

The Defence of 'Obedience to Superior Orders' in International Law

Yoram Dinstein

OXFORD

THE DEFENCE OF
‘OBEDIENCE
TO SUPERIOR ORDERS’
IN
INTERNATIONAL LAW
by

YORAM DINSTEIN

A reprinted edition with a new Postscript Preface



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LIST OF ABBREVIATIONS

- A.B.A.J.* – American Bar Association Journal.
A.D. – Annual Digest and Reports of Public International Law Cases.
A.J.I.L. – American Journal of International Law.
A.P.S.R. – American Political Science Review.
A.S.I.L. – Proceedings of the American Society of International Law.
 Bellot, ‘Punishment’ – Bellot, ‘War Crimes: Their Prevention and Punishment’, *T.G.S.*, vol. 2 (1917), pp. 31–55.
 Bellot, ‘War Criminals’ – Bellot, ‘War Crimes and War Criminals’, *C.L.T.*, vols. 36 (1916), pp. 754–768, 876–886; 37 (1917), pp. 9–22.
B.Y.B.I.L. – British Year Book of International Law.
C.L.R. – California Law Review.
C.L.T. – Canadian Law Times.
Clunet – Journal du Droit International.
C.M.A.I. – Cursos Monograficos, Academia Interamericana de Derecho Comparado e Internacional.
Cmd. – Command Papers.
 Colby, ‘War Crimes’ – Colby, ‘War Crimes’, *Mich. L.R.*, vol. 23 (1924–1925), pp. 482–511, 606–634.
C.R. Report – Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties – Report, 29 March 1919 – *A.J.I.L.*, vol. 14 (1920), pp. 95–154.
C.Y.B.I.L. – Czechoslovak Yearbook of International Law.
Dalloz – Recueil Dalloz (Analytique et Critique) de Doctrine de Jurisprudence et de Législation.
 Donnedieu de Vabres, ‘Nuremberg’ – Donnedieu de Vabres, ‘Le Procès de Nuremberg devant les Principes Modernes du Droit Pénal International’, *R.A.D.I.*, vol. 70 (1947), pp. 477–582.
 ECOSOC – Economic and Social Council.
 Eustathiades, ‘Ordres’ – Eustathiades, ‘Quelques Aspects de la Jurisprudence concernants les Criminels de Guerre: l’Exception des Ordres Reçus et Autres Moyens de Défense Similaires’, *Gegenwartsprobleme des Internationalen Rechtes und der Rechtsphilosophie* (1953), pp. 395–421.
 Finch, ‘Superior Orders’ – Finch, ‘Superior Orders and War Crimes’, *A.J.I.L.*, vol. 15 (1921), pp. 440–445.
For. Aff. – Foreign Affairs.
 G.A. – General Assembly.
 Garner, ‘Articles’ – Garner, ‘Recent Important Articles from Scientific Journals’, *A.P.S.R.*, vol. 14 (1920), pp. 137–143.
 Garner, *International Law* – Garner, *International Law and the World War* (1920).
 Garner, ‘Punishment’ – Garner, ‘Punishment of Offenders against the Laws and Customs of War’, *A.J.I.L.*, vol. 14 (1920), pp. 70–94.
German Views – Nuremberg, German Views of the War Trials (ed. by Benton and Grimm, 1955).
 Glaser, *Introduction* – Glaser, *Introduction à l’Etude du Droit International Pénal* (1954).
 Glaser, ‘L’Ordre’ – Glaser, ‘L’Ordre Hiérarchique en Droit Pénal International’, *R.D.P.C.*, vol. 33 (1952–1953), pp. 283–330.

Glaser, 'Nuremberg' – Glaser, 'La Charte du Tribunal de Nuremberg et les Nouveaux Principes du Droit International', *R.P.S.*, vol. 63 (1948), pp. 13–38.

G.L.J. – Georgetown Law Journal.

Glueck, *War Criminals* – Glueck, *War Criminals, their Prosecution and Punishment* (1944).

Graven, 'Code' – Graven, 'Principes Fondamentaux d'un Code Répressif des Crimes contre la Paix et la Sécurité de l'Humanité', *I.L.R.*, vol. 28 (1950), pp. 173–204, 361–392.

Graven, 'Crimes' – Graven, 'Les Crimes contre l'Humanité', *R.A.D.I.*, vol. 76 (1950), pp. 433–607.

Gros, *Symposium* – Gros, Address in a Symposium on the subject of 'The Responsibility of Governments and their Agencies in International Law', *Mishpat Vekalkala*, vol. 1 (1955), pp. 130–151.

Higgins – Hall, *International Law* – Hall, *A Treatise on International Law* (8th ed., by Higgins, 1924).

History of U.N.W.C.C. – *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948).

H.L.R. – Harvard Law Review.

I.C.L.Q. – International and Comparative Law Quarterly.

I.L.A. – Reports of the Conferences of the International Law Association.

I.L.C. – International Law Commission.

I.L.R. – International Law Review (Revue de Droit International, de Sciences Diplomatiques et Politiques).

I.L.Q. – International Law Quarterly.

I.M.T. – *Trial of the Major War Criminals before the International Military Tribunal*.

Int. Aff. – International Affairs.

Int. Con. – International Conciliation.

International Conference – *International Conference on Military Trials, London, 1945* (ed. by Jackson, 1949).

J.C.L.C. – Journal of Criminal Law and Criminology.

J. Rev. – Juridical Review.

J.S.C.L.I.L. – Journal of the Society of Comparative Legislation and International Law.

J.Y.B.I.L. – Jewish Yearbook of International Law.

Kelsen, 'Acts of State' – Kelsen, 'Collective and Individual Responsibility for Acts of State in International Law', *J.Y.B.I.L.*, 1948, pp. 226–239.

Kelsen, *Peace* – Kelsen, *Peace through Law* (1944).

Kelsen, *Principles* – Kelsen, *Principles of International Law* (1952).

Kelsen, 'Responsibility' – Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals', *C.L.R.*, vol. 31 (1942–1943), pp. 530–571.

Kelsen, *Theory* – Kelsen, *General Theory of Law and State* (3rd printing, 1949).

Lauterpacht, 'War Crimes' – Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', *B.Y.B.I.L.*, vol. 21 (1944), pp. 58–95.

Lauterpacht – Oppenheim, *International Law* – Oppenheim, *International Law, a Treatise* (5th ed. *et seq.* by Lauterpacht).

L.G.R. – Lawyers Guild Review.

Liang, 'Notes' – Liang, 'Notes on Legal Questions concerning the United Nations: The Second Session of the International Law Commission: Review of its Work by the General Assembly', *A.J.I.L.*, vol. 45 (1951), pp. 509–525.

L.Q.R. – Law Quarterly Review.

L.R.U.N.W.C.C. – *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission* (1947–1949).

- Mérignhac, 'Sanction' – Mérignhac, 'De la Sanction des Infractions au Droit des Gens Commises, au Cours de la Guerre Européenne, par les Empires du Centre', *R.G.D.I.P.*, vol. 24 (1917), pp. 5–56.
- Mich. L.R.* – Michigan Law Review.
- Minn. L.R.* – Minnesota Law Review.
- Mod. L.R.* – Modern Law Review.
- Morgan, *Assize* – Morgan, *The Great Assize, an Examination of the Law of the Nuremberg Trials* (1948).
- Morgan, 'Nuremberg' – Morgan, 'Nuremberg and After', *Q. Rev.*, vol. 285 (1947), pp. 318–336, 605–625.
- N.L.G. Report* – National Lawyers Guild – Report Adopted by the National Executive Board on the Punishment of War Criminals, 16 December 1944 – *L.G.R.*, vol. 4 (1944), pp. 18–23.
- N.M.T.* – *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, 1946–1949* (1950).
- O.R. – Official Records.
- People's Verdict* – *The People's Verdict, a Full Report of the Proceedings at the Krasnodar and Kharkov German Atrocity Trials*.
- Phillipson – Wheaton, *International Law* – Wheaton, *Elements of International Law* (5th English ed., rev. enl. and rewritten by Phillipson, 1916).
- P.S.Q.* – Political Science Quarterly.
- Q. Rev.* – Quarterly Review.
- R.A.D.I.* – Recueil des Cours de l'Académie de Droit International.
- R.D.I.L.C.* – Revue de Droit International et de Législation Comparée.
- R.D.P.C.* – Revue de Droit Pénal et de Criminologie.
- Red Cross Commentary* – *Commentary on the Geneva Conventions of 12 August 1949* (ed. by Pictet, 1952).
- R.G.D.I.P.* – Revue Générale de Droit International Public.
- R.I.D.P.* – Revue Internationale de Droit Pénal.
- R.P.D.P.* – Revue Pénitentiaire et de Droit Pénal (Bulletin de la Société Générale des Prisons).
- R.P.S.* – Revue Pénale Suisse (Schweizerische Zeitschrift für Strafrecht).
- R.S.C.D.P.C.* – Revue de Science Criminelle et de Droit Pénal Comparé.
- Sack, 'Punishment' – Sack, 'Punishment of War Criminals and the Defence of Superior Order', *L.Q.R.*, vol. 60 (1944), pp. 63–68.
- Sack, 'Superior Order' – Sack, 'War Criminals and the Defense of Superior Order in International Law', *L.G.R.*, vol. 5 (1945), pp. 11–17.
- Schick, 'Nuremberg' – Schick, 'The Nuremberg Trial and the Development of an International Criminal Law', *J. Rev.*, vol. 59 (1947), pp. 192–207.
- Schick, 'War Criminals' – Schick, 'War Criminals and the Law of the United Nations', *T.L.J.*, vol. 7 (1947–1948), pp. 27–67.
- Schwarzenberger, 'Inductive Approach' – Schwarzenberger, 'The Inductive Approach to International Law', *H.L.R.*, vol. 60 (1946–1947), pp. 539–570.
- Schwarzenberger, *Lawlessness* – Schwarzenberger, *International Law and Totalitarian Lawlessness* (1943).
- Schwarzenberger, 'War Crimes' – Schwarzenberger, 'War Crimes and the Problem of an International Criminal Court', *C.X.B.I.L.*, 1942, pp. 67–88.
- S.G. Memorandum* – Memorandum Submitted by the Secretary General of the United Nations on the Charter and Judgment of the Nürnberg Tribunal, History and Analysis, 3 March 1949 (A/CN.4/5).
- S.J.L.R.* – St. John's Law Review.

- H. Smith, 'Nuremberg' – H. Smith, 'The Nuremberg Trials', *Free Europe*, vol. 13 (1946), pp. 201–204.
- Spiropoulos, 'Code (1st Report)' – Spiropoulos, '(First) Report on a Draft Code of Offences against the Peace and Security of Mankind', 26 April 1950 (A/CN.4/25) – *I.L.C. Yearbook*, 1950, vol. 2, pp. 253–278.
- Spiropoulos, 'Code (2nd Report)' – Spiropoulos, 'Second Report on a Draft Code of Offences against the Peace and Security of Mankind', 12 April 1951 (A/CN.4/44) – *I.L.C. Yearbook*, 1951, vol. 2, pp. 43–69.
- Spiropoulos, 'Code (3rd Report)' – Spiropoulos, 'Third Report relating to a Draft Code of Offences against the Peace and Security of Mankind', 30 April 1954 (A/CN.4/85) (mimeographed).
- Spiropoulos, 'Principles' – Spiropoulos, 'Report on the Formulation of the Nürnberg Principles', 12 April 1950 (A/CN.4/22) – *I.L.C. Yearbook*, 1950, vol. 2, pp. 181–195.
- Tex. L.R.* – Texas Law Review.
- T.G.S.* – (Transactions of) Grotius Society.
- T.L.J.* – University of Toronto Law Journal.
- T.L.R.* – Tulane Law Review.
- V.L.R.* – Virginia Law Review.
- W.C.T.S.* – War Crimes Trials Series (ed. by Maxwell-Fyfe, 1948–1951).
- Winfield – Lawrence, *International Law* – Lawrence, *The Principles of International Law* (7th ed., rev. by Winfield, 1931).
- Y.B.W.A.* – Year Book of World Affairs.

UNITED NATIONS DOCUMENT SYMBOLS

- A – General Assembly.
- AC – Ad Hoc Committee.
- BUR – General Committee of the General Assembly.
- C – Committee.
- CN – Commission.
- E – Economic and Social Council.

POSTSCRIPT PREFACE FOR REPRINTED EDITION

1. PROLEGOMENA

A.

The book reprinted here is based on a doctoral thesis submitted to the Hebrew University in Jerusalem and approved in 1964. In 1965, the dissertation was published in Hebrew (by Magnes Press) and later in English (by A.W. Sijthoff in Leiden). The English version drew quite a few positive reviews worldwide in diverse languages. Over the years, it has been cited and quoted extensively in scholarly literature and also in judgments delivered by courts (notably, the Supreme Court of Canada).¹

I must confess that not every citation of the book has uniformly elated me. On various occasions, I discovered to my consternation that my message did not get across. I felt that I needed an opportunity to recapitulate in a more limpid fashion my views on sundry thorny issues. The notion of producing some sort of a postscript, highlighting the gist of my thesis and adding a terse update, therefore attracted me long ago.

The trouble was that by the time I came to entertain these thoughts, Sijthoff had virtually disappeared from the international legal scene. Thus matters stood for almost half a century. Then, in 2011, an exceedingly complimentary review essay appeared in the *Journal of International Criminal Justice* by Professor Robert Cryer of the University of Birmingham² (whom I had not even met at that stage). The review ends with a strong recommendation for reissuing the book. There was a ripple effect, and John Louth, Editor-in-Chief of Academic Law Books at Oxford University Press, took up the challenge. Here is the result.

B.

The genesis of my interest in the plea of obedience to superior orders was a Master's thesis that I wrote at the Hebrew University in 1958.

1. *R v Finta* (1994) 112 *Dominion Law Reports* (4th Series) 513.

2. R. Cryer, 'Superior Scholarship on Superior Orders', (2011) 9 *Journal of International Criminal Justice*, pp. 959-72.

My chosen theme was the historical Judgment rendered by the International Military Tribunal at Nuremberg in 1946. I graduated *summa cum laude* and was much encouraged by my supervisor, Professor Nathan Feinberg, to continue with the research on Nuremberg and its legal repercussions. When (a year later) I enrolled as a candidate for the doctoral degree, I knew that I wanted to examine more closely the defence pleas raised by counsel for the accused at Nuremberg and rejected by the International Military Tribunal. What I was less confident about was which aspect of the defence strategy I wanted most to tackle: initially I toyed with the idea of concentrating on the 'act of State' doctrine. In any event, I did not advance too far with the project right away. I was otherwise engaged: as a law clerk at the Israel Supreme Court, and later a cadet at the Ministry of Foreign Affairs, serving simultaneously as an Assistant at the Hebrew University (not even in international law).

I got into my stride only in New York. In 1960, I accepted a generous offer of a scholarship enabling me to study full-time for the LL.M. degree in international law at the New York University School of Law. I graduated in 1961 and lingered in New York for another year under the aegis of the Israel Mission to the United Nations. Throughout the two-year period of my stay in the city, I tapped the rich lode of the NYU Law Library (complementing it, when a gap occurred, with the resources of other institutions nearby), delving into books and journals not then readily available in Israel. It must be kept in mind that in those days there were no digital data bases: even the Xerox photocopying technique was a recent invention. Ergo, everything had to be done manually. I filled dozens of hefty notebooks with longhand verbatim quotations from an abundance of sources—on both obedience to superior orders and the 'act of State' doctrine—plus ruminative (not always coherent) scrawls of my own on the back of almost every page.

Fortunately, the NYU Law School allowed me some independent research as part of my LL.M. requirements. I accordingly submitted an embryonic paper on obedience to superior orders to Professor Albert Garretson. The paper met with resounding success: Garretson even shared it with several colleagues and urged me to publish a properly edited modification as a law review article. I eventually declined on the ground that such a move would be premature, inasmuch as I still had to wrestle with a slew of difficulties with which the subject was fraught. But the positive response served to stoke my interest in forging ahead with this particular motif, discarding 'act of State'. When I returned to Israel in 1962, the Eichmann trial had just come to an end. If in 1959 obedience to superior orders

had only a tepid appeal to me, in 1962 I found it irresistible. Now that I was moderately familiar with the legal landscape, I felt that I could contribute to improving its architecture.

My old-new mentor at the Hebrew University, Feinberg (who had earlier tried to dampen my enthusiasm for ‘act of State’), warmly welcomed this development. We met regularly, and he was quite pleased with my progress reports about the wrinkles that I was in the process of ironing out in 1962/3. Feinberg’s sole, mildly phrased admonition was that I was gradually growing more iconoclastic in my dissection of treatises carrying the names of pre-eminent figures in the field of international law. It is true that doctoral students are supposed to demonstrate original thinking, he said, but perhaps I was overdoing it. I had to assure Feinberg of my genuine veneration (which has not abated to this day) for such revered names as Lassa Oppenheim and Hans Kelsen. Regrettably and with sincere due respect, after prolonged exploration of both theory and practice, I could not avoid disagreeing with their points of view regarding pivotal questions underlying my study. Feinberg did not persist, and I was given a free hand. Yet, when I submitted my final draft, the same issue was brought up *de novo* (with even greater emphasis) by one of the external examiners. I was not privy to the confidential exchange of views, but I have been reliably informed that it was only thanks to Feinberg that the dissertation was approved without alterations.

It was Feinberg who immediately thereafter submitted my disquisition to Magnes Press for publication in Hebrew. He also commenced to exert moral pressure on me—now that I had obtained my prerequisite doctoral degree—to forsake the foreign service and join the groves of Academe. After some meanderings on my part, I opted for the career realignment that he had set his mind on. I cherish his memory as my principal academic tutor.

As soon as the Hebrew manuscript was in the hands of the printers, I began recasting my thesis in English. Here I was lucky: at the Foreign Ministry I got to know Ambassador Max Nurock, then the *arbiter elegantiae* in charge of English recension of all the Ministry’s communiqués. He kindly took me under his wing, going through my *oeuvre* and showering on me indispensable guidance concerning the intricacies of English usage and style. Ever since, when I write in English, I have his didactic image vividly engraved on my mind.

Upon completion of the English redaction, I turned to Ambassador Shabtai Rosenne who had been for a while my superior in

the Foreign Ministry and who became another life-long mentor (I subsequently had the privilege of editing a *Festschrift* in his honour).³ Rosenne liked what he saw, took the initiative, and got the book accepted for publication by Sijthoff. He even volunteered to add a short introduction by way of endorsement.

I only wish that Feinberg, Rosenne, Garretson, and Nurock could have seen this handsome new edition.

11. THE *MENS REA* PRINCIPLE

The main thrust of the present study was to propose a new outlook on the age-old problem of obedience to superior orders, which has served as an excuse for countless subordinates (whether military or civilian) accused of war crimes.⁴ I advocated my innovative approach as a substitute for two diametrically opposed precepts that had dominated the scene heretofore. The older school of thought, associated with the name of Oppenheim, was *respondeat superior*, whereby obedience to superior orders constitutes a full defence in war crimes trials, bringing about an automatic transference of accountability from the subordinate to his commanders (see pp. 38–48)⁵. At the other end of the spectrum stood the more contemporary postulate of absolute liability, according to which obedience to superior orders should play no role at all in appraising the guilt of the defendant in the dock, regardless of any defence plea put forward (see pp. 68–75). The latter doctrine gained the upper hand in the formulation of Article 8 of the 1945 London Charter of the International Military Tribunal, the linchpin of the proceedings at Nuremberg (see pp. 117–18). Contrary to what many scholars seem to believe, when the Tribunal delivered its Judgment the following year, it sustained *in toto* this stern posture (see p. 156).

After protracted inner struggles, I felt compelled to brandish a new banner. This was not a neutral, a-plague-on-both-your-houses, stance. I utterly sympathized with the desire of the proponents of absolute liability to make short shrift of *respondeat superior*. The insight that my research provided was that obedience to superior orders

3. Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989).

4. The plea of obedience to superior orders can be (and has been) invoked with respect to other international crimes, not only war crimes (see p. 1). For reasons of simplicity, I shall refer generically to war crimes in this Postscript Preface.

5. Citations of Arabic numbered pages are linked to the pages of the reprinted edition. Roman numbers interconnect with the sections of the Postscript Preface.

could not qualify as an admissible defence relieving the perpetrator of a crime from personal accountability. But I was unable to come to terms with the rigidity of absolute liability, notwithstanding the imprimatur stamped on it by the International Military Tribunal. I arrived at the conclusion that, when later jurisprudence is probed in depth, many of the judgments may be construed in a manner conducive to a more nuanced perspective which I called 'the *mens rea* principle'. I crafted this principle in the following way:

'the fact of 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' (see p. 88).

Obviously, in 1965, the *mens rea* principle could merely be advanced as a novel conception, striving to finesse the post-World War II legal developments by pushing the boundaries of absolute liability. I could not contend that this construct had already entrenched itself in the existing jurisprudence. All that I submitted was that the principle was reconcilable with critical segments of both theory and practice (see pp. 88, 214).

After publication of the book, the *mens rea* principle found favour with a fairly large number of scholars, but there was no resonant approbation of my way of thinking in the case law. Then, in 1997, in *Erdemović*, the Joint Separate Opinion of Judges McDonald and Vohrah—speaking for the majority of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY)—stated unequivocally:

'We subscribe to the view that obedience to superior orders does not amount to a defence *per se* but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out.'⁶

Surprisingly, although the present book was referred to in another context by another judge in *Erdemović* (see section VI below), no direct credit was given where credit was due.⁷ All the same, there is such a

6. *Prosecutor v. Erdemović* (Sentencing Appeal) (ICTY, Appeals Chamber, 1997), 111 *International Law Reports* 298, 333.

7. Let it be recorded, however, that a month before the *Erdemović* judgment was rendered, Judge McDonald had invited me to contribute the chapter on defences ('specifically superior orders, duress and official position') to a multi-volume tome that she was going to publish on international criminal law, alerting me to the forthcoming *Erdemović* decision and promising to send me the judges' opinions as soon as they were made public. In that chapter, I overtly drew attention to the origin of the *Erdemović* locution on obedience to superior orders. See Y. Dinstein, 'Defences', in G.K. McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of*

degree of correspondence between the language in which the passage as quoted is couched and my own turn of phrase that no room for doubt is left about the provenance of the view to which the majority subscribed.

The quintessence of *mens rea* in international criminal law is irrefutable. Its centre-stage place as a *sine qua non* condition of every penal prosecution is enshrined in Article 30 of the Rome Statute of the International Criminal Court concluded in 1998: this provision (entitled '[m]ental element') rests on the two classical pillars of intent and knowledge.⁸

III. ARTICLE 33(1) OF THE ROME STATUTE

Following the general prescription of Article 30, the Rome Statute goes on to enumerate specific grounds for excluding criminal responsibility. Appropriately, Articles 31 and 32 (analysed in sections IV to VI below) dwell, inter alia, upon mistake of fact, mistake of law, and duress. However, then comes Article 33(1), which promulgates:

'1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a government or of a superior, whether military or civilian, shall not relieve that person of responsibility unless:

- (a) The person was under a legal obligation to obey orders of the government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful."⁹

What this clause implies is that, although, as a rule, obedience to superior orders does not qualify as a defence *per se*, an exceptional situation arises when three cumulative conditions are fulfilled. These are the existence of a legal obligation to obey orders, the lack of knowledge of the illegality of the order, and the fact that the order is not manifestly unlawful. Criminal accountability is then quashed on the ground of obedience to superior orders as such.

Suffice it to juxtapose the Rome text with the Nuremberg Principles, outlined by the International Law Commission in 1950 (see p. 237), to realize that Article 33(1) represents a complete break with

International Criminal Law: The Experience of International and National Courts, vol.1, pp. 371, 379 (2000).

8. Rome Statute of the International Criminal Court, 1998, [1998] *United Nations Juridical Yearbook* 294, 310.

9. *Ibid.*, 311.

the Nuremberg legacy of absolute liability. As may be expected, there have been adaptations of the law governing obedience to superior orders over the decades since Nuremberg. But, when these are stitched together, the dissonant note struck by Article 33(1) becomes even more grating. In 1996, the International Law Commission presented the final version of the Draft Code of Crimes against the Peace and Security of Mankind, where it basically reiterated the language of Article 8 of the London Charter.¹⁰ More poignantly, the Security Council set forth in 1993–4 the Statutes of two ad hoc international criminal tribunals, one for the former Yugoslavia (ICTY) and the other for Rwanda (ICTR). In both Statutes there are lucid parallel stipulations on obedience to superior orders (Article 7(4) of the ICTY Statute¹¹ and Article 6(4) of the ICTR)¹² following in the same footsteps. If that is not enough, Article 2 of the 1984 United Nations Convention against Torture lays down *tout court* that '[a]n order from a superior officer or a public authority may not be invoked as a justification of torture'.¹³

When all the pre-1998 paraphrases are adumbrated as a backdrop for Article 33(1), it is not easy to figure out where this bolt from the blue came from.¹⁴ But, curiously, similar constituent elements (looked at from an inverse baseline angle) appear in the following instructions given by the military judge in the American court-martial proceedings in the Vietnam War (My Lai) *Calley* case of 1971:

‘The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior’s order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.’¹⁵

10. Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission, 48th Session, [1996] II (2) *Yearbook of the International Law Commission* 17, 23 (Article 5).

11. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, (1993) 32 *International Legal Materials* 1163, 1175.

12. United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda, (1994) 33 *International Legal Materials* 1598, 1605.

13. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, [1984] *United Nations Juridical Yearbook* 135, 136.

14. Technically, it came from the Preparatory Committee on the Establishment of the International Criminal Court. See O. Triffterer, ‘Superior Orders and Prescription of Law’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn, pp. 915, 919 (2008).

15. ‘Court-Martial of William L. Calley, Jr., 1971’, in L. Friedmann (ed.), *The Law of War: A Documentary History*, vol. 2, pp. 1703, 1722 (1972).