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# THE DUTY TO DISOBEY ILLEGAL ORDERS AND THE DEFENCE OF SUPERIOR ORDERS

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# Historical evolution

Traditionally, defenses - or grounds to exclude criminal liability - played only marginal role in the practice of International criminal courts

Defenses only emerged in ICL debate in a second moment. First, the principle of individual criminal responsibility needed to be established in international law, then various grounds for excluding responsibility emerged in the defense's arguments.

No grounds for excluding criminal responsibility were provided for in the Nuremberg Charter or in the ad hoc Tribunals (the main defense by the accused ones was to question the legitimacy of the tribunals itself and of convicting individuals for international crimes)

One defense however was invoked consistently by the defendants after Second WW, namely the defense of **superior orders**



# Link with the principle of individual criminal responsibility and culpability

The idea of individual responsibility is connected to the ability of individuals **to act differently**. The agent's lack of choice or the lack of capacity to comply with the law may reduce or exclude their responsibility

*“Law is based on what society can reasonably expects of its members. It should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below those standards.”*  
(Judge A. Cassese)

*But is following superior orders a defence when the order was illegal?*



# Superior Orders at Nuremberg

*“Befehl ist Befehl”*

Despite being invoked by the defendants, at Nuremberg superior orders were not recognised: *“that a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defense to such acts of brutality, though [ ...] the order may be urged in mitigation of the punishment”*.

Nuremberg Principle IV :

*“The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”*



# Superior Orders

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Often comes in question: hierarchical structure; obedience in the military is essential

Military discipline is founded on complete obedience to superior orders, and it was considered impractical to expect a member of the armed services in conditions of war “to weigh scrupulously the legal merits of the orders received.” (Mitchell, 2000)

- Superiors must trust that their orders will be obeyed
- Subordinates must trust the binding character of the orders are given: degree of protection from personal responsibility when executing orders
- Can this protection become a ground for excluding the responsibility of subordinates even in front of the commission of international crimes?

# Eichmann trial in Jerusalem



“There is a need to draw a line between the leaders responsible and the people like me forced to serve as mere instruments in the hands of the leaders,” (Eichmann in a letter dated May 29, 1962, after Israeli Supreme Court rejected his appeal)



# Different positions

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- **Principle of respondeat superior**: applied until WW II, superior orders completely excluded criminal liability on the part of the subordinate who acted upon orders. Only the superior would be liable - Aim to ensure obedience. Responsibility stays at the top of the chain of command
- **Absolute liability principle**: opposing position according to which the fact that the perpetrator committed the crime under orders does not affect his liability
- **Manifest illegality principle**: intermediate way. Orders can exclude criminal responsibility but not when they are manifestly illegal or the perpetrator knew they were illegal

# The UN ad hoc Tribunals case law

No provisions on defenses in the Statutes of the ICTY and ICTR

Their jurisprudence mainly followed the Nuremberg rules

In practice, it can be noted some grounds for excluding responsibility played a role in front of the commission of war crimes. On the contrary vis-à-vis genocide and crimes against humanity defenses only played a very limited role.

*ICTY, Appeals Chamber, Erdemović, 1997*

*ICTY, Trial Chamber, Delalić et al., 1998*

*ICTY, Trial Chamber, Kordić et al., 2001*

**Superior orders became relevant only to the extent it amounted to duress, and in limited circumstances**



# ICTY, Erdemović case:

*Drazen Erdemovic, member of the Bosnian Serbian army, had shot 70 people under threat of his own life in 1995*

The majority of Appeals Chamber held that duress does not afford a complete defense to a soldier charged with a crime against humanity/war crime involving the killing of innocent civilians.

- ✓ The defendant claimed he had no choice: “Because of everything that happened I feel terribly sorry, but I could not do anything. When I could do something, I did it.” (D. Erdemović, 1996).
- ✓ Judge A. Cassese appended a dissenting opinion: Duress can be recognized as a general rule also in case of murder. Consequently, duress may be admitted, subjected to various stringent requirements, and can apply also to crimes involving the killing of innocent persons.



# Limits to Duress

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The issue has been a long subject of debate:

- a) In common law the killing of innocent civilians is always punishable (only mitigation of punishment possible)
  - b) In civil law (continental Europe) the killing out of duress as last resort can go unpunished
- In the Erdemovic case the majority adopted the first view: “duress does not afford a complete defense to a soldier charged with a crime against humanity/war crime involving the killing of innocent human beings” (para. 19)

# Defenses in the Rome Statute of ICC (1998)

- The Rome Statute, for the first time, entails a comprehensive codification of the scope of, conditions for and grounds for excluding criminal responsibility
- Article 31(3) summarizes various grounds to exclude liability:
  - Mental disease or defect
  - Intoxication
  - Self-defense
  - Duress
  - Necessity
- Open catalogue (to be interpreted in light of Art. 21 ICC St.: customary law, general principles of law)



# Article 33 ICC St

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- From the letter of the provision it is clear that **the existence of orders in principle does not absolve perpetrator** (in conformity with customary law rule)
- Regardless of whether the order came from government, military or civilian superior
- In exceptional cases the order can be a ground to exclude liability, if (cumulative):
  - Legal duty to obey the order
  - Did not know that the order was unlawful
  - The unlawfulness was not manifest
  - Orders to commit genocide and Crimes against Humanity are always manifestly unlawful (compromise between absolute liability and manifest illegality)

# A limited recognition of Superior orders

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- Debate over whether the compromise of the Rome statute rule is justified today
- On the one hand, it recognizes that war crimes may take different forms of unlawfulness and have varying degrees of severity (not all of them *prima facie*)
- On the other hand, scholars question whether superior orders defense (even only for war crimes) is consistent with ICL/customary law
- In some cases (if not falling under mistake of law under Art. 32(2) ICC St) it remains the possibility to mitigate the sentence (Art. 78 ICC St), or to consider if amounts to duress

# Necessity and Duress: Art. 31(1)(d) ICC St.

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- ICL does not distinguish among the two, but: necessity presupposes a natural threat, which comes from objective circumstances, while duress a threat from another person
  - becomes close to superior orders
- Traditionally plays a prominent role in international case law: already after II WW, Nazi defendants pleaded this defense, unsuccessfully.
- Part of customary international law and general principle of law (see Judge A. Cassese separate opinion in ICTY, Appeals Chamber, Erdemović, 7 October 1997, para. 16) Judges often recognised its validity but denied that the element were fulfilled

# Elements of duress as developed by jurisprudence:

To be recognized as a valid defence:

- The crime was committed under an immediate threat of severe and irreparable harm to life or physical integrity
- There was no adequate means of averting such evil
- the crime committed was not disproportionate to the evil threatened
- the situation leading to duress must not have been voluntary brought about by the person coerced
- Disagreement among the judges as to the elements of the defense: can it be a complete defense or only mitigation of punishment?
- **ICC case law: Trial of Dominic Ongwen (child soldiers)**