

XV

The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders

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Introduction

As long as there have been trials for violations of the laws and customs of war, more popularly known as “war crimes trials”, the trial tribunals have been confronted with the defense of “superior orders”—the claim that the accused did what he did because he was ordered to do so by a superior officer (or by his Government) and that his refusal to obey the order would have brought dire consequences upon him. And as long as there have been trials for violations of the laws and customs of war the trial tribunals have almost uniformly rejected that defense. However, since the termination of the major programs of war crimes trials conducted after World War II there has been an ongoing dispute as to whether a plea of superior orders should be allowed, or disallowed, and, if allowed, the criteria to be used as the basis for its application. Does international action in this area constitute an invasion of the national jurisdiction? Should the doctrine apply to all war crimes or only to certain specifically named crimes? Should the illegality of the order received be such that any “reasonable” person would recognize its invalidity; or should it be such as to be recognized by a person of “ordinary sense and understanding”; or by a person of the “commonest understanding”? Should it be “illegal on its face”; or “manifestly illegal”; or “palpably illegal”; or of “obvious criminality”?¹ An inability to reach a generally acceptable consensus on these problems has resulted in the repeated rejection of attempts to legislate internationally in this area. Consequently, the continued existence of an international rule denying superior orders as a defense to a charge of violating the laws and customs of war appears to be in jeopardy—if it has not already ceased to exist.²

More than five centuries ago, when one Peter von Hagenbach was tried by an “international” tribunal for maltreating, and permitting his subordinates to maltreat, the inhabitants of the town of Breisach while he was in command of what might be termed a military occupation (although the war did not begin

until thereafter), his defense was that his actions were in compliance with the orders of his master, the Duke of Burgundy. Even though complete obedience to the commands of one's liege lord was a way of life in the fifteenth century, and even though human life, particularly of civilians, was not respected then as it is today, von Hagenbach was found guilty and he was sentenced to death.³

Similarly, in 1865, at the conclusion of the American Civil War, when Captain Henry Wirz, the erstwhile Confederate commander of the notorious prisoner-of-war camp at Andersonville, Georgia, was tried before a federal Military Commission for the maltreatment of the prisoners of war in his custody, one of his defenses was "superior orders." In his personal summation Wirz said:⁴

I think I may also claim as a self-evident proposition that if I, a subaltern officer, merely obeyed the legal orders of my superiors in the discharge of my official duties, I cannot be held responsible for the motives that dictated such orders.

Against this claim the prosecutor asserted:⁵

I know that it is urged that during all this time he was acting under General Winder's orders, and for the purpose of argument I will concede that he was so acting. A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey such an order and disastrous consequences result, the superior and the subordinate must answer for it. General Winder could no more command the prisoner to violate the laws of war than could the prisoner do so without orders. The conclusion is plain, that where such orders exist both are guilty. . . .

And notwithstanding his earnest appeal, made to you in his final statement, begging that he, a poor subaltern, acting only in obedience to his superior, should not bear the odium and punishment deserved, with whatever force these cries of a desperate man, in a desperate and terrible strait, may come to you, there is no law, no sympathy, no code of morals, that can warrant you in refusing to let him have all justice, because the lesser and not the greater criminal is on trial.

Wirz was found guilty and he was sentenced to death.⁶

It is interesting to note that in the first (1906) edition of his now famous and standard work on international law, Oppenheim said:⁷

If members of the armed forces commit violations *by order* of their Government, they are not war criminals and cannot be punished by the enemy; the latter can, however, resort to reprisals. 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.

That statement, or one closely resembling it, appeared in the subsequent editions of Oppenheim's treatise, with its various editors, including the first edition (the 5th) edited by Lauterpacht.⁸ In the next (6th) edition Lauterpacht reversed himself⁹ and in the 7th edition, the last that he edited (and the last edition of the second volume that has appeared to date), the following rule is set forth:¹⁰

253. 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. 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. Undoubtedly, a Court confronted with the plea of superior orders 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; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime. . . . However, subject to these qualifications, the question 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.

The Preliminary Peace Conference which met at Versailles in 1919 to draft a treaty of peace with Germany at the end of World War I established a *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* with the task of inquiring into and reporting upon, among other things, the degree of responsibility for breaches of the laws and customs of war. In its report the Commission listed thirty-two types of violations of the laws and customs of war and, concerning the defense of superior orders, its report unanimously stated:¹¹

We desired 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 offence. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility.

Article 228 of the *Treaty of Versailles* which actually ended World War I for many of the belligerents required the German Government to hand over to the

Allied Governments for trial “all persons accused of having committed an act in violation of the laws and customs of war.”¹² In the face of the public opinion prevailing in Germany at that time no Government could have survived compliance with such a requirement and so it was subsequently agreed that the individuals named would, instead, be tried by the Supreme Court of Leipzig. The trials were a fiasco;¹³ but in one of them, involving the trial of two officers who had obeyed the order of their commanding officer to fire upon the lifeboats of a hospital ship which their submarine had torpedoed, the German Court said:¹⁴

It is true that according to the [German] Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. However, the subordinate obeying an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused. It is certainly to be urged in favour 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.

The accused were found guilty by the Court and were sentenced to imprisonment for a term of years.¹⁵

While the *1922 Treaty of Washington*¹⁶ never came into force because of the failure of ratification by France, it is of interest to note that Article 3 thereof stated:

The Signatory Powers, desiring to ensure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that 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 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 and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

Although the inter-war period (1919-1939) was far from free of international hostilities, the subject of war crimes trials appears to have been raised, or even written about by the students of the subject, on comparatively few occasions.¹⁷

World War II and its Aftermath

All during the course of World War II there had been statements made by the Allies that there would be trials for those major war criminals who had

plunged the world into catastrophic war and for those individuals who had otherwise violated international law.¹⁸ A private conference of British and European jurists from occupied countries which met in Cambridge in November 1941 established a committee to draft rules and procedures to govern war crimes trials. The sub-committee on superior orders concluded that

generally speaking, the codes of law of the respective countries recognize the plea of superior orders to be valid if the order is given by a superior to an inferior officer, within the course of his duty and within his normal competence, provided the order is not blatantly illegal. The conclusion reached was that each case must be considered on its own merits, but that the plea is not an automatic defence.¹⁹

The London International Assembly, established by the League of Nations Union of Great Britain, adopted a resolution which included the following with respect to the defense of superior orders:²⁰

(a) That an order given by a superior to an inferior to commit a crime violating international law was not in itself a defence, but that the Courts were entitled to consider whether the accused was placed in a 'state of compulsion' to act as ordered, and acquit him or mitigate the punishment accordingly;

(b) That such exculpating or extenuating circumstances should in all cases be disregarded in two types of cases: when the act was so obviously heinous that it could not be committed without revolting the conscience of an average human being; and when the accused was, at the time of the offence, a member of an organization whose membership implied the execution of criminal orders.

The *United Nations Commission for the Investigation of War Crimes* (later the United Nations War Crimes Commission) was established in London on 20 October 1943 by 17 of the States at war with Germany and Japan. (The Soviet Union was not represented at this meeting, nor did it later participate in the activities of the Commission.)²¹ Its Legal Committee concluded that a general understanding between the victorious belligerent nations on the subject of superior orders was desirable and stated that it believed the following rule to be consistent with international law:²²

The defence of obedience to superior orders shall not constitute a justification for the commission of an offence against the laws and customs of war, if the order was so manifestly contrary to those laws or customs that, taking into account his rank or position and the circumstances surrounding the commission of the offence, an individual of ordinary understanding would have known that such an order was illegal.

274 Levie on the Law of War

This recommendation did not meet with unanimous support and the Commission's Enforcement Committee eventually recommended that the Commission submit the following statement to the Governments:²³

The Commission has considered the question of 'superior orders'. It finally decided to leave out any provision on the subject. . . . The Commission considers that it is better to leave it to the court itself in each case to decide what weight should be attached to a plea of superior orders. But the Commission wants to make it clear that its members unanimously agree that in principle this plea does not of itself exonerate the offenders.

Finally, in March 1945, the Commission itself adopted the following position:²⁴

Having regard to the fact that many, if not most, of the members States have legal rules on the subject, some of which have been adopted very recently, and that in most cases these rules differ from one another, and to the further consideration that the question how far obedience to the orders of a superior exonerates an offender or mitigates the punishment must depend on the circumstances of the particular case, the Commission does not consider that it can usefully propound any principle or rule.

The Commission unanimously maintains the view . . . that the mere fact of having acted in obedience to the orders of a superior does not of itself relieve a person who has committed a war crime from responsibility.

Early in 1945 the United States prepared a draft of a proposal for an international military tribunal to try the major German war criminals. Paragraph 11 of that proposal stated:²⁵

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.

That proposal was submitted to the representatives of the Provisional French Government, the Soviet Union, and the United Kingdom at San Francisco in April 1945, together with a later draft in which a paragraph concerning trial procedures contained a sub-paragraph stating that any agreement on the matter should include a provision which could,

(c) except as the court in its discretion shall deem appropriate in particular cases, exclude any defense based upon the fact that the accused acted under orders of a superior officer or pursuant to state or national policy.²⁶

Then, on 14 June 1945, the United States distributed a revision of its draft proposal, a document which later became the working paper for the London Conference which met to draft the definitive Charter of the International Military Tribunal. Paragraph 15 of that revision stated:²⁷

In any trial before an International Military Tribunal the fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute a defense *per se*, but may be considered either in defense or in mitigation of punishment if the tribunal determines that justice so requires.

In a further Revised Draft submitted by the United States on 30 June 1945, during the course of the London Conference, the relevant paragraph now read:²⁸

17. 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.

A Soviet proposal which was tabled at the Conference on 2 July 1945 stated:²⁹

ARTICLE 29

Carrying Out of an Order

The carrying out by the defendant of an order of his superior or government shall not be considered a reason excluding his responsibility for the crimes set out in Article 2 of this Statute. In certain cases, when the subordinate acted blindly in carrying out the orders of this superior, the Tribunal has right to mitigate the punishment of the defendant.

A drafting subcommittee was then created by the Conference. The provision which it drafted on the question of superior orders varied little from that set forth in the last revision proposed by the United States:³⁰

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

In what was apparently the only real discussion of superior orders which took place at the London Conference, the following occurred:³¹

General Nikitchenko: In article 7 [8?] of the Charter I do not propose any change but would like to point out two considerations. Would it be proper really in speaking of major criminals to speak of them as carrying out some order of a

superior? This is not a question of principle really, but I wonder if that is necessary when speaking of major criminals.

Sir David Maxwell Fyfe: There are two points: first, they have already said they were just doing what Hitler said they should do; and secondly, in international law, certainly in some cases, superior orders were a defense, but in the sixth and seventh editions of Oppenheim it appears that they aren't a defense. If we don't make it clear, we may have some trouble on it.

General Nikitchenko: There is a misunderstanding. I wasn't against disallowing orders of a superior as a defense, but I thought that in regard to major criminals it would be improper to say that superior orders could be used in mitigation of punishment.

Sir David Maxwell Fyfe: It seems to me difficult. Suppose someone said, he was threatened to be shot if he did not carry out Hitler's orders. If he wasn't too important, the Tribunal might let him off with his life. It seems to be a matter for the Tribunal.

In one of the German cases on trial which were such a farce after the last war they did say that superior orders were no defense but could be taken into account on mitigation. That has been the general rule on superior orders in international law books.

General Nikitchenko: If the other heads of the delegations consider it best, we have no intention of pressing it. In general, it should be considered in mitigation; we think it is proper.

* * * *

Judge Falco: Is it necessary to indicate to the Tribunal the reason for mitigation? If we say simply that orders are not a defense, it would seem to be left to the tribunal to say that they may be in mitigation.

Mr Justice Jackson: That is about what we proposed originally—not an absolute defense but a mitigation.

Sir David Maxwell Fyfe: The important part is that it should not be an absolute defense.

Judge Falco: That is the important part. Must we add that that is the reason for the Tribunal to consider mitigation?

With some minor editing the Article 8 set forth above became Article 8 of the Charter of the International Military Tribunal which later sat in Nuremberg. As finally adopted it stated:³²

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.

In applying that rule at the Nuremberg Trial the International Military Tribunal said:³³

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, 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.

Another statement in that judgment was to effect that³⁴

When they [certain of the defendants] with knowledge of his [Hitler's] aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.³⁵

In considering whether the General Staff and the High Command of the Germany armed forces should be found to be criminal organizations, the Tribunal said:³⁶

Many of these men have made a mockery of the soldier's oath of obedience to military orders. When it suits their defense they say they had to obey; when confronted with Hitler's brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed.

On 20 December 1945 the Allied Control Council for Germany, consisting of military representatives of the Occupying Powers, the same four nations which had drafted the London Charter of the International Military Tribunal, promulgated Allied Control Council Law No. 10, setting forth the basis for the trials in Germany of war criminals other than those to be tried by the

278 Levie on the Law of War

International Military Tribunal.³⁷ The provisions of Article II(4)(b) of that Law with respect to superior orders were substantially the same as those of the London Charter:

The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

In *The Hostage Case* the Tribunal, convened pursuant to Law No. 10, held:³⁸

Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the order. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice.

In effect, here the Tribunal was saying that if the subordinate did not know and could not be expected to know that the order was illegal, there was no criminal intent, no *mens rea*, and the subordinate would not be guilty. The opinion in *The Einsatzgruppen Case* is to the same effect, the Tribunal there having said:³⁹

Those of the defendants who admit participation in the mass killings which are the subject of this trial, plead that they were under military orders and, therefore, had no will of their own. As intent is a basic prerequisite to responsibility for crime, they argue that they are innocent of criminality since they performed the admitted executions under duress, that is to say, superior orders. The defendants formed part of a military organization and were, therefore, subject to the rules which govern soldiers. It is axiomatic that a military man's first duty is to obey. If the defendants were soldiers and as soldiers responded to the command of their superiors to kill certain people, how can they be held guilty of crime? That is the question posed by the defendants. The answer is not a difficult one.

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 piece of machinery. It is a fallacy of wide-spread consumption that a soldier is required to do everything his superior officer orders him to do.... The fact that a soldier may not, without incurring unfavorable consequences, refuse to drill, salute, exercise, reconnoiter, and even go into battle, does not mean that he must

fulfill every demand put to him. In the first place, an order to require obedience must relate to military duty. An officer may not demand of a soldier, for instance, that he steal for him. And what the superior officer may not militarily demand of his subordinate, the subordinate is not required to do. Even if the order refers to a military subject it must be one which the superior is authorized, under the circumstances, to give.

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. 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.⁴⁰

In *High Command Case*, the Tribunal before which that case was tried quoted a 1944 statement of Goebbels, the Nazi Propaganda Minister, in which he had said:⁴¹

It is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior, especially if orders of the latter are in evident contradiction to all human morality and every international usage of warfare.

As would be expected, that statement was made in his official capacity as Minister of Propaganda and referred to alleged acts of Allied troops. It was not intended as a statement of German military law, nor as an admonition to the German soldier.

Concerning the act of an intermediate headquarters in passing down to its subordinate commands an order received from higher headquarters, the Tribunal in *High Command Case* went on to say:⁴²

Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.

It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of

command and the order must be one that is criminal on its face, or one which he is shown to have known was criminal.

In a digest of the laws applied by various courts which conducted war crimes trials after World War II the *United Nations War Crimes Commission* said:⁴³

The plea of superior orders has been raised by the Defence in war crimes trials more frequently than any other. The most common form of the plea consists in the argument that the accused was ordered to commit the offence by a military superior and that under military discipline orders must be obeyed. A closely related argument is that which claims that had the accused not obeyed he would have been shot or otherwise punished; it is sometimes also maintained in court that reprisals would have been taken against his family.

It has often been said that an accused is entitled under international law to obey commands which are lawful or which he could not reasonably be expected to know were unlawful. The question, however, arises whether these commands must be lawful under municipal law or international law; ... the legality under municipal law of the accused's *acts* does not free him from liability to punishment if those acts constitute war crimes, and it seems to follow that the plea of having acted upon *orders* which were legal under municipal law must also fail to constitute a defence. On the other hand, if the order is legal under international law, it is difficult to show how an act committed in obedience to it could be illegal under that system.... The true test in practice is whether an order, *illegal* under international law, on which an accused has acted was or must be presumed to have been known to him to be so illegal, or was obviously so illegal ("illegal on its face" to use the term employed by the Tribunal in the *High Command* Trial) or should have been recognised by him as being so illegal.

The provisions contained in Article 8 of the London Charter denying superior orders as a defense and limiting its application to mitigation of punishment were followed by many of the laws enacted and orders issued after the conclusion of World War II which were concerned with the trials of violators of the laws and customs of war. Thus, the Charter attached to the Special Proclamation creating the *International Military Tribunal for the Far East* (IMTFE), issued on 19 January 1946 by General Douglas MacArthur as Supreme Commander for the Allied Powers (SCAP), included the following provisions:⁴⁴

Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such an 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.

None of the judges of the IMTFE, concurring or dissenting, found it necessary to advert to the quoted provision of its Charter either in the lengthy judgment or in the other opinions.⁴⁵

As we have already seen, Article 8 of the London Charter was also the source for the cognate provision of Allied Control Council Law No. 10 and for similar provisions issued in other occupied territories.⁴⁶

United Nations

On 11 December 1946 the General Assembly of the United Nations unanimously adopted a resolution the first operative paragraph of which stated that the General Assembly:⁴⁷

Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.

Another operative paragraph charged its Committee on Codification (later changed to the International Law Commission) with the formulation of those principles, either in the context of a code of offenses against the peace and security of mankind or of an international criminal code. When the International Law Commission had prepared its first draft in complying with the task assigned to it of “formulating” the principles of international law recognized in the London Charter and in the Judgment of the Nuremberg Tribunal, its Principle IV read as follows:⁴⁸

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.

The overall document received a mixed reception in the Sixth Committee of the General Assembly, the result of which was the preparation of a draft resolution, later adopted by the General Assembly,⁴⁹ referring it to member States for comment, a process which had early evolved in the United Nations as a method of indefinite postponement.

The following year, in accordance with the directive received from the General Assembly, the International Law Commission began to work on a *Draft Code of Offences Against the Peace and Security of Mankind*. Article 4 of the first draft text prepared by the Special Rapporteur, J. Spiropoulos, stated:⁵⁰

The fact that a person charged with a crime defined in this code acted under the orders of a government or a superior may be taken into consideration either as a defence or in mitigation of punishment if justice so requires.

This proved unacceptable to the Commission which modified the Rapporteur's proposal to read:⁵¹

The fact that a person charged with an offence 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.

In its commentary on this Article the Commission said:

Principle IV of the Commission's formulation of the Nuremberg principles, on the basis of the interpretation given by the Nuremberg Tribunal to article 8 of its Charter, states: "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."

The observations on principle IV, made in the General Assembly during its fifth session, have been carefully studied; no substantial modification, however, has been made in the drafting of this article, which is based on a clear enunciation by the Nuremberg Tribunal. The article lays down the principle that the accused is responsible only if, in the circumstances, it was possible for him to act contrary to superior orders.

The International Law Commission's Draft Code did not meet with any greater acceptance in the General Assembly than had its formulation of the Nuremberg Principles and the project was shelved for some time. When it was once again taken up by the Commission in 1954, Article 4 was redrafted to state:⁵²

The fact that a person charged with an offence 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 comply with that order.

This time the Commission's commentary stated:

Since some Governments had criticized the expression 'moral choice', the Commission decided to replace it by the wording of the new text above.

However, on the recommendation of its Sixth Commission, the General Assembly postponed all action on the draft Code until a decision had been reached on the definition of aggression.⁵³ This did not occur until 1974 and the *Draft Code of Offences Against the Peace and Security of Mankind* did not reappear on the agenda of the International Law Commission until 1981. During its 1984 session it once again started to have annual discussions on the subject. Most of

its time has been spent on the question of the offenses to be included and through 1986 the problem of superior orders had not been reached for discussion. As a result, today, almost forty years later, the efforts of the International Law Commission to “formulate” the Nuremberg Principles and to draft a code of offenses against the peace and security of mankind have still not been successful.

On the same day that it adopted the resolution on the “formulation” of the Nuremberg Principles and the drafting of a code of offenses, the General Assembly adopted another resolution which requested the Economic and Social Council to draw up a convention on genocide.⁵⁴ The Council, in turn, requested the Secretary-General to collate the comments received and to prepare a draft convention on the subject. Article V of his draft provided:⁵⁵

Command of the law or superior orders shall not justify genocide.

No provision on the subject of superior orders appears in the convention as eventually drafted and adopted.⁵⁶

Other International Efforts to Codify the Rule

We have seen the actions taken by the United Nations General Assembly, and by its subordinate bodies, concerning the codification of the rule with respect to the non-availability of the defense of superior orders in international criminal trials. Now let us review the efforts of other international bodies on this subject.

In 1948 the XVIIth (Stockholm) International Red Cross Conference recommended that the International Committee of the Red Cross (ICRC) draft provisions for the repression of breaches of the humanitarian conventions which were then in the process of evolution⁵⁷ and which ultimately became the four *1949 Geneva Conventions for the Protection of War Victims*.⁵⁸ The ICRC complied with that resolution and, with the help of a small group of recognized experts, drafted a number of separate provisions on the subject, one of which provided:⁵⁹

ARTICLE 40 (a)

The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify.

With respect to this proposed provision the ICRC said:⁶⁰

It establishes, within prescribed limits, the responsibility of offenders; it rejects the principle, recognized in various military penal codes, that orders received from a superior exculpate the subordinate who has carried them out.

The text proposed does not, however, go as far as the Declaration of London of August 8, 1945, which, in the case of 'war crimes', only admitted the plea of superior orders as a possible extenuating circumstance, the executor of the order bearing full responsibility.

The suggested text appears to the ICRC to be an acceptable compromise between obedience to orders,—an essential prerequisite of military discipline,—and the moral duty to oppose any patent atrocity, such as the massacre of defenceless women and children.

It should be noted that the onus of proof lies on the prosecution. This is important in view of the fact that certain legislations called upon the accused to prove that he was not guilty.

The experts debated whether, even in the case of flagrant participation in such violations, the threat of death were not sufficient to constitute a legal excuse for obeying superior orders. No concession of this kind was however made, as every latitude is left to the judge to mitigate or remit punishment. This power of discretion seems the best practical solution to the conflict on this point between English and Continental conceptions of law.

The few bits of legislative history which are available on this subject, particularly the report of its Special Committee, indicate that the 1949 Diplomatic Conference discarded the forgoing provision on the following basis:⁶¹

[N]or could general agreement be reached at this stage regarding the notions of complicity, attempted violation, duress or legitimate defense or the plea 'by orders of a superior'. These should be left to the judges who would apply the national laws.

The Diplomatic Conference is not here to work out international penal law. Bodies far more competent than we are have tried to do it for years.

As a result, no provision with respect to superior orders appears in the 1949 Geneva Conventions.

In 1971 the ICRC convened a Conference of Government Experts to consider the drafting of a protocol to the 1949 Geneva Conventions which, among other things, would remedy some of the defects in those Conventions which had surfaced over the years. One of the conclusions reached by Commission IV of that first conference was to the effect that:⁶²

556. A number of shortcomings in the Conventions should be remedied. They concerned, in particular, the question of superior orders. That problem had not been provided for in the Conventions, and it was necessary to specify precisely

under what conditions an accused person could plead that he had received orders from a superior, as a justification for his commission of an act forbidden by the Conventions. In order to remedy that deficiency it would be necessary to be guided by the work of the United Nations which itself took as a basis the principles laid down by the Nuremberg tribunal.

Apparently the ICRC felt that there was more justification in the decision of the 1949 Diplomatic Conference than in the recommendation of the 1971 Conference of Government Experts and when it prepared a draft Protocol to the 1949 Geneva Conventions for consideration by various other preliminary conferences which it was about to convene, that draft included the following rather innocuous paragraph in its Article 75:⁶³

2. The High Contracting Parties shall determine the procedure to be followed for all application of the principle under which a subordinate is exempted from any duty to obey an order which would lead him to commit a grave breach of the provisions of the Conventions and of the present Protocol.

In its Commentary on that provision the ICRC said:⁶⁴

In particular, it [the ICRC] considered that the basic question of superior orders should be settled at the national level, in a manner consistent with the guidelines laid down in the Judgment of the Nuremberg Tribunal, namely, that it should be possible for soldiers to refuse to obey an order which, if carried out, would constitute a serious infraction of humanitarian rules. The military regulations of some countries already contain a provision regarding superior orders and submission to rank, whereby superiors must only issue orders which conform to international law and subordinates are relieved from the obligation to obey an order which would be contrary thereto and which would cause them to commit a crime or an offence.

The summary of the discussions of this article that took place at the 1972 (Second) Conference of Government Experts, convened by the ICRC to review and propose changes in the draft Protocol which the ICRC had prepared, indicates some of the problems that have been encountered in the efforts to legislate internationally in this area. It states:⁶⁵

4.123. A number of experts approved the introduction of a provision on superior orders, such as proposed in draft Article 75, § 2 of the ICRC text. . . . The language of that paragraph did not, however, seem sufficiently clear and a number of amendments were proposed. It was pointed out that attempts had been made in several national legislations to give a satisfactory formulation of the defence of superior orders, a concept recognized by the Charter and the Judgment of the

International Military Tribunal at Nuremberg; but so far it had appeared impossible to find a formula that would really cover all situations and on which agreement would be general. It would not be right to limit the scope of the defence to grave breaches only (as the ICRC draft did). According to one expert, it should be stipulated that the subordinate not merely had the right, but was obliged, to disobey the unlawful order. Some experts, however, were of a completely opposite view and demanded the deletion of the proposed paragraph. They laid emphasis on the necessity to respect the exigencies of military discipline, and they pointed out that it would be difficult in time of armed conflict to permit soldiers to decide whether to obey or not. It was equally considered that the approach to this question should be far more general and that the principles recognized by the Nuremberg Tribunal, the Draft Code of Offences Against the Peace and Security of Mankind should be taken into account.

Actually, there were five separate proposals on the subject of superior orders, none of which was adopted by the Conference.⁶⁶ The ICRC thereupon took it upon itself to include the following provisions in the Draft Additional Protocol I prepared by it for use as the Working Document of the Diplomatic Conference which the Swiss Government had already agreed to host beginning in April 1974:⁶⁷

ARTICLE 77. — *Superior orders*

1. No person shall be punished for refusing to obey an order, of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol.

2. The fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from penal responsibility if it be established that, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the Conventions or of the present Protocol and that he had the possibility of refusing to obey the order.

The ICRC's Commentary on that provision stated:⁶⁸

It was pointed out that this provision might put soldiers in an extremely difficult position, as they were compelled by military laws and regulations to obey orders issued to them. That is the reason why it was thought necessary to add to the sentence "he should have reasonably known that he was committing a grave breach" the words "and that he had the possibility of refusing to obey the order."

These provisions fared no better in the Diplomatic Conference which drafted the 1977 Protocol I⁶⁹ than had the comparable provision proposed by the ICRC in 1949 fared in the earlier Diplomatic Conference. Fortunately for the researcher, the action on these provisions is better documented than was that of

its 1949 predecessor. After considerable debate in Committee I during the 1976 and 1977 sessions of the Diplomatic Conference, a roll call vote was taken in that Committee to make the basic determination as to whether an article on superior orders should be included in the Protocol which was being drafted. That roll call resulted in a favorable vote of 34/9/35.⁷⁰ To implement that decision the following article was subsequently approved by the Committee by a vote of 38/22/15:⁷¹

Article 77. — Superior orders

1. The High Contracting Parties undertake to ensure that their internal law penalizing disobedience to orders shall not apply to orders that would constitute grave breaches of the Conventions and this Protocol.

2. The mere fact of having acted pursuant to an order of an authority or a superior does not absolve an accused person from penal responsibility, if it be established that in the circumstances at the time he knew or should have known that he was committing a grave breach of the Conventions or of this Protocol. It may, however, be taken into account in mitigation of punishment.

The breadth of the differing views of the various delegations was indicated by the fact some twenty-five of them found it necessary to explain their votes.⁷² Those explanations fell into three general categories: the proposed article either did, or did not, draw the necessary balance between compliance with humanitarian law and military discipline; the proposed article either did, or did not, draw an adequate distinction between national and international law; and the proposed article properly, or improperly, limited its coverage to “grave breaches” of the 1949 Geneva Conventions and of the Protocol. Thereafter, with a minimum of discussion, the article was taken up by the Plenary Meeting on 30 May 1977 and resulted in a vote 36/25/25.⁷³ As the Conference rules required a two-thirds majority for the inclusion in the 1977 Protocol I, the vote constituted a rejection of the article on superior orders. (Although abstainers were not considered as voting, the 36 affirmative votes out of 61 votes cast amounted to only 59% of the total. To have been included in the 1977 Protocol I, 41 of the 61 votes cast were required.)

Conclusion

There has been no international activity in this area since the rejection by the Diplomatic Conference in 1977 of the provision adopted by the Committee of that Conference. The current discussions in the International Law Commission appear to have completely eliminated any reference to the subject; and the present author is inclined to believe that even if the Commission were to adopt a provision, perhaps similar to that contained in its 1954 draft of *Code of Offences*

Against the Peace and Security of Mankind, it is doubtful that such a provision would receive the approval of the Sixth (Legal) Committee of the General Assembly or that it would be included in any convention submitted to the nations for adoption. In other words, it appears unlikely that there will be any internationally approved provision on the subject of superior orders in the foreseeable future.⁷⁴

Where does that leave the matter? On two occasions specific proposals for provisions of major humanitarian conventions on the law of war which would have placed limitations on the availability of superior orders as a defense have been rejected by large, representative, Diplomatic Conferences. An organ of the United Nations eliminated such a proposal from the draft of the Genocide Convention prepared by its Secretary-General. Two specific proposals drafted by the International Law Commission which included provisions on the subject of superior orders have met with less than enthusiasm from the General Assembly of the United Nations. Although this latter was not necessarily directed against the proposed provisions with respect to superior orders, but might have been directed against other parts of the documents submitted by the Commission, the fact remains that in the more than forty years which have elapsed since the completion of the war crimes trials after World War II, there has been no successful drafting of such a provision by any international body—and there is none in sight. Unless applicable national law provides otherwise, any defense counsel in a future war crimes trial would be professionally derelict if he failed to assert to the trial court that the rule denying the availability of the defense of superior orders has been rejected as a rule of international law and that such a defense is available to an individual charged with the commission of a violation of the law of war.

Notes

1. For studies in depth of many of these aspects of the problems, see: *L'Obéissance Militaire au regard des Droits Pénaux Internes et du Droit de la Guerre*, V. Recueils de la Société Internationale de Droit Penal Militaire et de Droit de la Guerre (1971); Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (1965) (hereinafter cited as Dinstein); L.C. Green, *Superior Orders in National and International Law* (1976); and N. Keijer, *Military Obedience* (1978).

2. Throughout the discussion which follows it must be borne in mind that there are two totally opposing points of view of the problem of obedience to the order of a superior: the point of view of the armed force which alleges the commission of a war crime against it by a member of the enemy armed force (this will usually be similar to the international point of view); and the point of view of the armed force of which the individual who allegedly received and complied with the illegal order is a member (the primary concern here will be with the problem of military discipline).

3. 2 Schwarzenberger, *International Law as Applied by Courts and Tribunals* 462-466 (1968).

4. *United States v. Henry Wirz*, H.R. Ex. Doc. No. 23, 40th Cong., 2nd Sess., 706 (1867).

5. *Idem* at 773 and 778.

6. *Idem* at 808.

7. 2 Oppenheim, *International Law: A Treatise* 264 (1st ed., 1906). As far as it goes, this statement closely resembles the provision of the German Military Penal Code quoted by the Court in *The Llandovery Castle Case*. See text in connection with note 14, *infra*.

8. 2 Oppenheim, *International Law: A Treatise* 453-455 (H. Lauterpacht, ed., 5th ed., 1935).

9. 2 Oppenheim, *International Law: A Treatise* 453-455 (H. Lauterpacht, ed., 6th ed., 1940). An article by Lauterpacht entitled "The Law of Nations and the Punishment of War Crimes", 21 Brit. Y.B. Int'l L. 58, 69-74 (1944) sets forth the reasons for his new position.
10. 2 Oppenheim, *International Law: A Treatise* 568 (H. Lauterpacht, ed., 7th ed., 1952).
11. 14 A.J.I.L. 95, 117 (1920).
12. *Treaty of Peace between the Allied and Associated Powers, of the One Part, and Germany, of the Other Part*, signed at Versailles, 28 June 1919, 112 B.F.S.P. 1; 225 Perry T. S. 188; 2 *Treaties and Other International Agreements of the United States of America, 1776-1949*, at 43 (C. Bevans, ed.).
13. See, generally, C. Mullins, *The Leipzig Trials* (1921).
14. *The Llandovery Castle Case*, 2 Ann. Dig. 436 (1923-1924); 16 A.J.I.L. 708, 721-722 (1922). In a prior case (*The Dover Castle*, 2 Ann. Dig. 429 (1923-1924); 16 A.J.I.L. 704 (1922)), the same court had acquitted an accused charged with sinking a British hospital ship because he had honestly believed that the order which he obeyed was justified as a lawful reprisal for the misuse of such vessels.
15. One author interprets this decision to lay down the rule that, under German national law, "a subordinate may count on the legality of the orders received by him; but when it is known to one and all, the subordinate himself not excluded, that the order is unlawful, we encounter an exception to the rule, and the subordinate can rely no longer on the alleged legality of the order." Dinstein, *supra* note 1, at 16.
16. *Treaty Relating to the Use of Submarines and Noxious Gases in Warfare* signed at Washington, 6 February 1922, 25 L.N.T.S. 202; 16 A.J.I.L. (Supp.) 57 (1922).
17. A notable exception to the foregoing statement is E. Colby, "War On Crimes," 23 Mich. L. Rev. 482-511, 606-634 (1925).
18. See, for example, the *Declaration of St. James*, London, 13 January 1942 (United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and The Development of the Laws of War* 89-90 (1948) (hereinafter cited as *United Nations History*); 144 B.F.S.P. 1072; the statement made at Moscow in 1943 (*For. Rel. of the U.S.*, 1943, Vol. 1, General, at 768-769); the agreement reached at Yalta in 1945 (Department of State), *The Conference of Malta and Yalta, 1945*, at 975, 979 (1955); and the Potsdam Communiqué (154 B.F.S.P. 366, 467). Germany also had plans for trials with respect to war crimes allegedly committed by its enemies. A. de Zayas, *Die Wehrmacht Untersuchungsstelle* (1979) (published in English under the title *The Wehrmacht War Crimes Bureau, 1939-1945*).
19. *United Nations History*, *supra* note 18, at 98.
20. *Idem* at 275.
21. *Idem* at 112-113 and 158-159. It should be borne in mind that here the term "United Nations" refers to the nations at war with Germany and Japan. The United Nations Organization was not yet in existence.
22. *Idem* at 279.
23. *Idem* at 280.
24. *Loc. cit.*
25. *Report of Robert H. Jackson, United Nations Representatives to the International Conference on Military Trials* 22, 24 (1949) (hereinafter cited as Jackson).
26. *Idem* at 28, 33.
27. *Idem* at 55, 58.
28. *Idem* at 119, 124.
29. *Idem* at 165, 181.
30. *Idem* at 194, 197.
31. *Idem* at 367-368.
32. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, with the Charter of the International Military Tribunal Attached*, signed at London, 8 August 1945, 82 U.N.T.S. 279. Nineteen other States subsequently adhered to this Agreement.
33. *Judgment of the International Military Tribunal, Nuremberg*, 30 September-1 October 1946, 1 *Trial of Major War Criminals* 171, 224 (1947) (hereinafter cited as *T.M.W.C.*); *Nazi Conspiracy and Aggression: Opinion and Judgement* 53-54 (1947) (hereinafter cited as *Nazi Conspiracy*).
34. 1 *T.M.W.C.*, *supra* note 33, at 226; *Nazi Conspiracy*, *supra* note 33, at 55-56.
35. In setting forth the reasons for the findings of guilty with respect to Field Marshal Wilhelm Keitel and Colonel General Alfred Jodl, the Tribunal referred to Article 8 and then made a passing reference to the fact that the provisions of that Article precluded resort to the defense of superior orders. As to each of these accused it specifically found nothing in mitigation. 1 *T.M.W.C.*, *supra* note 33, at 2981 and 325; *Nazi Conspiracy*, *supra* note 33, at 118-119 and 151.
36. 1 *T.M.W.C.*, *supra* note 33, at 278-279; *Nazi Conspiracy*, *supra* note 33, at 107. The General Staff and the High Command were found not to be criminal organizations. 1 *T.M.W.C.*, *supra* note 33, at 276-279;

290 Levie on the Law of War

Nazi Conspiracy, *supra* note 33, at 105-107. The Soviet member of the Tribunal dissented from this finding. 1 *T.M.W.C.*, *supra* note 33, at 359-364; *Nazi Conspiracy*, *supra* note 33, at 183-188.

37. 1 *The Law of War: A Documentary History* 908, 909 (L. Friedman, ed., 1972); *Documents on Prisoners of War* 304, 305 (H. Levie, ed., 1979) (hereinafter cited as *Documents*). This Law was further implemented by the heads of military government in the four zones of occupation. Provisions to the same effect as that of Allied Control Council Law No. 10 will, for example, also be found in the regulations issued by the U.S. Commanders in the Mediterranean and in China. See United Nations War Crimes Commission, 1 *Law Reports of Trials of War Criminals* 120 (1947) (hereinafter cited as *Law Reports*).

38. *The Hostage Case (United States v. Wilhelm List et al.)*, 11 *Trials of War Criminals* 1230, 1236 (1950).

39. *The Einsatzgruppen Case (United States v. Otto Ohlendorf et al.)*, 4 *Idem* at 411, 470-471 (1950).

40. In a study in considerable depth of this problem, one international law scholar has made a proposal for a rule which parallels the reasoning of the Tribunals in these cases. His proposed rule is as follows:

The fact that a defendant acted in obedience to superior orders shall not constitute a defence *per se*, but may be considered—in conjunction with other circumstances—within the scope of an admissible defence based on lack of *mens rea*.

Dinstein, *supra* note 1, at 252. A perusal of the opinions of the three judges of the United States Court of Military Appeals in the case of *United States v. William L. Calley, Jr.* [22 C.M.A. 534, 48 C.M.R. 19 (1973); habeas corpus granted 382 F. Supp. 650 (1974), *rev'd* 519 F. 2d 184 (1975), *cert. den.* 425 U.S. 911 (1976)] will reveal some of the difficulties encountered in attempting to establish the scale by which the knowledge of the illegality of the order is to be measured.

41. *The High Command Case (United States v. Wilhelm von Leeb et al.)*, 11 *Trials of War Criminals* 462, 509 (1950).

42. *Idem* at 511.

43. 15 *Law Reports*, *supra* note 37, at 157-158 (Emphasis in original.)

44. *Special Proclamation by the Supreme Commander for the Allied Powers*, 19 January 1946, 4 *Treaties and Other International Agreements of the United States of America, 1776-1949*, at 20, 23 and 27, 28 (C. Bevans, ed., 1970); *Documents*, *supra* note 37, at 312. The amendment of this Charter on 26 April 1946 did not affect this provision.

45. See *The Tokyo Judgment* (B. Roling and C. Ruter, eds., 2 Vols., 1977).

46. See note 37, *supra*, and the text in connection therewith. For other representative examples, see 3 *Law Reports*, *supra* note 37, at 93, 96 (France); *idem* at 81, 85 (Norway); 4 *idem* at 125, 129 (Canada); but see 11 *idem* at 86, 99 (Netherlands). In his much cited book, published during the course of World War II, Professor Trainin left no doubt that in the Soviet Union superior orders would not be a defense when the order "is not a military order but an incitement to crime." A.N. Trainin, *Hitlerite Responsibility under Criminal Law* 90 (c. 1945). In addition, the official Soviet position at the 1945 London Conference unquestionably fully supported the inclusion of Article 8 in the Charter of the International Military Tribunal. See pp. 9-10, *supra* note 25, at 61, 62.

47. G.A. Res. 94(1), 11 December 1946; 2 B. Ferencz, *An International Criminal Court* 127 (1980) (hereinafter cited as Ferencz); 1 J. Djonovich, *United Nations Resolutions* 175 (hereinafter cited as Djonovich).

48. *Formulation of the Nuremberg Principles*, (1950) *Y.B. Int'l L. Comm'n* 374; 2 Ferencz, *supra* note 47, at 235, 237; *Documents*, *supra* note 37, at 559, 560.

49. G.A. Res. 488 (V), 12 December 1950; 2 Ferencz, *supra* note 47, at 312; 3 Djonovich, *supra* note 47, at 151.

50. [1951] 2 *Y.B. Int'l L. Comm'n* 43, 60; 2 Ferencz, *supra* note 47, at 331.

51. [1951] 2 *Y.B. Int'l L. Comm'n* 123, 137; 2 Ferencz, *supra* note 47, at 335-336; 45 *A.J.I.L. (Supp.)* 123, 132 (1951).

52. [1951] 2 *Y.B. Int'l L. Comm'n* 123, 137; 2 Ferencz, *supra* note 47, at 462-463.

53. G.A. Res. 897 (IX), 4 December 1954; 2 Ferencz, *supra* note 47, at 467; 5 Djonovich, *supra* note 47, at 166. See also G.A. Res. 1 186 (XII), 11 December 1957; 2 Ferencz, *supra* note 47, at 497; 6 Djonovich, *supra* note 47, at 243.

54. G.A. Res. 96 (I), 11 December 1946; 2 Ferencz, *supra* note 47, at 127, 1 Djonovich, *supra* note 47, at 175.

55. *Draft Convention on Genocide*, U.N. Doc. A/362 (25 August 1947); 2 Ferencz, *supra* note 47, at 131. The United States commented that the article should include the provision on mitigation of punishment contained in the London Charter. U.N. Doc. 402/Add.2 (30 September 1947); 2 Ferencz, *supra* note 47, at 143, 145.

56. *Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260 (III), 9 December 1948; 78 *U.N.T.S.* 277; 2 Ferencz, *supra* note 47, at 174; 2 Djonovich, *supra* note 47, at 238. An attempt by

the Soviet Union to have the Sixth Committee restore this provision was rejected by a vote of 15 for, 28 against, and 6 abstaining. *Y.B. of the U.N.*, 1948-1949, at 954-955.

57. International Committee of the Red Cross, *Report of the Seventeenth (Stockholm) International Red Cross Conference* 94 (1948).

58. 1949 Geneva Conventions for the Protection of War Victims, Geneva, 12 August 1949, 75 U.N.T.S. 31/85/135/287; 6 U.S.T. 3114/3217/3316/3516; 157 B.F.S.P. 234/262/284/355.

59. *Revised and New Draft Conventions for the Protection of War Victims: Remarks and Proposals Submitted by the International Committee of the Red Cross* 19, 34, 64, 85 (February 1949).

60. *Idem* at 21-22.

61. Swiss Federal Political Department, Fourth Report of the Special Committee of the Joint Committee, 12 July 1949, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. IIB, at 115 (n.d.). Article 40 was among those discussed by the Special Committee during the 29th-33rd Meetings but the term "superior orders" was not mentioned at any time. *Idem* at 85-91.

62. International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (First Session) (August 1971).

63. International Committee of the Red Cross, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Second Session), Basic Texts, 25 (January 1972).

64. International Committee of the Red Cross, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Second Session), Commentary (Part One) 155 (January 1972).

65. International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Second Session) Vol. 1, 188 (July 1972).

66. *Idem* at 189 (§ 4.126).

67. International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, at 25 (June 1973).

68. International Committee of the Red Cross, *Commentary on the Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, at 97 (October 1973).

69. 1977 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Swiss Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-1977)*, Vol. I, Part 1, at 115 (1978) (hereinafter cited as *Official Records*); U.N. Doc. A/32/144, 15 August 1977, Annex I; 16 I.L.M. 1391.

70. *Official Records*, *supra* note 69, at 381, 387; *Protection of War Victims: Protocol I to the 1949 Geneva Conventions* (Supplement) (H. Levie, ed., 1985) 22-23 (hereinafter cited as *Protection*). The Communist bloc voted solidly in favor of including such a provision, as did Belgium, Canada, France, Ireland, Japan, Netherlands, Norway, Portugal, and the United States; while Australia, India, New Zealand, Pakistan, and Switzerland voted against it. Denmark, the Federal Republic of Germany, Italy, and the United Kingdom abstained, as did a majority of the Third World countries.

71. *Official Records*, *supra* note 69, at 392; *Protection*, *supra* note 70, at 26.

72. *Official Records*, *supra* note 69, at 399-415; *Protection*, *supra* note 70, at 26-36.

73. *Official Records*, *supra* note 69, at 329-339; *Protection*, *supra* note 70, at 38-45. There was no roll-call vote in the Plenary Meeting. After its rejection by the Plenary Meeting, nine countries, including Canada, Spain, and the United States, explained their votes. VI *Official Records*, *supra* note 69, at 329-340; *Protection*, *supra* note 70, at 39-45.

74. Subsequent to writing the foregoing statement the author learned that the International Law Commission had not included a provision on superior orders in its latest *Draft Code of Crimes [sic] Against the Peace and Security of Mankind*. See S. McCaffrey, "The Fortieth Session of the International Law Commission," 83 A.J.I.L. 153, 155 (January 1989).