROCEEDINGS, 470.) Reproduced at Tab 17.

The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a

do.³¹ The subordinate is bound to obey only the lawful orders of his superior and if he accepts a criminal order and executes it with malice of his own, he may not plead superior orders in mitigation of his defence.³² Even in the trial of Adolf Eichmann in Israel, where the superior orders defense was most explicitly rejected, the court felt obliged to inquire as to Eichmann's moral guilt. The court wanted to know whether he had acted under compulsion, as an automaton, or, as the prosecution sought to prove, whether he identified with the content of the orders and carried them out with enthusiasm.³³

piece of machinery. It is a fallacy of widespread consumption that a soldier is required to do everything his superior officer orders him to do....The subordinate is bound to obey only 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 defence. If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance of of the criminality of the order. If one claims duress in the execution of an illegal order, it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse...if a subordinate, under orders, killed a person known to be innocent, because by not obeying it he himself would risk a few days of confinement. Nor if one acts under duress, may he, without culpability, commit the illegal act once the duress ceases....

³¹ *Einsatzgruppen Case*, 4 SUBSEQUENT PROCEEDINGS, 470.

³² *Einsatzgruppen Case*, 4 SUBSEQUENT PROCEEDINGS, 470.

³³ See *Attorney General of Israel v. Eichmann*, 36 I.L.R. 5, 259 (D.C. Jm. 1961) (noting Eichmann's statements that he carried out "his duties willingly and with inner rejoicing"). See also M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 399 (1996). Reproduced at Tab 17

Quoting the District Court of Jerusalem in the *Eichmann* Trial:

"We reject absolutely the accused's version that he was nothing more than a "small cog" in the extermination machine. In fulfilling this task, the accused acted in accordance with general directives from his superiors, but there still remained to him wide powers of discretion which extended also to the planning of operations on his own initiative. He was not a puppet in the hands of others;

3. The International Criminal Tribunal For The Former Yugoslavia

Based on the precedents following the Second World War, the statutes of previous Tribunals, and general principles of law, the drafters for the statute for the International Criminal Tribunal for the Former Yugoslavia (ICTY) included Article 7(4) which states:

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.³⁴

Based on post-World War II case law, the court in the *Tadic Case*³⁵ held that intent and participation are the key elements for individual responsibility.³⁶ The Court in *Tadic* acknowledged that both *mens rea* and *actus reus* must be present in order to find a defendant individually responsible. In the *Erdemovic Case*,³⁷ the Chamber took superior orders into account in the mitigation of the accused's punishment.

his place was amongst those who pulled the strings.”

³⁴ Statute for the International Criminal Tribunal for Yugoslavia, art. 7(4), *supra* note 3. Reproduced at Tab 2.

³⁵ *Tadic Case* (IT-94-1-T), Trial Chamber II, 7 May 1997. Reproduced at Tab 11.

³⁶ *Id.* “First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.” Reproduced at Tab 11.

³⁷ *Erdemovic Case* (IT-96-22-T), Trial Chamber I, 29 November 1996. Reproduced at Tab 12.

B. THE DEFENSE OF SUPERIOR ORDERS AS VIEWED BY THE UNITED STATES

1. A Legal Review of The History of The Defense of Superior Orders In The United States

The essential reasons for recognizing the defense of obedience to superior orders are: (1) the hierarchical nature of the command military structure; (2) the need to maintain discipline in the military structure; and (3) the fact that a commanding officer is responsible for the acts of his subordinates.³⁸ If the International Criminal Tribunal for Rwanda wishes to rely on customary international law in interpreting the contours of Article 6(4) of the ICTR Statute, that law may be found in various national military codes and regulations.

It is important to investigate the advancement of the superior orders doctrine in military tribunals around the world. The United States, being a permanent member of the United Nations Security Council and having a very capable military presence internationally, would likely be viewed as influencing the customary international law relating to the superior orders doctrine. Historically, however, the United States has held a different view than the International Tribunals on the application of the superior orders doctrine.

According to the updated 1995 copy of the United States Manual For Courts-Martial, obedience to superior orders is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a

³⁸ See M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 374 (1996). Reproduced at Tab 17.

person of ordinary sense and understanding would have known the orders to be unlawful.³⁹ If an act is performed pursuant to a lawful superior order it is justified.⁴⁰ If an act is performed pursuant to an unlawful superior order it is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have know it to be unlawful.⁴¹ The United States' view differs from the precedent set by the statutes of the International Tribunals because under the United States view, there is an absolute defense of superior orders, which may eliminate all culpability, as long as the person did not know the orders were unlawful or a person of reasonable sense would not know the orders were unlawful.⁴² According to the statutes of the International

³⁹ MANUAL FOR COURTS-MARTIAL, Rule 916(d), *Prescribed by Exec. Ord. No. 12473 as amended by E.O. Nos. 12484, 12550, 12586, 12708, 12767, 12888, 12936 and 12960* (1995). Reproduced at Tab 3.

⁴⁰ *Id.* at Rule 916(d). Reproduced at Tab 3.

⁴¹ *Id.* at Rule 916(d). Reproduced at Tab 3.

⁴² See M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 388 and n. 131, (1995):

At the *Wirz Trial*, *H.R. Exec. Doc. No. 23*, 40th Cong., 2d Sess. 764 (1865), the defendant, Major Henry Wirz, was charged with committing atrocities against Union prisoners of war at the Andersonville prison. Wirz was tried before a military commission of six Union generals and two colonels. The commission heard a prodigious amount of evidence which showed that Union prisoners were given inadequate shelter, inadequate food, and contaminated water. Wirz turned away farmers offering relief. A stream which constituted the sole source of water was fouled not only by human waste, but also with corpses. As a result, some 14,000 prisoners died by the end of the Civil War. Wirz defended himself by providing evidence that he administered the camp pursuant to the orders of General John H. Winder, the officer in charge of all Confederate prison camps. The commission found him guilty of murder in violation of the laws and customs of war and sentenced him to death by hanging. The Judge Advocate stated, "A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obeys such an order and disastrous consequences result, both the superior and the subordinate must answer for it." *H.R. Exec. Doc. No. 23*, 40th Cong., 2d Sess. 764, 773 (1865). See also *Riggs v. State*, 3 Cold. 85, 91 Am.

Tribunals, there is no defense of superior orders which will completely eliminate culpability however, the defense may be raised for purposes of mitigation of the sentence. Despite the fact that Tribunal statutes have traditionally been interpreted to preclude the total elimination of culpability under the doctrine of superior orders, the United States has attempted to influence the formation of the articles governing the doctrine of superior orders to provide for complete elimination of guilt in certain circumstances.

2. The Possible Use of Ambassador Albright's "Additional Clarifications" of Article 7 of the ICTY As Binding Legislative History

On May 3, 1993, the report of the Secretary General, containing a draft statute for the Yugoslavia Tribunal, was sent to the Security Council. The report was prepared by a working group within the United Nations Office of Legal Affairs (OLA). The U.S. State Department, on balance, thought the OLA had done an excellent job, though the Department was not completely satisfied with every clause of the statute.⁴³ The Department of Defense felt that the statute's prohibition of the defense of superior orders

Dec. 272 (Tenn. 1866). The Court found no error in a lower court instruction that, "Any order given by an officer to a private, which does not expressly and clearly show on its face or in the body thereof its own illegality, the soldier would be bound to obey and such an order would be a protection to him....But an order illegal in itself and not justified by the rules and usages of war, or in its substance being clearly illegal so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that such order was illegal, would afford a private no protection for a crime committed under such order." *Id.* at 273.

Reproduced at Tab 17.

⁴³ MICHAEL P. SCHARF, BALKAN JUSTICE 58 (1997). Reproduced at Tab 21.

found in Article 7(4), should contain a limited exception to this rule as recognized in United States law for circumstances in which a subordinate lacks information necessary to adjudge the legality of an act ordered by his superior.⁴⁴

The United States considered a variety of possible ways to modify the statute. Due to the intensified fighting in Yugoslavia, the five permanent members of the Security Council agreed during informal meetings that there should be no amendments and no further discussion on the Secretary General's statute for the Tribunal.⁴⁵ In order to influence the interpretation of certain provisions in the statute, the United States along with France, the United Kingdom and Russia, made unilateral "clarifications" in its explanation of vote on Resolution 827.⁴⁶ In regards to Article 7(4) of the ICTY Statute, Ambassador Albright's "clarification" was, "It is, of course, a defence that the accused was acting pursuant to orders where he or she did not know the orders were unlawful and a person of ordinary sense and understanding would nor have known the orders to be unlawful."⁴⁷ The United States wanted a "back door" approach to avoid culpability and the real question is whether this legislative history may be used by advocates in the defense of their clients?

According to Article 32 of the Vienna Convention on the Law of Treaties, if a statute is unclear, ambiguous or produces an unreasonable result, supplementary means

⁴⁴ *Id.* at 59.

⁴⁵ *Id.* at 60.

⁴⁶ *Id.* at 60-1.

⁴⁷ See *Statement of Ambassador Albright, Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, U.N. Doc. S/PV.3217, 25 May 1993, reproduced in Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. 2 (1995), pp. 185-189. Reproduced at Tab 4.

of interpretation may be used.⁴⁸ The supplementary means may include legislative history, negotiation records and minutes. The Trial Chamber of the ICTY has relied on interpretive statements in the past to decide issues. In the *Tadic* Defence Motion on Jurisdiction, the Trial Chamber supported its decision by citing to the statements made by the U.S., U.K. and French representatives to the Security Council following the adoption of resolution 827.⁴⁹

Despite citing to interpretive statements, it is not clear whether Tribunals will feel guided by the legislative history of Resolution 827. Only four of the fifteen members of the Security Council participated in making such interpretive statements.⁵⁰ None of the four members collaborated on the interpretive statements and thus, none of the four statements were worded identically which leaves the interpretive statements open for varying interpretation.⁵¹ Further, the four members did not even make “clarifications” on the same provisions. Britain, France and Russia limited their statements to a few provisions whereas the United States was the only country to make “clarifications” on the defense of superior orders.⁵² Moreover, the statement was given after the delegates had already voted on the resolution, and the delegates had no notice of the United States’ “additional clarifications” until it was too late to vote no.⁵³

⁴⁸ The Vienna Convention on the Law of Treaties, January 27, 1980, U.N. Conference on the Law of Treaties, Article 32, (1980). Reproduced at Tab 5.

⁴⁹ Prosecutor v. Dusko Tadic A/K/A “Dule”, Decision on the Defence Motion on Jurisdiction, 10 August 1995. Reproduced at Tab 10.

⁵⁰ MICHAEL SCHARF, BALKAN JUSTICE 61 (1997). Reproduced at Tab 21.

⁵¹ *Id.* at 61.

⁵² *Id.* at 61.

⁵³ See MICHAEL SCHARF, BALKAN JUSTICE 61-2 (1997). Reproduced at Tab 21.

3. U.S. Position: Negation of *Mens Rea* And the Effect of This View If Applied In The ICTR

Through the use of its “additional clarification,” the United States was attempting to influence the ICTY Statute, Article 7(4), by interpreting that the defense of superior orders is acceptable when there is negation of *mens rea*.⁵⁴ This view, that the entire question of obedience to superior orders should be viewed as part of the mental element of the crime and not as a separate defense, was first asserted by Lauterpacht in 1944.⁵⁵ Lauterpacht stated: “it is necessary to approach the problem of superior orders on the basis of general principles of criminal law, namely as an element in ascertaining the existence of *mens rea* as a condition of accountability.”⁵⁶ The United States takes the

⁵⁴ See M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 381-2, n. 104 (1996). *See also* J.I. HARE, *AMERICAN CONSTITUTIONAL LAW* 920 (1889).

The most comprehensive doctrinal statement of the US position, and one adopted by the courts, is by Hare:

The question is...had the accused reasonable cause for believing in the necessity of the act which is impugned, and in determining this point a soldier or member of the posse comitatus may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and, if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier consequently runs little risk in obeying any order which a man of common sense so placed would regard as warranted by circumstances.

Reproduced at Tab 17.

⁵⁵ See M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 378 (1996). Reproduced at Tab 17.

⁵⁶ *Id.* at 378. *See also* Hersch Lauterpacht, *The Law of Nations and the Punishment of War Criminals*, 21 *BRIT. Y.B. INT'L L.* 58, 87 (1944).

position that obeying a superior order may exclude the inference of malice or wrongful intention which might otherwise follow from a specific act. Again, this differs from the view of previous International Tribunals because the US view of negation of mens rea allows for the complete elimination of culpability if the person did not know the act was unlawful or a reasonable person would not know the act was unlawful. Historically, the International Tribunals have not allowed for the complete elimination of a person's culpability, rather the Tribunals allowed only for the mitigation of the sentence. But, as Professor Dinstein, who is one of the most authoritative scholars on the subject, argues: "obedience to orders constitutes not a defence per se but only a factual element that may be taken into account in conjunction with the other circumstances of the given case within the compass of a defence based on lack of *mens rea*, that is, mistake of law or fact or compulsion."⁵⁷

⁵⁷ See M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 385 (1996). *See also* n. 115 and 118:

As Dinstein further explains:

"obedience to orders should be regarded as a factual detail germane to the offence, just like the time when, and the place where, the offence was committed; just like the weapon by which it was carried out; and just like the myriads of other circumstantial minutiae. None of these factual details standing alone and out of context is endowed with special traits which radiate special legal significance. When the only thing that we know about a particular offence is that it was performed pursuant to orders, the knowledge does not get us, legally speaking, any farther than if the only thing we knew were that the offence was committed, for instance, at 6 o'clock p.m. It would have been rash and impetuous on our part, if, on the basis of this knowledge alone, we had jumped to the conclusion that when the offender is brought to trial he must need be relieved of responsibility. No particularly immunizing ingredient is inherent in the mere fact that the offender obeyed an order, just as no specially exculpatory component is inherent in the fact that the offence was committed at 6 o'clock p.m. Of course, when the scope of the knowledge in respect of the circumstances of the case broadens and all the facts are assembled and evaluated, the fact that the offence was carried out in submission to orders may contribute to the discharge of the defendant from responsibility, just as the fact that the offence was committed at 6 o'clock p.m. may be material in the achievement of the same result."

None of the International Tribunals have set forth a specific definition for the application of the defense of superior orders. There has also never been a clear legal standard set forth for applying the doctrine of superior orders. A dichotomy exists between the need for a well disciplined military and the desire to deter criminal acts. Prosecutors in the United States attempt to resolve this conflict by using the standard of a reasonable person, also known as the objective standard.

The reasonable person standard, at first glance, may appear to resolve the dilemma which exists between a lawful order issued by a superior and an unlawful order issued. After all, the ICTR is indicting perpetrators of genocide, crimes against humanity and war crimes. A reasonable person would never mistake orders to kill innocent people or rape women as lawful orders. While in these situations, the reasonable person standard applies easily, there are other situations where the reasonable standard is not so easily applicable. For example, one would assume that blowing up a church or a school is clearly unreasonable and thus, an unlawful order. However, it is not a war crime to blow up a church or school that is being used as a military base by the enemy. Would it be reasonable then to assume the order to blow up a church or school is lawful? Under the United States' view of the doctrine of superior orders, the subordinate may escape culpability completely by claiming negation of mens rea. The soldier would defend himself by declaring his actions reasonable under the situation.

By attempting to distinguish reasonable orders from clearly unlawful orders, an assumption is being made that some notion of reasonableness or moral choice persists in war-time conditions.⁵⁸ In *United States v. Calley*,⁵⁹ the defense pointed out that the

Reproduced at Tab 17.

⁵⁸ See Gerry J. Simpson, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Didactic*

“reasonable person,” no matter how it is defined, had long since left the battlefield by the time Calley and his platoon entered My Lai and began the notorious massacre during the Vietnam War.⁶⁰ If the law were to require a subordinate to make an independent legal judgment each time an order is received, there is a huge risk of eliciting disobedience to orders that appear wrongful from the soldier’s restricted perspective but which in reality are justified by larger operational circumstances.⁶¹ Such an evaluation during wartime conditions would often be unfair and frequently require knowledge of considerations beyond a foot soldiers awareness.⁶²

The Tribunal has interpreted Article 6(4) of the Statute for the ICTR as precluding total elimination of culpability. While a lack of *mens rea* argument may be asserted by a defendant for all the reasons mentioned above, the Tribunal will only allow a mitigation of sentencing.

and Dissident Histories in War Crimes Trials, 60 Alb. L. Rev. 801, 818, (1997).
Reproduced at Tab 16.

⁵⁹ *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff’d*, 48 C.M.R. 19 (C.M.A. 1973). *See also* M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 400, (1996). Reproduced at Tabs 6 and 17.

In a case arising out of the My Lai (My Song) massacres, that of Lieutenant Calley, the military judge in his instructions to the court members stated that: “the obedience of a soldier is not the obedience of an automaton, a soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.”

⁶⁰ *See Id.* at 1180-82. Reproduced at Tab 6.

⁶¹ Mark J. Osiel, Article: [Part 1 of 2] *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 Calif. L. Rev. 939, October, 1998. Reproduced at Tab 15.

⁶² *Id.* at 30.

C. THE RELATIONSHIP BETWEEN OBEDIENCE TO SUPERIOR ORDERS AS A DEFENSE AND DURESS AS A DEFENSE

1. Legal Discussion of Duress As A Defense

According to Professor Roling, the problem of superior orders has two aspects, one of knowledge (the negation of mens rea argument) and the other of fear.⁶³ The second aspect, fear, arises when a defendant knew an order was an illegal one but feared for his life if he did not complete the illegal act. The accused may argue that he was in a clear position of duress because he realized serious personal harm would be the consequence of disobeying the order.⁶⁴ The position of duress has many shades of intensity which create debate regarding its application.⁶⁵ Consequently, depending on the jurisdiction and depending on the facts of each individual case, duress as a defense may lead to mitigation of punishment and even to no punishment at all.⁶⁶

According to the United States Manual For Court-Martial, duress is a defense to any offense except killing an innocent person.⁶⁷ The first element required by U.S. military courts is that the accused's participation in the offense was caused by a

⁶³ See M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 380, n. 102 (1996). See also Bert Roling, *Criminal Responsibility For Violations of the Laws of War*, 12 REVUE BELGE DE DROIT INTERNATIONAL 8, 18-19 (1976). Reproduced at Tab 17.

⁶⁴ *Id.* at n. 102.

⁶⁵ *Id.* at n. 102.

⁶⁶ *Id.* at n. 102.

⁶⁷ MANUAL FOR COURTS- MARTIAL, Rule 916(h), *Prescribed by Exec. Order No. 12473, as amended by E.O. Nos. 12484, 12550, 12586, 12767, 12888, 12936 and 12960* (1995). Reproduced at Tab 3.

reasonable apprehension.⁶⁸ The term reasonable apprehension has been interpreted to mean that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act.⁶⁹ The apprehension must reasonably continue throughout the commission of the act.⁷⁰ Lastly, if the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.⁷¹

U.S. military law comports with traditional Anglo-American views of allowing duress as a defense in all situations except the killing of innocent people. However, United States military law differs from U.S. state law, as the majority of states, due to statutory reform, now allow duress as a defense even in the case of homicide. In the case of Spunaugle v. The State Of Oklahoma, the Appeals Court held, "A person is entitled to assert duress as a defense if that person committed a prohibited act or omission because of a reasonable belief that there was imminent danger of death or great bodily harm from another upon oneself, ones (sic) spouse or ones (sic) child."⁷² U.S. state statutes are

⁶⁸ *Id.*

⁶⁹ *Id.* Reproduced at Tab 3.

⁷⁰ See MANUAL FOR COURTS-MARTIAL, Rule 916(h), *supra* note 35. Reproduced at Tab 3.

⁷¹ See MANUAL FOR COURTS-MARTIAL, Rule 916(h), *supra* note 36. Reproduced at Tab 3.

⁷² Delpha Jo Spunaugle, Appellant, v. The State Of Oklahoma, Appellee, 1997 OK CR 47; 946 P.2d 246; 1997 Okla. Crim. App. LEXI 51; 68 O.B.A.J. 2905 September 3, 1997. Reproduced at Tab 7.

"In Oklahoma, Section 156, amended in 1992, entitles a person to the defense [of duress] if that person acted as a result of a reasonable belief "there was imminent danger of death or great bodily harm" to himself, his spouse, or his child. All of the defining statutory language focuses on the actor, while none of it focuses on

commonly interpreted by courts as characterizing duress as an excuse rather than a justification in order to allow the defense even in cases of homicide. The legal theory of excuse focuses on the actor and "represents the legal conclusion that the conduct is wrong, . . . but that criminal liability is inappropriate because some characteristics of the actor vitiates society's desire to punish him."⁷³ Arguably, in cases of kill-or-be-killed, the criminal law should be prepared in some cases to attempt to assuage the guilt feelings of the homicidal wrongdoer by excusing him-- by reminding him that he acted no less valiantly than any other person of reasonable moral strength would have done.⁷⁴

The International Tribunals approach duress using the justification philosophy. Under this philosophy, one is not morally justified to commit a greater harm to avoid a

the act, or justification of the act." The Appeals Court further held, "In light of this clear and consistent statutory language, we conclude Oklahoma did not adopt the "choice of evils" theory of justification. Rather our defense of duress is based on the legal theory of excuse. Therefore, the Tully discussion of "choice of evils" and justification, while accurate for those states which use justification to support [**10] the defense of duress, has no application to the defense in Oklahoma. We find the defense of duress is available in Oklahoma to a defendant charged with the crime of first degree malice murder."

⁷³ *Id.*

⁷⁴ Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching For Its Proper Limits*, 62 S. CAL. L. REV. 1331, July, 1989. Reproduced at Tab 13.

"When we examine out temptation to excuse coerced wrongdoers, we find that various common explanations for the excuse are not acceptable. Specifically, we ought not to excuse a person who accedes to threats on the grounds of compassion, evaluation of the actor's character, or simply because the wrongdoer has behaved in a manner that is statistically normal or predictable. Rather, the defense must be based on the normative claim that the actor lacked a fair opportunity to avoid acting unlawfully. Such an opportunity is lacking if a person of reasonable moral strength cannot fairly be expected to resist the threat."

lesser one.⁷⁵ “Thus, where harm is unavoidable, one may not choose to commit an equal or greater harm to avoid harm himself.”⁷⁶ In the *Einsatzgruppen Case*,⁷⁷ the Control Council Law 10 Court was interested in weighing the potential harm to the accused if he should refuse to obey the order versus the harm the accused would cause the third party if in fact the order was followed. The court held, “If one claims duress in the execution of an illegal order, it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order.”⁷⁸

The International Criminal Tribunal for Yugoslavia has also ruled on the application of duress as a defense in the *Erdemovic Case*.⁷⁹ The majority of the court held that duress could not afford a complete defense to a charge of crimes against humanity or war crimes when the underlying defense involves the killing of innocent people.⁸⁰ There were two Judges who dissented to the majority opinion in the

⁷⁵ See *supra* note 73.

⁷⁶ See *supra* note 73.

⁷⁷ *Einsatzgruppen Case*, 4 Subsequent Proceedings, at 470, *supra* note 30.

⁷⁸ *Einsatzgruppen Case*, 4 Subsequent Proceedings, at 470. See also M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 398 (1996). Reproduced at Tab 17.

⁷⁹ *Erdemovic Case*, (A441-246), 7 October 1997.

⁸⁰ *Erdemovic Judgement*, (A441-246), 7 October 1997. However, the court also held that the Appellant gave an “uninformed” plea because he had not received adequate explanation as to the difference between crimes against humanity and war crimes, nor of the implications of pleading guilty to crimes against humanity. Hence the matter was remanded to a new Trial Chamber for entry of an informed plea. See John R.W.D. Jones, *The Practice Of The International Criminal Tribunals For The Former Yugoslavia and Rwanda*, 72 (1998). Reproduced at Tab 19.

Erdemovic Case.⁸¹ Judge Stephen argued that no rule of customary international law either expressly allowed nor expressly forbade duress as a defense to unlawful killing.⁸² Due to lack of customary international law guidance, the court must turn to general principles of law recognized by civilized nations.⁸³ As a general rule, most countries recognize duress as a general defense with no exceptions for crimes of killing.⁸⁴ Therefore, Judge Stephen concludes that duress may be raised as a general principle of law.

2. Effect of Duress As A Defense If Applied In The ICTR

While the Statute for the International Criminal Tribunal for Rwanda does not

⁸¹ *Erdemovic Judgement*, *supra* at note 79. Judge Cassese and Judge Stephen, in two separate opinions, dissented from the majority and argued, as a matter of general principle of law recognized by civilized nations, duress is a viable defense even to unlawful killing. Reproduced at Tab 12.

⁸² *Erdemovic Judgement*, *supra* at note 81, dissenting opinion by Judge Stephen. Reproduced at Tab 12.

⁸³ John R.W.D. Jones, *The Practice Of The International Tribunals For The Former Yugoslavia And Rwanda*, 71 (1998). Reproduced at Tab 19.

⁸⁴ *Id.* at 71-2.

“Anglo-American, common law did make such an exception. Judge Stephen considered, however, that the situation where an accused would not be able to save the victims, no matter what he did - the situation in which the Appellant allegedly found himself - was not answered by this rationale. Whatever the Appellant chose, the lives of the innocent would be lost and he had no power to avert that consequence. Since the Anglo-American authorities did not address this issue, and their rationale for excluding duress as a defence to unlawful killing were inapplicable to these circumstances, duress, under the general principles of law, could be raised in such a case.” *Erdemovic Judgement*, dissenting opinion by Judge Stephen, *supra* at note 66.

clearly state that duress is a defense, arguably duress may be asserted as a general principle of law and thus a defense. Regarding the defense of superior orders, the Secretary-General's Report states, "...the International Tribunal (ICTY) may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice," which raises the possibility that coercion and lack of moral choice are complete defenses and, if proved, may lead to acquittal.⁸⁵ The dissenting Judges in the *Erdemovic Judgment* took the view that duress was a viable defense as a general principle of law, even in situations where innocent people are killed.⁸⁶

However, the majority opinion in the *Erdemovic Judgment* seems to be controlling for the ICTY as well as ICTR. The Majority held, "The Trial Chamber has applied the ruling of the Appeals Chamber that "duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings. It may be taken into account only by way of mitigation."⁸⁷ Due to the fact that the Appeals Chamber for the ICTY and the ICTR are the same, duress as a defense will likely not be afforded as a complete defense in cases where innocent people are killed.

⁸⁵ See John R.W.D. Jones, *The Practice Of The International Criminal Tribunals For The Former Yugoslavia and Rwanda*, 71 (1998). Reproduced at Tab 19.

⁸⁶ See *supra* note 82.

⁸⁷ *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment 5 March 1998. Reproduced at Tab 12.