

Chapter 2

Before the Adoption of the Nuremberg Charter

Abstract This chapter first surveys the national legal situations of the countries that drafted the Nuremberg Charter before the end of World War II, in preparation for the examination of the Charter's preparatory work. It is observed that the national judicial precedents or military legal materials of these countries commonly recognized the possibility of immunization under the superior orders defense on certain conditions. On the other hand, the concurrent international rule-making on the issue of the superior orders defense was in its infancy. Although there were some international legal instruments adopted at the time, they did not fully contribute to the formulation of relevant international rules.

2.1 National Laws of the Drafting Countries of the Nuremberg Charter

As a preliminary step for the examination of the Nuremberg Trial, this section seeks to grasp the legal situations of the countries that drafted the Nuremberg Charter – the United States, the United Kingdom, France, and the Soviet Union. The outcome of the examination described below is probably what influenced the debates of the drafters of the Nuremberg Charter or, what the drafters intentionally overlooked.

2.1.1 *The Defense of Superior Orders in the United Kingdom*

Studies that have analyzed domestic laws on the superior orders defense in the United Kingdom have often highlighted that the relevant provision of the British Manual of Military Law was drastically revised during World War II.¹ They

¹For instance, G. Williams, *Criminal Law, The General Part*, 2nd ed. (London: Stevens & Sons, 1961), 299–300; L. Green, 'Superior Orders and the Reasonable Man', *Canadian Yearbook of International Law* (1970): 81–3; B. Röling, 'Criminal Responsibility for Violations of the Laws of War', *Revue belge de droit international* 12 (1976): 18 L. Green, 'Superior Orders and Command Responsibility', *Canadian Yearbook of International Law* (1989): 176–80.

underline the fact that the Manual abolished the notion of automatic immunity on the ground of superior orders in its 1944 edition and vested it with only an effect of conditional immunity along with mitigation of punishment. However, this revision cannot be said to have reflected the overall development of legal situations in the United Kingdom. The precedents laid down by the civil courts of this country, irrespective to the revision of the Manual, had already shown a certain trend by the time. The revision of the Manual in 1944, as will be seen below, was rather a recurrence to the general trend of judicial practice in the United Kingdom.

Before the end of World War II, there had been few judicial precedents dealing with the issue of the superior orders defense in British civil courts, especially in military affairs. N. Dunbar commented on this fact:

The few relevant cases leave one with the impression that English Courts, especially in the early part of last century [nineteenth century], did not welcome litigation involving an examination of military affairs or which might set an unhealthy precedent by encouraging members of the armed forces to air their grievances in public and to bring actions tending to impair respect for military discipline.²

In these circumstances, commentators often refer to the judgment of the Supreme Court of the Cape of Good Hope (South Africa) on the case of *Queen v. Smith* as an authority on the issue of the superior orders defense.³ Academic arguments that criticize the Manual's provision before its revision in 1944 generally stand on the ground of the *Smith* judgment.⁴

In the following section, we will survey the relevant judicial precedents of British civil courts, and contrapose them to the revision of the Manual of Military Law.

2.1.1.1 Judicial Precedents in the United Kingdom

As stated above, up to the mid-twentieth century, the judicial precedents of British civil courts dealing with the issue of the superior orders defense in military affairs

²N. Dunbar, 'Some Aspects of the Problem of Superior Orders in the Law of War', *Judicial Review* 63 (1951): 238. Other arguments that pointed out a paucity of relevant judicial precedents of the United Kingdom include C. Kenny, *Outlines of Criminal Law*, 15th ed. (Cambridge: Cambridge University Press, 1936), 81; Williams, *supra* n. 1, at 297. Battle further drew attention to the inconsistency among those limited number of judicial precedents. (G. Battle, 'The Trial before the Leipsic Supreme Court of Germans Accused of War Crimes', *Virginia Law Review* 8 (1921): 21–2).

³For instance, H. Stephen, 'Superior Orders as Excuse for Homicide', *Law Quarterly Review* 17 (1901): 87–9; Dunbar, *supra* n. 2, at 239–40; K. Kittichaisaree, *International Criminal Law* (New York; London: Oxford University Press, 2001), 266.

⁴H. Bellot, 'War Crimes: Their Prevention and Punishment', *Transactions of Grotius Society* 2 (1917): 45–8; Address by Lord Cave, Minutes of the Proceedings of the Seventh Annual General Meeting, *Transactions of the Grotius Society* 8 (1923): xxiii; S. Glueck, *War Criminals, Their Prosecution & Punishment* (New York: Alfred A. Knopf, 1944) 149–50; Green, *supra* n. 1, 'Reasonable Man', at 78–83.

were considerably limited. Further, the views expressed in the relevant precedents had not been standardized.

For instance, there was a judgment that recognized immunity by the fact of superior orders in some cases. The judgment in *Keighly v. Bell*, which was a civil case in the late nineteenth century treating false imprisonment by a military person, showed such an idea:

Were I compelled to determine that question, I should probably hold that the orders are an absolute justification in time of actual war – at all events, as regards enemies, or foreigners – and, I should think, even with regard to English-born subjects of the Crown, unless the orders were such as could not legally be given. I believe that the better opinion is, that an officer or soldier, acting under the orders of his superior – not being necessarily or manifestly illegal – would be justified by his orders.⁵

This judgment expressed the view that superior orders were to be recognized as immunizing factors where the conduct in question had not been manifestly illegal.⁶

On the other hand, other judgments denied immunity on the ground of superior orders, for example, the judgment in *Rex v. Thomas*. In this case of murder by an English marine, the court convicted the accused by rejecting the jury's view that the accused was carrying out his duty.⁷

In these circumstances, many commentators evaluate the 1900 judgment in *Smith* as an authoritative view.⁸ The judgment was made by the Supreme Court of the Cape of Good Hope, a special court of the colony of the British Empire at the time. The accused, a private soldier, was charged with the murder of a local who had not immediately obeyed his order. The accused asserted that he had acted in obedience of his superior's orders. The Supreme Court admitted this assertion, reasoning that the superior orders defense could be recognized under the conditions of a lack of the knowledge of the illegality of his/her conduct and a lack of manifest illegality of the conduct in question⁹:

I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he

⁵*Keighly v. Bell* (1866), 4 F&F 763, 790, 176 ER 781, 793.

⁶Lauterpacht quoted *Keighly v. Bell* as representing concurrent judicial precedents in the United Kingdom. See H. Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', *British Yearbook of International Law* 21 (1994): 72.

⁷Dunbar, *supra* n. 2, at 239; J. Turner, *Russell on Crime*, 12th ed., vol. 1 (London: Stevens, 1964), 87–8. Regarding to this case, see *Rex v. Thomas* (1816), 4 M&S 441, 105 ER [KB] 897.

⁸See the academic arguments referred to in Footnotes 3 and 4 of this chapter.

⁹Although the judgment of *Keighly v. Bell* used the word 'justification' whereas the *Smith* judgment made use of the expression 'excuse', it is not required to strictly differentiate the notion of a justification from that of an excuse in British criminal law (J. Smith, *Justification and Excuse in the Criminal Law* (London: Stevens, 1989), 7–8). As both the notions of a justification and of an excuse are included in the notion of 'defense' (*ibid.*, 1; M. Allen, *Textbook on Criminal Law*, 8th ed. (Oxford; New York: Oxford University Press, 2005), 158–9), it does not seem to be necessary to pay attention so much to the difference of the terminology of the judgments in question.

must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer.¹⁰

This view resembles the judgment given in *Keighly v. Bell*. The *Smith* judgment underlined the importance of military discipline as the ground for recognizing the superior orders defense. The court explained that it would be a subversion of military discipline if a soldier hesitated in obeying orders, although ‘it is monstrous to suppose that a soldier would be protected where the order is grossly illegal’.¹¹ The court concluded that immunizing a soldier who had obeyed ‘not necessarily or manifestly illegal’ orders was ‘a well-established principle of law’.¹² The judgment in *Smith* mentioned that the *Keighly v. Bell* judgment had shown this ‘principle of law’. This is the principle of conditional immunity. A difference between these two judgments was that the *Smith* judgment, in contrast to the other judgment, limited the possibility of immunity by also considering subjective factors such as the ‘knowledge’ of the accused. This rule denoted in the *Smith* judgment would be an exception in common law, which generally does not recognize a mistake of law as an immunizing factor.¹³

The judgment given in *Smith*, which represented a ‘well-established principle of law’, has been upheld by many commentators. Nonetheless, this precedent cannot be deemed binding in the United Kingdom under the doctrine of precedent (*stare decisis*).¹⁴ Moreover, commentators have not clarified why *Smith* should be recognized as a leading case.¹⁵ In fact, the judgments of the Dominions and other units of the British Empire had sometimes been attached importance as ‘persuasive precedents’¹⁶ or ‘authorities’.¹⁷ However, high esteem for the *Smith* judgment seems, after all, as Hugh Bellot pointed out,¹⁸ owing to the fact that it had been the only

¹⁰17 Cape Rep. (1900) 561, 568.

¹¹*Ibid.*, 566–7.

¹²*Ibid.*, 568.

¹³J. Appleman, *Military Tribunals and International Crimes* (Indianapolis: Bobbs-Merrill Company, Inc., 1954), 59; Allen, *supra* n. 9, at 91–2. Regarding this point, German *Criminal Code* recognizes a mistake of law as an exempting factor if the mistake in question was unavoidable (§17, *Strafgesetzbuch*). It is also the case with criminal laws of other countries that have been influenced by German criminal law. (M. Osiel, ‘Obeying Orders: Atrocity, Military Discipline, and the Law of War’, *California Law Review* 86 (1998): 960). On the variety of academic arguments and judicial precedents in Japan, see N. Nishida, *Keihō Sōron (Criminal Law, General Part)* (Tokyo: Kōbundō, 2006), 222–30.

¹⁴With regard to the judicial precedents of the Dominions and colonies of the British Empire, *stare decisis* in relation to judicial organs of the United Kingdom only matters with the precedents of the Privy Council (K. Takayanagi, *Eibeiōgen Riron (Theory of the Source of Anglo-American Law)* (Tokyo: Yūhikau, 1938), 97–8; C. Allen, *Law in the Making*, 6th ed. (Oxford: Clarendon Press, 1958), 243–5; H. Tanaka, *Eibeiō Sōron (Introduction to Anglo-American Law)*, vol.2 (Tokyo: University of Tokyo Press, 1980), 477.

¹⁵See, for instance, Glueck, *supra* n. 4, at 149–50.

¹⁶Takayanagi, *supra* n. 14, at 98.

¹⁷Allen, *supra* n. 14, at 260–61.

¹⁸Bellot, *supra* n. 4, at 47–8. See also Dunbar, *supra* n. 2, at 239.

judicial precedent dealing with the issue of the superior orders defense at the time. A more important case from the viewpoint of the doctrine of precedent would be, as Hersch Lauterpacht denoted, the *Keighly v. Bell* case.¹⁹ However, this was a judgment on a civil case and it would not be appropriate to consider its judgment as directly applicable to criminal cases.

Thus, the judgment given in *Smith* cannot be deemed indisputably established as a leading case in the United Kingdom. On the other hand, there were no relevant precedents during the time in question, whereas *Smith* had been positively evaluated by many commentators. All in all, one can possibly regard the judgments in *Smith* and *Keighly v. Bell* as indicating a concurrent trend in the opinions of the civil courts of the United Kingdom to some extent – that is, a trend to recognize the superior orders defense under the criteria of ‘knowledge of illegality’ and/or ‘manifest illegality’. It can be said that, although the judicial precedents of the United Kingdom had not been fully established on the issue of the superior orders defense, it had given certain direction until World War II.

2.1.1.2 Oppenheim’s *International Law* and the British Manual of Military Law

Oppenheim and the Manual of 1914

The British Manual of Military Law of 1914 recognized automatic immunity under the superior orders defense. The British Manual was drawn up in 1884 by the Parliamentary Counsel Office under the request of the Secretary of State for War. It surveyed the Army Act, 1881, the Rules of Procedure, and the history of military law and organizations.²⁰ The Manual first provided for the superior orders defense in its 1914 edition.²¹ Its previous fifth edition of 1907 shelved relevant provisions in light of the fact that important issues of international law had just been considered at the Hague Conference.²² Its fourth edition of 1899 contained no provisions on the superior orders defense.²³

Section 443 of the Manual of 1914 in principle approved the punishment of enemy soldiers who carried out state acts. However, the provision did not recognize acts committed under superior orders as war crimes:

¹⁹Lauterpacht, supra n. 6, at 72.

²⁰‘Preface to the First Edition’, in War Office, *Manual of Military Law* (London: Printed for His Majesty’s Stationery Office by Harrison and Sons, 1899), iii.

²¹Bellot, supra n. 4, at 47; Glueck, supra n. 4, at 150; Lauterpacht, supra n. 6, at 69.

²²‘Note’, in War Office, *Manual of Military Law* (London: Printed for His Majesty’s Stationery Office by Harrison and Sons, 1907), 222.

²³War Office, *Manual of Military Law* (London: Printed for His Majesty’s Stationery Office by Harrison and Sons, 1899).

members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government or by their commander are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress [complaints, good offices, reprisals, and so forth] which are dealt with in this chapter.²⁴

This provision was elaborated on by Brigadier-General Sir James Edmonds. Edmonds, as per the decision of the Secretary of State for War, sought Lassa Oppenheim's opinions on the Manual before its publication.²⁵

Oppenheim, in the first edition of his *International Law, Vol. 2, War and Neutrality*, stated the following on the orders of the government or superiors:

Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations *by order* of their Government, they are not war criminals and 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 cannot be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.²⁶

The third edition of Oppenheim's *International Law* in 1921 emphasized that the reason for recognizing the superior orders defense was the existence of compulsion by law: 'The law cannot require an individual to be punished for an act which he was compelled by law to commit'.²⁷ Violations of the laws of war committed under the orders of governments or superiors shall not be deemed as war crimes; only the person who committed such illegal acts without any orders may be punished by adversaries.²⁸ The rule of the British Manual of Military Law which recognized automatic immunity under the superior orders defense can be said to have reflected this view of Oppenheim at the time.²⁹

²⁴War Office, *Manual of Military Law* (London: Printed for His Majesty's Stationery Office by Harrison and Sons, 1914), Art. 443.

²⁵Lord Hankey's Speech, *Parliamentary Debates, House of Lords* 168 (19 July 1950): 467.

²⁶L. Oppenheim, *International Law, vol.2, War and Neutrality* (London: Longmans, Green and Co., 1906), 264–5.

²⁷L. Oppenheim, *International Law*, 3rd ed. by R. Roxburgh, vol.2, *War and Neutrality* (London: Longmans, 1921), 343. Its fourth and fifth editions expressed the same argument (L. Oppenheim, *International Law*, 4th ed. by A. McNair, vol.2, *Disputes, War and Neutrality* (London: Longman, Green, 1926) 410; L. Oppenheim, *International Law*, 5th ed. by H. Lauterpacht, vol.2, *Disputes, War and Neutrality* (London: Longmans, Green, 1935) 454).

²⁸Oppenheim, *supra* n. 26, at 264.

²⁹It is the common understanding among commentators that the provision on the superior orders defense in the Manual reflected the view of Oppenheim. *See* Bellot, *supra* n.4, at 46; Lauterpacht, *supra* n. 6, at 69; Dunbar, *supra* n. 2, at 242; Green, *supra* n. 1, 'Reasonable Man', at 81.

Revision of the Manual in 1944

A considerable number of concurrent commentators were critical of the Manual provision that recognized automatic immunity under the superior orders defense. The criticism reflected the view of British civil courts, which had developed but not yet established certain trend by that time.³⁰ Some commentators who pointed out the disparity between the Manual provision and British judicial precedents also asserted that the Manual did not hold any legal effect or official authority.³¹

Meanwhile, Coleman Phillipson criticized the Manual from the viewpoint of the necessity of punishing war crimes:

It has been contended in some quarters that a combatant's acts, no matter how heinous, outrageous, and abominable, do not possess a criminal character if they are committed under orders from superior officers. But this argument carried to its logical conclusion would lead to ineptitude and absurdity; the successive shifting of responsibility would exculpate every one until we reached the ultimate cause – in the case of Germany let us say, for example, the Kaiser.³²

Phillipson implied that the superior orders defense should not be recognized in principle so that it does not impede punishments for war crimes. However, he termed the conduct as 'heinous, outrageous, and abominable' and did not necessarily deny the superior orders defense for acts whose illegality was not manifest. His view was surely critical of the relevant provision of the Manual. But it did not apparently conflict with the trend of the British judicial precedents,³³ which conditionally allowed the superior orders defense on the test of manifest illegality.

A fatal blow to the 1914 edition of the Manual provision on the superior orders defense was the report of the British Government Committee of Enquiry into 'War Crimes' of 1918–1919 (Birkenhead Committee). The Committee reported that the relevant provision of the Manual did not have the authority and the Committee could not back the view expressed by the Manual.³⁴

It is noteworthy that the Birkenhead Committee report, along with Phillipson's view, possibly coincided with concurrent judicial precedents of British civil courts. That is, the report denied the superior orders defense only if the illegal conduct in question led to manifest violation of laws and customs of war.³⁵

³⁰See the academic arguments referred to in Footnote 4 of this chapter.

³¹Bellot, *supra* n. 4, at 46; Cave, *supra* n. 4, at xxiii.

³²C. Phillipson, *International Law and the Great War* (London: T. Fisher Unwin, 1915), 260–61.

³³See the judgment of *Keighly v. Bell* of 1866.

³⁴J. Morgan, 'Nuremberg and After', *Quarterly Review* 285 (1947): 330. The report of the Committee supported the 'Opinion' of Morgan which had been requested by Lord Birkenhead (*ibid.*, 329–30).

³⁵*Ibid.*

The notion of automatic immunity under the superior orders defense did not gain support, except in the military circle.³⁶ Under such circumstances, the editor of the sixth edition of Oppenheim's *International Law* of 1940, Lauterpacht, revised the description of the superior orders defense. He took a 180° turn on the relevant lines that had been maintained until the treatise's fifth edition of 1935. The sixth edition rejected the view adopted by the British Manual of Military Law, stating that 'it is difficult to regard it as expressing a sound legal principle':³⁷

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.³⁸

It is to be noted that the above quote uses the expression 'neither does it, *in principle*, confer upon the perpetrator immunity [italics by the author]'. It implies that the clause does not categorically reject the superior orders defense, which is parallel to the positions of Phillipson and the report of the Birkenhead Committee that criticized the 1914 edition of the British Manual. The sixth edition of *International Law* stated that when considering the issue of superior orders, it was necessary to take into account:

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.³⁹

Lauterpacht thus indicated the possibility of allowing the superior orders defense in exceptional cases. This view was also apparently in line with the trend that had been developed by the judicial precedents in the United Kingdom.

Oppenheim's *International Law* revised its description on the superior orders defense in 1940. In 1944, and in concert with this revision, the British Manual of Military Law was also revised. Both revisions were made after the outbreak of World War II. This change of course has been explained as a measure for preventing enemy soldiers from appealing for defense, which had conventionally been allowed for British soldiers.⁴⁰ Such a comment seems to stand to reason. However,

³⁶ Bellot, *supra* n. 4, at 47; G. Finch, 'Superior Orders and War Crimes', *American Journal of International Law* 15 (1921): 441. For instance, see the argument of Commander Graham Bower in G. Bower, 'The Laws of War: Prisoners of War and Reprisals', *Transaction of Grotius Society* 1 (1916): 24.

³⁷ L. Oppenheim, *International Law*, 6th ed. by H. Lauterpacht, vol.2, *Disputes, War and Neutrality* (London: Longman, Green & Co., 1940), 453–4.

³⁸ *Ibid.*, 453.

³⁹ *Ibid.*, 454.

⁴⁰ A. Knieriem, *The Nuremberg Trials* (Chicago: Henry Regnery Company, 1959), 246–9; H. Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht – Eine Studie zu den*

even if there were political motives behind the revision of the Manual, a consequence of the revision eventually conformed to the rule laid down by British courts.⁴¹ We should be careful about this point.

The opening of Section 443 of the Manual was revised to reflect verbatim the description of the sixth edition of Oppenheim/Lauterpacht's *International Law*.⁴² With respect to the exceptional cases where the superior orders defense would be recognized, Section 443 basically used the sixth edition of *International Law* verbatim.

Thus, it can be said that the notion of automatic immunity under the superior orders defense much reflected Oppenheim's view from the 1900s to the 1910s. However, such a notion did not conform to the judicial precedents of British civil courts. What the civil courts had been developing was the principle of conditional immunity on the tests of the knowledge of illegality and/or manifest illegality. In consequence, and against the background of a change in circumstances caused by the outbreak of war, the Oppenheim's view and the British Manual of 1914, which reflected his view, were much criticized. Eventually, Oppenheim's treatise and the Manual were amended in 1944. It can be said that in the United Kingdom, the prevalent view on the superior orders defense toward the end of World War II was the principle of conditional immunity on the tests of the knowledge of illegality and/or manifest illegality.

Such a change in the legal situations in the United Kingdom led to a similar change in the United States to some extent. However, the development of judicial precedents on the superior orders defense in the latter bore independent characteristics. It was rather substantial in contrast to the case of the United Kingdom.

2.1.2 Superior Orders Defense in the United States

As discussed above, the British Manual of Military Law was revised just before the end of World War II in reflecting the trend of British civil courts. Almost the same can be said about the United States' Rules of Land Warfare. Moreover, as in the British case, critics of the US Rules before their revision based their arguments on the judicial precedents of US civil courts.⁴³

As the British judicial precedents up to the end of the war had been limited, it was difficult to even identify the standpoint of courts on the superior orders defense.

Nürnberger Prozessen – (Bonn: Ludwig Röhrscheid Verlag, 1952), 260. See also Parliamentary Debates, House of Lords 168 (19 July 1950): 442.

⁴¹Glaser drew attention to this point. See S. Glaser, 'L'ordre hiérarchique en droit pénal international', *Revue de droit pénal et de criminologie* 33 (1952–3): 294–8.

⁴²The United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948), 282.

⁴³Glueck, *supra* n. 4, at 140–49; J. Berger, 'The Legal Nature of War Crimes and the Problem of Superior Command', *American Political Science Review* 38 (1944): 1203; Dunbar, *supra* n. 2, at 240–43.

The situation was somehow different in the United States. The view of US civil courts on the superior orders defense was conspicuously in contrast to the relevant provision of the Rules.

We will now survey the development of the Rules of Land Warfare and the judicial precedents of US courts on the issue of the superior orders defense before the end of World War II.

2.1.2.1 Change in the Rules of Land Warfare

The Rules of Land Warfare is a manual first adopted in 1914 for use by officers of the US land forces. The provisions were based on the *Instructions for the Government of Armies of the United States in the Field* (Lieber Code).⁴⁴ The Lieber Code, promulgated by President Lincoln during the Civil War, was the first US code regulating military actions in the field.⁴⁵ The Code was effective only for the US Army. Nonetheless, it much influenced the adoption of military manuals of countries such as Prussia, France, and Russia.⁴⁶ The Lieber Code confined itself to recognizing the superior orders defense for specific criminal acts in Articles 44 and 69.⁴⁷ It did not provide for the said defense in a general manner.

In contrast to the Lieber Code, the Rules of Land Warfare stipulated general rules on the superior orders defense. Section 366 of the Rules allowed automatic immunity under the superior orders defense regardless of individual circumstances in the respective cases:

Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.⁴⁸

This provision is similar to Section 443 of the 1949 edition of the British Manual of Military Law. Commentators such as George Finch expressed that Section 443 of the British Manual ‘was substantially copied into the Rules of Land Warfare’.⁴⁹

⁴⁴‘Preface’, in War Department: Office of the Chief of Staff, Rules of Land Warfare (Washington, DC: GPO, 1914), 7.

⁴⁵L. Green, *The Contemporary Law of Armed Conflict*, 2nd ed. (New York: Juris Publishing, 2000), 29.

⁴⁶*Ibid.*, 29–30.

⁴⁷Instructions for the Government of Armies of the United States in the Field, Prepared by Francis Lieber, Promulgated as General Orders No.100 by President Lincoln, 24 April 1863, in *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, eds D. Schindler & J. Toman (Dordrecht : Nijhoff, 1988), 10, 12.

⁴⁸War Department: Office of the Chief of Staff, Rules of Land Warfare (Washington, DC: GPO, 1914), Sec. 366.

⁴⁹Finch, *supra* n. 36, ‘Superior Orders’, at 441; A. Sack, ‘Punishment of War Criminals and the Defence of Superior Order’, *Law Quarterly Review* 60 (1944) 66; Berger, *supra* n. 43, at 1203; Glueck, *supra* n. 4, at 150.

However, toward the end of World War II, the treatment of war criminals of the Axis Powers had been focused as of vital importance, and the provision on the superior orders defense of the Rules was deemed to be an obstacle to the punishment of war criminals of those adversaries. The view that the recognition of the superior orders defense would hedge war crimes trials was specifically expressed by Colonel Archibald King, Chief of War Plans Division of the Judge Advocate General's Department of the United States Army, which proposed the revision of the Rules of Land Warfare. King, in his memorandum for the Judge Advocate General in October 1944, emphasized the necessity of revising Section 366 of the Rules, which, in his argument, (1) did not reflect the judicial precedents of the United States, (2) did not conform with the concurrent views of international law, and (3) was likely to be used for the prevention of proper punishment of Axis war criminals.⁵⁰ With regard to the concurrent 'views of international law', King referred to the revision of the British Manual of Military Law in April 1944.

The eventual proposal for the revision by the Judge Advocate General to the Assistant Chief of Staff of the War Department – which reflected the memorandum of King – had a provision that denied the superior orders defense for 'acts which violate accepted rules of warfare or are otherwise clearly illegal'.⁵¹ The memorandum of King for the Commanding General of the Army Service Forces denoted that the proposed change would deny the superior orders defense 'where the superior's order is clearly illegal or would obviously violate accepted rules of warfare'.⁵²

Consequently, after the discussion in the War Department, Section 366 of the Rules of Land Warfare was revised as follows:

Individuals and organisations who violate the accepted laws and customs of war may be punished therefore. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished.⁵³

Similar to the British Manual, this revision realized a change from automatic immunity to conditional immunity. A person who committed criminal acts may possibly be immunized on the ground that he/she was following the orders of the government or superiors. However, he/she cannot expect automatic immunity any longer, which was recognized by the Rules of 1914.

The Rules of 1944 did not clarify the circumstances under which the accused may be immunized on the ground of superior orders or government sanction. King's proposal relied on the test of manifest illegality. Nonetheless, the final provision did

⁵⁰Memorandum for the Judge Advocate General, 4 Oct. 1944, in RG 153, *JAG*, Box 1606, Case File 103-24 (United States National Archives and Records Administration).

⁵¹Memorandum for the Assistant Chief of Staff, G-1, WDGS, 4 Oct. 1944, in *ibid*.

⁵²Memorandum for the Commanding General, Army Service Forces, 4 Oct. 1944, in *ibid*.

⁵³Memorandum for General Henry, 2 November 1944, in RG 165, *WDGS/WDSS, Personnel*, Box 313 (United States National Archives and Records Administration); The United Nations War Crimes Commission, *supra* n. 42, at 282.

not refer to this point. As will be seen below, the US courts argued on the lack of the knowledge of illegality and/or lack of manifest illegality, and coercion from superiors as the grounds of immunity by that time. However, it would not be appropriate to conclude on the content of Section 366 by analogy with those arguments. It seems difficult to specify the grounds of immunity from the wording of the Rules.

As King pointed out, automatic immunity, which was adopted by the Rules of Land Warfare of 1914, did not conform with the concurrent judicial precedents of US civil courts. This point will be clarified in the next section. The most significant difference was that the courts, in contrast to the Rules, deemed the function of the superior orders defense to be restrictive.

2.1.2.2 Judicial Precedents of US Courts

‘Denial of Superior Orders Defense’ and Judicial Precedents

The judgment given in *Wirz* in 1865 has often been referred to as the first precedent of US courts dealing with the issue of the superior orders defense.⁵⁴ In this case, Major Henry Wirz was charged on the count of persecuting Union prisoners of war during the Civil War. The judgment was delivered by a military commission and the grounds for conviction as well as the reasoning behind the judgment were not clearly presented. Therefore, it is difficult to find out the details of the discussion. However, Leslie Green and M. Cherif Bassiouni interpret the Wirz’s conviction as the denial of the superior orders defense for enemy soldiers.⁵⁵

Some people argue that the US courts had not recognized the superior orders defense by soldiers on violations of the laws of war up to the end of World War II,⁵⁶ whereas others contend the opposite.⁵⁷ However, the judicial precedents, which were raised by the former, seem to have been shelved in a disorderly fashion in

⁵⁴Green, supra n. 1, ‘Reasonable Man’, 77–8; M. Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht; Boston: Martinus Nijhoff Publishers, 1992), 418–9. See also Finch, supra n. 36, ‘Superior Orders’, at 444–5; S. Gregory, ‘Criminal Responsibility of Sovereigns for Willful Violations of the Laws of War’, *Virginia Law Review* 6 (1919): 403–5.

⁵⁵Green, supra n. 1, ‘Reasonable Man’, at 78; Bassiouni, supra n. 54, at, 419.

⁵⁶Berger, supra n. 43, at 1203. See also A. Dinstag, ‘*Fedorenko v. United States*: War Crimes, the Defense of Duress, and American Nationality Law’, *Columbia Law Review* 82 (1982), 145. As to this point, Bassiouni restricted himself to listing the cases in which the superior orders defense had been denied. See Bassiouni, supra n. 54, at, 416–9.

⁵⁷The arguments which deem that conditional immunity was recognized include Battle, supra n. 2, at 22–4; Green, supra n. 1, ‘Reasonable Man’, at 73–7. Colby restricted himself to listing the cases in which the superior orders defense was allowed. See E. Colby, ‘War Crimes’, *Michigan Law Review* 23 (1924–5): 606–7.

defiance of the respective character of the cases. The examples are the judgments in *Little et al. v. Barreme et al.*,⁵⁸ *Mitchell v. Harmony*,⁵⁹ and *US v. Bevans*.⁶⁰

Little et al. v. Barreme et al. dealt with the illegal capture of a Danish brigantine by the US frigates. The Supreme Court judged that the defendant who had captured the Danish brigantine under superior orders should be answerable for damages. The court rejected the superior orders defense by the defendant, delivering that ‘the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass’.⁶¹ The judgment deemed that the order of the capture, which eventually had directed a manifest trespass, was illegal.

In *Mitchell v. Harmony*, the judgment recognized that the US officer who had seized the plaintiff’s property in Mexico during the war between the United States and Mexico was responsible for compensation. In *US v. Bevans*, a sentry was convicted for murdering a person who had abused him using reproachful words on board a US naval vessel. In both cases, the judgment rejected the superior orders defense of soldiers as in *Little et al. v. Barreme et al.*

However, it would be problematic to reject the superior orders defense in a general way by consulting the judgments in *Little et al. v. Barreme et al.* and *US v. Bevans*. To be sure, the judgment in *US v. Bevans*, for example, denied the superior orders defense. It delivered that an order that directs the killing of a person in response to abuse through reproachful words would be ‘illegal and void, and not binding upon any person; and the party who should give the order, equally with the party who should execute it, would be involved in the guilt of murder’.⁶² However, the judgment restricted the argument of the quote to the orders that are ‘against the express provisions of law, and against natural justice’.⁶³ This was also the case with *Little et al. v. Barreme et al.* As already noted, the judgment in *Little et al. v. Barreme et al.* dealt with the acts ‘which without those instructions would have been a plain trespass’. As will be seen below, a question of whether or not the illegality of the criminal conduct was manifest has been treated as crucial in discussing the superior orders defense. It would be inappropriate to regard these two judgments as having completely denied the superior orders defense.

In contrast to these cases, the judgment in *Mitchell v. Harmony* generally rejected the superior orders defense irrespective of whether or not the conduct in question had been manifestly illegal.⁶⁴ However, it should be noted that the

⁵⁸6 US (2 Cranch) 170 (1804).

⁵⁹54 US (13 How) 115 (1851).

⁶⁰24 F. Cas. 1138 (No. 14,589)(C.C.D.Mass., 1816).

⁶¹6 US (2 Cranch) 170, 179 (1804). The cases which specifically supported *Little et al. v. Barreme et al.* include *US v. Bright*, 24 F.Cas. 1232, 1238 (No. 14,647)(C.C.D.Pa. 1809).

⁶²24 F. Cas. 1138, 1140 (No. 14,589)(C.C.D.Mass. 1816).

⁶³Ibid.

⁶⁴54 US 115, 137 (1851).

judgment was made for civil proceedings, a conclusion of which does not necessarily conform to the precedents of criminal cases.⁶⁵

Criminal Cases and Superior Orders Defense

Oft-cited criminal cases of US courts that dealt with the issue of the superior orders defense by soldiers are *US v. Jones*,⁶⁶ *McCall v. McDowell et al.*,⁶⁷ and *In re Fair et al.*⁶⁸

In *US v. Jones*, a US officer was indicted for piracy upon a Portuguese vessel. The court reasoned in its judgment that ‘the participation of the inferior officer, in an act which he knows, or ought to know, to be illegal, will not be excused by the order of his superior’.⁶⁹

McCall v. McDowell et al. treated a false imprisonment by a US officer. The court resolved in its judgment that the accused had ‘acted not as a volunteer’:

Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto.⁷⁰

The judgment made use of the notion of ‘commonest understanding’ in deciding whether or not the illegality of the conduct was manifest.⁷¹

Further, the court gave a reason as to why the superior orders defense should be approved in cases where the illegality of the criminal conduct had not been manifest. The court underlined the importance of the obligation of obeying orders in the army and drew attention to the fact that such an obligation made subordinates vulnerable to ‘coercion’:

The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the

⁶⁵Glueck, *supra* n. 4, at 144; Dunbar, *supra* n. 2, at 235–6. On the other hand, Bartlett understood the defense of superior orders as that of coercion. He explained on *Mitchell v. Harmony* that the accused had not faced urgent or immediate danger by superior orders so that the defense could not be recognized. See H. Bartlett, ‘Liability for Official War Crimes’, *Law Quarterly Review* 35 (1919): 191).

⁶⁶26 F.Cas. 653 (No. 15,494)(C.C.D.Pa. 1813).

⁶⁷15 F.Cas. 1235 (No. 8,673)(C.C.D.Cal. 1867).

⁶⁸100 Fed. 149 (C.C.D.Neb. 1900).

⁶⁹26 F.Cas. 653, 657–8 (No. 15,494)(C.C.D.Pa. 1813).

⁷⁰15 F.Cas. 1235, 1240 (No. 8,673)(C.C.D.Cal. 1867). The same view was shown in the judgment in *In re Fair et al.* (100 Fed. 149, 154–5 (C.C.D.Neb. 1900)).

⁷¹See the *In re Fair et al.* judgment that held the same test (100 Fed. 149, 155 (C.C.D.Neb. 1900)).

legality of the orders of the commander, and obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.⁷²

The judgment attached importance to the fact that soldiers were possibly required to act in contravention of his/her own intention because of the coercion under which they were placed. Eventually, the court recognized the superior orders defense on the test of manifest illegality. The factor of coercion was referred to only as the ground for adopting the test of manifest illegality, that is, the reason why the superior orders defense should be allowed in cases where the illegality of the conduct was not manifest. However, the issue of coercion was revealed as an independent topic on the superior orders defense later in the drafting of the Nuremberg Charter.

Thus, it can be said that some major precedents of US civil courts that dealt with the issue of the superior orders defense by US soldiers had been developing a view as follows: If a soldier who committed a criminal act was not aware of the illegality of the act, and/or if the act was not manifestly illegal, the soldier may appeal under the defense of superior orders. Whether or not the illegality of the act was manifest should be judged by the test of 'commonest understanding'.⁷³

The Rules of Land Warfare of 1914 introduced a provision that allowed automatic immunity under the superior orders defense. This provision can be said to have been contrary to the general trend of the judicial precedents of US civil courts since the nineteenth century. The revision of the Rules in 1944 and the eventual denial of the superior orders defense in principle could not avoid criticism as was the case with the revision of the British Manual of Military Law. Critics regarded the revisions as political expedencies foreseeing the prosecution of enemy war criminals after World War II.⁷⁴ Nonetheless, as seen above, the view that the British Manual of 1944 adopted was in conformity with the developing trend of the judicial precedents of British civil courts. The same may be said with the legal situations in the United States. A change from automatic immunity to conditional immunity could be described as a highly political measure, but it was in fact a recurrence to the major view of the US judicial precedents.

⁷²15 F.Cas. 1235, 1240-41 (No. 8,673)(C.C.D.Cal. 1867).

⁷³The arguments which conclude that conditional immunity had come to be recognized especially in criminal cases include Glueck, *supra* n. 4, at 144-9; Dunbar, *supra* n. 2, at 235-7. See also J. Insko, 'Defense of Superior Orders before Military Commissions', *Duke Journal of Comparative & International Law* 13 (2003): 399-406.

⁷⁴See, for instance, the statement of the Earl of Cork and Orrery that '[r]evenge is sweet, and the rules laid down in the British and American Manuals were an obstacle to its attainment' (Parliamentary Debates, House of Lords 168 (19 July 1950): 442). The American 'Manual' is identical with the US Field Manual 27-10, that is, the US Rules of Land Warfare.

2.1.3 Superior Orders Defense in France

In France, the issue of the punishment of enemy soldiers for war crimes had been focused on since World War I. First, it was discussed whether or not French judicial organs had jurisdiction for war crimes that had been committed by enemy soldiers. If the answer was positive, the next question was whether or not such jurisdiction covered criminal acts that had been committed outside French territory. Further, in relation to the issue of the superior orders defense, it was questioned if the provision on an excuse in the French *Penal Code* (*Code pénal (ancienne)*) could be applied to the trials of enemy soldiers. These problems were much discussed especially towards the end of World War I.

Principal debaters on the topic of war crimes prosecution at the time in France were Alexandre Mérignhac and Louis Renault.⁷⁵ This section surveys the academic debates mainly between these two commentators and the eventual legislation promulgated by the French government just before the establishment of the Nuremberg Charter.

2.1.3.1 Academic Debates

Until World War II, there were various arguments in France about superior orders with respect to the French *Penal Code*. For instance, commentators such as Henri Donnedieu de Vabres⁷⁶ recognized immunity or mitigation of punishment on the test of manifest illegality. On the other hand, Émile Garçon⁷⁷ and others recognized immunity on the ground of coercion incidental to orders.⁷⁸ There were also discussants such as Léon Duguit who completely denied the illegality of the acts committed under superior orders.⁷⁹

However, since World War I, the issue of punishment of enemy war criminals came to be intensively discussed and the question of the superior orders defense by

⁷⁵See A. Mérignhac, 'De la sanction des infractions au droit des gens commises, au cours de la guerre européenne, par les empires du centre', *Revue générale de droit international public* 24 (1917): 5–56; L. Renault, 'De l'application du droit pénal aux faits de guerre', *Revue générale de droit international public* 25 (1918): 5–29.

⁷⁶H. Donnedieu de Vabres, *Traité élémentaire de droit criminel et de législation pénale comparée* (Paris: Librairie du recueil sirey, 1937), 246–7. He recognized mitigation of punishment in the case the illegality was not manifest and immunity in the case the factor of coercion mattered.

⁷⁷E. Garçon, *Code pénal*, tome premier (Paris: Librairie de la société du recueil général des lois et arrêts, 1901–6), 184–5.

⁷⁸The arguments which recognized immunity on the tests of manifest illegality and/or coercion include J. Barthélémy, 'L'influence de l'ordre hiérarchique sur la responsabilité des agents', *Revue du droit public et de la science politique en France et à l'étranger* 31 (1914): 506–7; I. Poljokan, *La responsabilité pour les crimes et délits de guerre* (Paris: Jouve et c^{ie}, Éditeurs, 1923), 155–6, 165.

⁷⁹L. Duguit, *Etudes de droit public*, vol.2, *L'État, les gouvernants et les agents* (Paris: A. Fontemoing, 1903), 633–4.

enemy soldiers were treated independent of the relevant national law. First, automatic immunity, as Duguit maintained, had hardly been supported in this context. Second, the issue of the superior orders defense in international law had been treated mainly as the question of whether or not Article 64 of the French *Penal Code* which recognized immunity on the ground of coercion should be applied.

With respect to war crimes committed during World War II, the problem of coercion drew attention much more than the issues of the knowledge of illegality and/or manifest illegality. Article 327 of the French *Penal Code* recognized a justification for ‘the homicide, the wounding and striking that was ordered by the law and commanded by the legitimate authority (l’homicide, les blessures et les coups étaient ordonnés par la loi et commandés par l’autorité légitime) (translated by the author)’. However, as Paul Coste-Floret argued that the order of the law (l’ordre de la loi) was apparently lacking with regard to war crimes,⁸⁰ there were hardly any commentators who referred to that provision concerning war crimes trials. Under such circumstances, it was unlikely that the view that recognized immunity on the tests of the knowledge of illegality and/or manifest illegality could be widely supported. Cost-Floret’s argument that the illegality of superior orders on war crimes was manifest in most cases⁸¹ seemed to reflect the views prevalent at the time.

Eventually, the debates on the superior orders defense developed around the question of whether or not an excuse on the ground of coercion in national law could be allowed for enemy soldiers. As was noted before, Anglo-American judicial precedents had concurrently been shaping a rule to immunize soldiers on the tests of the knowledge of illegality and/or manifest illegality. It was an exceptional rule for soldiers. In contrast, discussions in France did not presuppose that some special rules should be applied for military orders. Here, the point was whether the accused who appealed under the superior orders defense was a French national or an enemy soldier. The issue of coercion was treated as the question of whether the rule in the French *Penal Code* would likewise be applicable for its adversaries.

Article 64 of the French *Penal Code* recognized an excuse on the ground of coercion under which the accused had been placed:

There is no felony nor misdemeanor when the defendant was in a state of insanity at the time of the action, or when he was coerced by a force which he could not resist (Il n’y a ni crime ni délit, lorsque le prévenu était en état de démence au temps de l’action, ou lorsqu’il a été contraint par une force à laquelle il n’a pu résister). (translated by the author)

The question was whether enemy soldiers could be immunized on the ground of this provision if they appealed under the superior orders defense for their war crimes.

⁸⁰P. Coste-Floret, ‘La répression de crimes de guerre et le fait justificatif tiré de l’ordre supérieur’, *Recueil dalloz de doctrine de jurisprudence et de législation – Chronique* (1945): 21. See also Barthélémy, *supra* n. 78, at 33; Donnedieu de Vabres, *supra* n. 76, at 246.

⁸¹Coste-Floret, *supra* n. 80, at 21.

Commentators, including Renault, who recognized the superior orders defense, emphasized the absolute character of military discipline.⁸² Soldiers were not usually allowed to question the orders of their superiors. Moreover, the knowledge on the laws of war was not fully popularized in the army. Even if soldiers were aware of the illegality of the orders, the violation of a duty to obey them would lead to severe penalties. Considering these points, we should bear in mind that soldiers were under immediate coercion (*contrainte immédiate*). Having said so, Renault contended to apply Article 64 of the *Penal Code*.⁸³ There may be a view, he argued, that the usual penal provision should not be applied to war crimes committed by enemy soldiers. Surely, international law allows reprisals for violations of the laws of war by belligerent parties. Nonetheless, it is deceptive to resort to reprisals behind a mask of judicial measures. In such a case, ‘the violence and the arbitrariness bear a particularly odious character ([l]a violence et l’arbitraire prennent un caractère particulièrement odieux)’.⁸⁴

On the other hand, Mérignhac represented another view that did not recognize the defense of coercion. He assumed that it was abusive to apply ordinary rules of French criminal law for war crimes committed by its enemy country, particularly, Germany. He argued that German state organs under Kaiser’s rule would evade prosecution under Article 64 of the French *Penal Code*. In turn, Kaiser himself would evade prosecution because he only accomplished ‘a collective act (*un acte collectif*)’ or ‘an act of government (*un acte de gouvernement*)’.⁸⁵

The fact that the conduction of war is grounded in the intention of a head of state would not necessarily lead to the assumption that war crimes committed by state organs should be immunized by Article 64 of the French *Penal Code*. War crimes would not always be committed by the orders of a head of state. Moreover, the argument that deems the defense of coercion to be always applicable regardless of the degree of coercion at the time of the criminal conduct cannot be said to be in keeping with Article 64. The article used the expression, ‘when he was coerced by a force which he could not resist’.

However, where state acts, especially military acts, matter, the treatment of the coercion defense would substantially influence the eventual number of conviction. In the army, military discipline has decisive importance. This point has been equally agreed upon by both the commentators who supported the application of the coercion defense and those who did not. Wide-ranging recognition of the coercion defense on war crimes implies drastic restriction of the cases for punishment. It would mean, depending on the situation, a denial of punishment for almost all violations of the laws of war.

⁸²Renault, *supra* n. 75, at 27.

⁸³*Ibid.*

⁸⁴*Ibid.*, 28. The same view was expressed in Comment by F. du Saint, *Réforme sociale* 69 (1915): 212. See also M. Nast, ‘Le sanctions penales de l’enlèvement par les allemands du matériel industriel en territoires français et belges occupés par leurs troupes’, *Revue générale de droit international public* 26 (1919): 123.

⁸⁵Mérignhac, *supra* n. 75, at 52.

The coercion in question is not physical or mental coercion among private persons. Superior orders in military organizations are accompanied by legal coercion backed by the power of state and national laws, which are grounded on this power. In recognizing automatic immunity under the superior orders defense in the third edition of his *International Law*, Oppenheim emphasized that soldiers were ‘compelled by law to commit’ the conduct in question under superior orders.⁸⁶ It is thus undeniable that coercion generally accompanies acts committed under superior orders. Mérignhac’s rejection of the coercion defense for enemy soldiers could be considered as his concern for this specific aspect of the coercion in question. If one aims at prosecuting individuals for their state acts, the coercion defense emerges as a serious obstacle for trials.

The problem of how to deal with the coercion defense and the superior orders defense, which is closely related to the former, leads to the question with regard to the significance of prosecuting state acts. What should the prosecution of state organs who committed war crimes aim at, and where should the limit of such prosecution be set?

2.1.3.2 The *Ordonnance* of 1944

Should national rules on the coercion defense consistently be applied for war crimes by enemy soldiers or should some peculiar rules that give the highest priority to punishing enemy soldiers be applied? French military commissions during World War I took the latter position with regard to war crimes by German soldiers and rejected the application of Article 64 of the French *Penal Code*.⁸⁷ *Ordonnance du 28 août 1944 relative à la répression des crimes de guerre* which was stipulated for trials of enemy war criminals during World War II allowed immunity on the ground of superior orders. However, the relevant provisions did not clarify the relationship between the superior orders defense and coercion defense.

The French judicial organs that had jurisdiction over war crimes during World War II were the Military Government Tribunals set up in the French-occupied zone of Germany and the Permanent Military Tribunals.⁸⁸ The *ordonnance* of 1944 provided for jurisdiction and other legal competence of the latter. Article 3 of the *ordonnance* states the following on the superior orders defense:

The laws, decrees or regulations issued by the enemy authority, the orders or authorizations issued by that authority or the authorities, which are or which had been subordinated to it, cannot be invoked as justifying factors within the meaning of Article 327 of the *Penal Code*, but can only, in suitable cases, be invoked as extenuating circumstances or as absolute excuses (Les lois, décrets ou règlements émanant de l’autorité ennemie, les ordres ou autorisations donnés par cette autorité ou par les autorités qui en dépendent ou qui en ont

⁸⁶Oppenheim, supra n. 27 (1921), at 343.

⁸⁷Mérignhac, supra n. 75, at 53.

⁸⁸The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 3 (London: HMSO, 1948), 93.

dépendu ne peuvent être invoqués comme faits justificatifs au sens de l'art. 327 c. pén., mais seulement, s'il y a lieu, comme circonstances atténuantes ou comme excuses absolues). (translated by the author)

As previously noted, Article 327 of the French *Penal Code* recognized unconditional justification under the superior orders defense. In contrast, the *ordonnance* of 1944 did not recognize a justification by the said defense with regard to war crimes by enemy soldiers. Article 3 of the *ordonnance* denoted that superior orders should only be considered for an excuse or mitigation of punishment depending on the situations of the respective cases. However, the provision did not provide any criteria for judgment on the allowance of the said defense. Some commentators understand the provision as relevant to the issue of coercion.⁸⁹ However, in light of the fact that the French military commissions did not allow enemy soldiers the coercion defense during World War I, it would not be appropriate to instantly judge on this point.

Thus, in France, before the adoption of the Nuremberg Charter, the problem of the superior orders defense manifested mainly as that of the coercion defense. The situation was different from that of the Anglo-American judicial precedents which treated the problem under the topics of the knowledge of illegality and/or manifest illegality, but while bearing in mind the importance of military discipline and the existence of coercion. However, the *ordonnance* of 1944 eventually did not clarify the relationship between the superior orders defense and coercion defense. The question was whether or not to take into consideration the fact of coercion in recognizing superior orders as an excuse. The situation is reminiscent of the fact that the British Manual of Military Law and the US Rules of Land Warfare revised in the same year also did not clarify the conditions under which the superior orders defense could be recognized.

In the United Kingdom, the United States, and France, the topics of the knowledge of illegality and/or manifest illegality, and coercion, were put forth in regard to the superior orders defense. These topics gained prominence again in the drafting of the Nuremberg Charter as unresolved problems at the international level.

2.1.4 Superior Orders Defense in the Soviet Union

The Russian Empire, in its *Military Criminal Code* of 1910 – which was based on its 1869 edition – stipulated that subordinates who were not conscious of the illegality of the orders that they had received should not be punished.⁹⁰ After the

⁸⁹Coste-Floret, supra n. 80, at 21.

⁹⁰See Article 69 of the Russian *Military Criminal Code* (R. Klibanski, *Das Russische Militär-Strafrecht, Übersetzt und Bearbeitet* (Berlin: J. Guttentag, 1913), 29). See also P. Fuhrmann, *Der Höhere Befehl als Rechtfertigung im Völkerrecht* (Berlin: C. H. Beck'sche Verlagsbuchhandlung, 1963), 61.

formation of the Union of Soviet Socialist Republics, however, the *Regulations on the Military Crime* of 1927 did not provide for the superior orders defense, whereas a few judicial precedents relevant to the issue had not yet formed the case law.⁹¹

In such circumstances, the *Kharkov* trial conducted in Ukraine during World War II deserves special mention; this trial drew international attention as a trial of German war criminals in Soviet territory.

In the Moscow Declaration, the United States, the United Kingdom, and the Soviet Union declared to punish war crimes committed during World War II. The Declaration clearly put forth the Allied Powers' intention to punish persons responsible for atrocities during the war after peace was made with Germany.⁹² However, Soviet military tribunals tried and convicted German war criminals in 1943 before the conclusion of peace with Germany.⁹³ In particular, *Kharkov* drew much attention as a war crimes trial 'directed' by the Soviet regime.⁹⁴ Three German and Soviet corroborators were sentenced to death on the counts of atrocities against Soviet citizens and Soviet prisoners of war. After the *Kharkov* trial, the Soviet government changed its policy – it suspended war crimes trials until the end of World War II and did not mention the *Kharkov* trial any more.⁹⁵ With regard to this change in policy, it has been pointed out that the aim to demonstrate a strict attitude by the Soviet Union toward war crimes trials had been accomplished to some extent and that German retaliation for the *Kharkov* trial had proved to be a new menace for the Allied Powers.⁹⁶

In *Kharkov*, the prosecution tried to assign the criminal conduct with an organizational character and emphasized the responsibility of the German government. In having done so, the prosecution often guided the accused to admit that they committed criminal acts under superior orders.⁹⁷ However, this did not mean that they attached importance to superior orders as a ground for immunity. On the contrary, the prosecution relied on the judgment of the Reipzig Trials and rejected the superior orders defense under which the accused sought refuge.⁹⁸ The judgment of the Reipzig Trials, as will be seen later, denoted a test of the knowledge of illegality in deciding on the question of immunity under the superior orders defense.

⁹¹R. Maurach, *Die Kriegsverbrecherprozesse gegen deutsche Gefangene in der Sowjetunion* (Hamburg, 1950), 32–5, 37–41.

⁹²'Great Britain – Soviet Union – United States, Tripartite Conference in Moscow, Anglo-Soviet-American Communiqué, November 1, 1943', *Supplement to the American Journal of International Law* 38 (1944): 3, 7–8.

⁹³G. Ginsburg, *Moscow's Road to Nuremberg, The Soviet Background to the Trial* (The Hague: Martinus Nijhoff Publishers, 1996), 52.

⁹⁴On the *Kharkov* trial, an audience was made rotate to maximize the attendance, and foreign correspondents were also admitted to attend (*ibid.*, 52–5).

⁹⁵*Ibid.*, 55–6

⁹⁶*Ibid.*, 56.

⁹⁷*Ibid.*, 53–4.

⁹⁸*Ibid.*, 54; Glueck, *supra* n. 4, at 150–51.

The judgment in *Kharkov* convicted all four accused. The significance of *Kharkov* lies in the fact that it clarified that the superior orders defense should not immunize war criminals.⁹⁹ Academic arguments in the Soviet Union at the time generally denied the superior orders defense for manifestly illegal acts.¹⁰⁰ Commentators attached importance to *Kharkov* as a precedent that backed this academic view.¹⁰¹

2.1.5 Conclusion

As seen in this section, at least the three countries that drafted the Nuremberg Charter – the United Kingdom, the United States, and France – had been forming basic views on the superior orders defense by 1944, although with some contradictions and confusion.

In the United Kingdom, as the judicial precedents were inconclusive, the British Manual of 1944 recognized the principle of conditional immunity just like the US judicial precedents, the US Rules of Land Warfare, and the French *ordonnance* on war crimes. This principle denied automatic immunity under the superior orders defense but allowed immunity or mitigation of punishment on the ground of orders depending on the situations of the respective cases.

However, the national legislation or precedents of these three countries did not fully present the grounds on which immunity or mitigation of punishment was to be recognized. The British and US judicial precedents had developed criteria such as the knowledge of illegality and/or manifest illegality. The French academic society focused on the factor of coercion by superiors. Nonetheless, these arguments were not reflected on the relevant military documents in a specific way.

The civil courts of the United Kingdom and the United States generally judged on the superior orders defense on the basis of the tests of the knowledge of illegality and/or manifest illegality. This appears to be fundamentally different from the arguments of the French academic society which had mainly dealt with the problem of coercion. However, it is noteworthy that some US judicial cases such as *McCall v. McDowell et al.* associated the issue of manifest illegality with coercion. The judgment in *McCall v. McDowell et al.* was, in referring to the test of manifest

⁹⁹Ginsburg, *supra* n.93, at 64.

¹⁰⁰*Ibid.*, 63–4. For instance, Trainin recognized the strictness of military discipline but still denied immunity on the ground of superior orders, arguing that manifestly illegal act was not that of the army but instigation of a crime (A. Trainin, *Hitlerite Responsibility under Criminal Law* (First published in Russian for the Institute of Law, Academy of Sciences of the U.S.S.R., Translated by A. Rothstein) (London: Hutchinson & Co. Ltd., 1945), 90). In so arguing, he referred to the Reipzig Trials and Section 47 of the German *Military Criminal Code* as the prosecution in the *Kharkov* trial did.

¹⁰¹Ginsburg, *supra* n. 93, at 63–4.

illegality of the criminal conduct, grounded on the fact that soldiers had been placed under coercion by military discipline.¹⁰² The court emphasized the importance of the obligation of obedience as well as military discipline, and pointed out that soldiers acted under actual coercion especially during armed conflicts. It then delivered that the superior orders defense should be allowed if the illegality of the conduct in question had not been manifest.

The factor of coercion bears a peculiar character in the case of superior orders. As seen before, Oppenheim in his third edition of *International Law* which significantly influenced the provisions of the British Manual underlined the ‘compulsion by law’ as a ground for recognizing the superior orders defense.¹⁰³ Indeed, as far as military conduct is concerned, it should be noted that soldiers are placed in a specific environment – the army – where military discipline is vital. In addition, military discipline is backed by the fact that superior orders in the army reflect state acts. Military orders are given on the basis of national laws. These facts give a peculiar character to the ‘coercion’ which is to be considered with regard to the superior orders defense. Such coercion bears legal character along with physical and mental character. The US courts did not pay attention to whether or not there had been actual coercion – physical or mental – in recognizing the superior orders defense on the test of manifest illegality. The courts simply emphasized that soldiers had acted under coercion, which is a part of military discipline. Such an argument could be said to relate to the peculiar character of the coercion discussed here. It may be understood that the court meant that legal coercion, together with a lack of the knowledge of illegality and/or a lack of manifest illegality, brought about a multiplier effect of immunity.

Meanwhile, it is also noteworthy that the judgment in *McCall v. McDowell et al.* recognized immunity on the test of manifest illegality, underlining the importance of military discipline besides coercion. The concurrent writing of William Winthrop, which has been dubbed as the ‘Blackstone of Military Law’¹⁰⁴ recognized the superior orders defense on the test of manifest illegality because of the importance of military discipline.¹⁰⁵ It would be reasonable to consider that from the viewpoint of state interest, immunity should be allowed exceptionally in the case of superior orders because of a lack of the knowledge of illegality and/or a lack of manifest illegality.

¹⁰²It is noteworthy that the *Smith* judgment of the Supreme Court of the Cape of Good Hope also recognized conditional immunity by emphasizing the importance of military discipline. However, the *Smith* judgment did not specifically connect the issue of military discipline with that of coercion.

¹⁰³Oppenheim, *supra* n. 27 (1921), at 343. Green also argues on legal compulsion that ‘both duress and orders involve some measure of compulsion upon the actor, the former by way of a direct threat against his personal security, and the latter by way of legal compulsion accompanied by an implied sanction for non-compliance (L. Green, *Superior Orders in National and International Law* (Leyden: A. W. Sijthoff, 1976), 15)’.

¹⁰⁴*Reid v. Covert*, 354 U.S. 1, 19, n.38 (1957); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2777 (2006).

¹⁰⁵W. Winthrop, *Military Law and Precedents*, Second ed. (Washington, DC: GPO, 1920), 296–7.

Various arguments surveyed in this section put forth a significant question dealing with the issue of the superior orders defense at the international level: how to deal with conflict between international obligations and the coercion by or obligations under national law? Conceptual priority on international obligations does not instantly lead to the dissolution of conflicts between international and national obligations. Should the ideal of international law precede and should international legal order attain its goal, or should one make a compromise in realizing the ideal of international law, facing a complex construction of international legal order, which has been considerably influenced by national legal orders? These questions were to be answered by the international rule-making on the issue of the superior orders defense.

In the national laws of the United Kingdom, the United States, and France, automatic immunity under the superior orders defense had been rejected and conditional immunity had been introduced by the end of World War II. The national legislation or other legal materials of these countries did not clarify the conditions on which immunity could be allowed. However, they were basically accorded in recognizing superior orders as a defense in certain situations.

One should bear in mind that the relevant legal instruments of the three countries were revised in 1944. In the United Kingdom and the United States, the Manual and the Rules, respectively, were revised mostly in conformity with the judicial precedents of civil courts. In contrast, the new *ordonnance* of France was specially promulgated for the cases of enemy soldiers. Nonetheless, the countries had common grounds for adopting the principle of conditional immunity in anticipating the postwar trials of enemy war criminals. Thus, it can be said that the positions of these three countries on the superior orders defense, which had been formed by 1944, possibly had considerable influence on the drafting of the Nuremberg Charter and the proceedings of the Nuremberg Trial.

2.2 Situation of International Law

Toward the end of World War II, legislations on the superior orders defense were far from established at the international level. The situation was even more confused than that of the drafting countries of the Nuremberg Charter. The United Kingdom, the United States, and France – the three of those drafting countries –, together with Japan and Italy, proposed an agreement on the laws of armed conflict, which recognized automatic immunity under the superior orders defense on the one hand, while on the other, they proposed another agreement that categorically denied immunization. The Treaty of Versailles, which was concluded in consequence of World War I, did not provide for the superior orders defense. As a result, war crimes trials were conducted in Germany by German judicial organs that applied their national law.

The two instruments mentioned above did not take effect. Moreover, German war crimes trials after World War I were not conducted by directly applying

international law. Such precedent does not offer decisive materials in examining international rules on the superior orders defense.

Nonetheless, it would be possible to determine what the governments of the relevant countries expressed on the issue of the superior orders defense in the rule-making process of those documents. Further, the German trials drew much attention in the international society as alternative proceedings to those of the Allies.¹⁰⁶ This section will examine the above-mentioned precedent for considering the international legal situation before the establishment of the Nuremberg Charter. We will consult the *Washington Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare* and the *Rules for the Control of Radio in Time of War*, which were adopted in the 1920s, together with the war crimes trials conducted in Germany – the so-called Leipzig Trials – following the conclusion of the Versailles Treaty.

2.2.1 *Proposals of Treaties and Superior Orders Defense*

2.2.1.1 *Washington Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare*

In 1922, the United Kingdom, the United States, and France – which later participated in the drafting of the Nuremberg Charter – along with Japan and Italy, signed the Washington Treaty. The Treaty was concluded at the Washington Naval Conference. The Conference considered ‘the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, and to prevent the use in war of noxious gases and chemicals’ as a part of its agenda¹⁰⁷ and specifically dealt with the problems of submarines and gases.

The Washington Treaty prohibited attacks against merchant vessels without warning by submarines. Article 3 of the Treaty thoroughly denied the superior orders defense for violations of relevant provisions. Article 3 read as follows:

The Signatory Powers, desiring to insure 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

¹⁰⁶Regarding German war crimes trials conducted in Germany, see Battle, *supra* n. 2, at 1–26; Finch, *supra* n. 36, ‘Superior Orders’, at 440–45; Y. Dinstein, *The Defence of ‘Obedience to Superior Orders’ in International Law* (Leyden: A.W. Sijthoff, 1965), 10–20. On the drafting process of international agreements between World War I and World War II, see J. Shinobu, *Senjokokusaihō Kōgi (Lectures on International Laws of War)*, vol. 3 (Tokyo: Maruzen, 1941), 405–411; Dinstein, *supra* n. 106, at 97–103; E. Fukatsu & Y. Kita, “Jōkanmeirei no Kōben” ni Kansuru Kokusaihōtenka wo Meguru Shomondai – Dainijisekaitaisen Izen no Sagyo – (Problems on International Codification on “Superior Orders Defense” – The Process before World War II –), *Hōgaku Kiyō (Nihon Daigaku Hōgakubu Hōgaku Kenkyūjo)* 34 (1993): 187–99.

¹⁰⁷H. Malkin, ‘The Washington Conference (November 12, 1921—February 6, 1922)’, *British Yearbook of International Law* 3 (1922–3): 179.

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.

As the clause ‘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’ indicated, the Treaty meant to oblige punishment of violations without any consideration for the circumstances prevailing at the time of the criminal conduct. As seen in the previous section, the British Manual of Military Law and the US Rules of Land Warfare specifically allowed automatic immunity under the superior orders defense in the 1920s. As both countries had signed the Washington Treaty, this instrument would be deemed to be rather stringent on the responsibility of the subordinates who had acted under superior orders. During World War I, the United States and the United Kingdom suffered serious damages from a submarine sink-on-sight policy of the German Navy.¹⁰⁸ The Washington Treaty was proposed by these two countries for regulating submarines. Stringency in terms of equating attacks against merchant vessels with ‘piracy’¹⁰⁹ and rejecting the superior orders defense could be considered as the strong repulsion of these countries against unrestricted submarine warfare.

The Washington Treaty was signed by the said five countries. Nonetheless, France did not ratify the instrument and it was not put into effect eventually. A reason for the French refusal was that the Treaty generally prohibited the commerce destruction by submarines.¹¹⁰ France was unwillingly restricted on its warship tonnage through the Washington Conference. The French delegate thus occasionally tried to avoid excessive regulations on submarines.¹¹¹ The provisions of the Washington Treaty, which declared that the commerce destruction by

¹⁰⁸In particular, these two countries received a severe blow with the sinking of the British cargo and passenger ship *Lusitania* because of German submarine attacks. Out of over 1,200 casualties, approximately 150 were US citizens. In response to this incident, the United States broke off relations with Germany and entered World War I. For more information on the relationship between the *Lusitania* incident and the Washington Treaty, see Shinobu, *supra* n. 106, at 382–95; A. Mérignhac, ‘Le désarmement, les traités de paix de 1919–1920, la conférence de Washington de 1921–1922’, *Revue général de droit international public* 29 (1922): 136–7. France also suffered serious damages from a submarine sink-on-sight policy of Germany (Shinobu, *supra* n. 106, at 389–90). However, as will be seen later, the French government placed importance on the commerce destruction by submarines and stood on a different position from the United States and the United Kingdom.

¹⁰⁹It was criticized on this point that state acts should not be identified with private piracy which was irrelevant with state power. See K. Yokota, ‘Rondonkaigi to Sensuikanshiyōhōki (The London Conference and the Rules on the Use of Submarines)’, *Kokusaihō Gaikō Zasshi* 29, no. 6 (1930): 13; R. Genet, ‘The Charge of Piracy in the Spanish Civil War’, *American Journal of International Law* 32 (1938): 257; Shinobu, *supra* n. 106, at 406.

¹¹⁰Yokota, *supra* n. 109, at 8; Mérignhac, *supra* n. 75, at 142–5.

¹¹¹Mérignhac, *supra* n. 75, at 136–9; J. François, ‘L’Avenir du sous-marin’, *Revue general de droit international public* 30 (1923): 39–40.

submarines was practically impossible under the rules of the Treaty, were far from acceptable for France, which took submarine warfare very seriously.¹¹²

2.2.1.2 Rules for the Control of Radio in Time of War

The Washington Treaty ultimately did not come into effect. However, the adopted provisions at least clarified its denial of the superior orders defense for the material jurisdiction of the Treaty. What sharply contrasted with this Treaty was the draft of the *Rules for the Control of Radio in Time of War* of 1923. This proposal was adopted by the Commission of Jurists, which comprised of the delegates of the United Kingdom, the United States, France, Japan, and Italy.¹¹³ The tasks of the Commission were to report on (1) whether or not concurrent international law kept up with the advent of new measures for warfare and (2) if not, then what kind of provisions for rules should be made.¹¹⁴

The Commission finally prepared the drafts of the *Rules for the Control of Radio in Time of War* and the *Rules of Aerial Warfare*. With respect to the superior orders defense, Article 12 of the former read that '[r]adio operators incur no personal responsibility from the mere fact of carrying out the orders which they receive in the performance of their duties as operators'.¹¹⁵

Did the quoted expression mean that the fact of the execution of orders indicated immunity of the subordinates, or that some additional factors such as voluntariness on the part of the subordinates were necessary for the establishment of their responsibility? A commentary attached to the provision made it clear that it was only the superiors that should be held accountable. Article 12 thus can be construed as recognizing automatic immunity under the superior orders defense.¹¹⁶ The commentary included the following explanation and underlined the peculiar character of the duties of radio operators who executed orders in cabins:

The operator works in his cabin where he executes the orders of those above him. Consequently it is right that he should incur no personal responsibility merely because he

¹¹²According to Genet, the French delegate contended that commanders on board submarines should not bear individual responsibility for orders from their superiors (Genet, *supra* n. 109, at 256). In light of the relevant provisions of the British Manual and the US Rules of Land Warfare at the time, and of the fact that the British government once recognized the superior orders defense for German commanders of submarines (*ibid.*), such contention of the French delegate would not be deemed as peculiar. It could be said that the United Kingdom and the United States that had faced the incident of *Lusitania* changed their conventional attitude.

¹¹³Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, 'General Report', *American Journal of International Law, Supplement* 32 (1938): 1.

¹¹⁴*Ibid.*

¹¹⁵*Ibid.*, 11.

¹¹⁶The arguments which deemed the article as recognizing automatic immunity on the ground of superior orders include F. Shick, 'War Criminals and the Law of the United Nations', *University of Toronto Law Journal* 7 (1947–8): 48–9; Dinstein, *supra* n. 106, at 101–2.

has executed orders which he has received in the discharge of his duties as radio operator. Liability to punishment for acts which contravene rules such as Articles 9 or 10 falls on those who have given the orders for such acts.¹¹⁷

However, this proposal did not clarify the relationship between these rules and the general international law. Did the draft Rules presuppose that the superior orders defense was generally recognized for violations of the laws of war, or did it specially allow the said defense for radio operators? These questions have been left unanswered.

The draft Rules of 1923 were not made into effect as a treaty. The final report of the Commission of Jurists, which comprised of the drafts of the *Rules for the Control of Radio in Time of War* and the *Rules of Aerial Warfare*, was much criticized on the whole. It was said that the regulation of the warfare based on airplanes and radio technology was unrealistic since such technology developed rapidly.¹¹⁸ Moreover, the content of the instruments was considered to be ambiguous.¹¹⁹

Eventually, none of the five countries accepted the final report of the Commission. Even if Article 12 of the draft Rules was put into effect, the provision could not be deemed to contribute to the general understanding of the concurrent international rules.

2.2.2 *The Versailles Treaty and the Reipzig Trials*

2.2.2.1 *The Versailles Treaty*

The Washington Treaty and the draft Rules were attended to with the common problems on the issue of the superior orders defense. These instruments did not clarify whether they denied/supported this defense as a general rule or restricted themselves to partially conclude on this defense just in the scope of their material jurisdiction. In addition, the two instruments ultimately did not come into force as a treaty or a rule.

Another attempt to establish a multinational rule on the superior orders defense was the drafting of the Versailles Treaty at the end of World War I. It was a significant multilateral conference that examined the issue of the superior orders defense in the violation of the laws of war in general. However, it has already been noted that the conclusion of the Washington Treaty and the draft Rules that

¹¹⁷Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, *supra* n. 113, at 11.

¹¹⁸R. Wyman, 'The First Rules of Air Warfare', *Air University Review* (1984, March – April): 99–100.

¹¹⁹*Ibid.*, 100. See also W. Rodgers, 'The Laws of War Concerning Aviation and Radio', *American Journal of International Law* 17 (1923): 629–40.

followed the Versailles Treaty was extremely difficult. Even among the victorious countries, it was not easy to express specific ideas on the issue of the superior orders defense.

The Preliminary Peace Conference of 1919 established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, comprising the delegates of the United States, the United Kingdom, France, Italy, and Japan, in order to inquire into the issue of individual responsibility with regard to the breach of the laws and customs of war during World War I.¹²⁰

The Commission expressed its basic idea on the superior orders defense in dealing with the issue of individual responsibility:

the trial of the offenders might be seriously prejudiced if they attempted and were able to plead the superior orders of a sovereign against whom no steps had been or were being taken. . . . We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility.¹²¹

The first part of the paragraph appears to have generally denied the superior orders defense. However, it primarily indicated the necessity of prosecuting the head of state and simply underlined that a combination of the immunity of the head of state and the superior orders defense would be harmful. In fact, the latter part of the paragraph showed that the report recognized the superior orders defense in some cases. Although a person who violated the laws of war could not be immunized solely on the ground of superior orders, he/she could be immunized if some other factors had accompanied the superior orders. The report did not clarify the 'other factors' and entrusted courts to use their discretion. Nonetheless, it is worth bearing in mind that the courts were allowed to decide 'whether a plea of superior orders is sufficient to acquit the person charged from responsibility'.¹²²

As per the author's knowledge, there are no other records on the Commission's discussion relevant to this issue. However, it has already been seen above that the Allied Powers expressed various views on the superior orders defense at that time. In such circumstances, it was fully foreseeable that the conclusion of a unified idea on this issue was not easily expected.

Eventually, the Versailles Treaty stipulated on trials and punishment of war criminals in Articles 227–30 of Section 7. It contained no provision on the superior orders defense. Some commentators argued that it should not be construed that the superior orders defense was denied, since there was no provision in the Treaty that

¹²⁰Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference', *American Journal of International Law* 14 (1920): 95.

¹²¹*Ibid.*, 117.

¹²²The arguments which deem the line in question as recognizing conditional immunity under the superior orders defense include S. Glaser, *Introduction à l'étude du droit international pénal* (Paris: Sirey, 1954), 128; Fukatsu & Kita, *supra* n. 106, at 182–3.

conflicted with the Commission's report.¹²³ However, considering that a unified international rule on the said defense had not been formed by that time, a final judgment of the Allied Powers on this problem could not be instantly estimated.

An international rule on the superior orders defense was not clearly formulated on the occasion of World War I. As we will see below, German national courts eventually tried German war crimes during the war. These national courts applied the nation's criminal law in dealing with the problem of the superior orders defense.

2.2.2.2 The Reipzig Trials

Articles 228 and 229 of the Versailles Treaty provided that the Allied Powers would try German war criminals and Germany should extradite German nationals for trials to the Allied Powers:

Article 228

The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

Article 229

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.

In every case the accused will be entitled to name his own counsel.

However, as the Allied Powers sent Germany a list of suspects, the German government disapproved the extradition on the ground of its domestic political conditions. The German government contended that the extradition of major figures of the German Army and Navy in the list would stir up public opinion and the new regime in Germany would become unstable.¹²⁴ In addition, it had often been argued in Germany that the extradition of German war criminals, including those who were not in the list, was in conflict with international law and the general principle of law.¹²⁵

¹²³G. Manner, 'The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War', *American Journal of International Law* 37 (1943): 417.

¹²⁴A. Mérignhac, 'De la responsabilité pénale des actes criminels commis au cours de la guerre de 1914–1918', *Revue de droit international et de législation comparée, Troisième série* 1 (1920): 61–8; Cave, supra n. 4, at xxviii; E. Colby, supra n. 57, at 615; Jescheck, supra n. 40, at 64.

¹²⁵J. Bell (ed.), *Völkerrecht im Weltkrieg 1914–1918*, vol.3 (Deutsche Verlagsgesellschaft für Politik und Geschichte M.B.H., 1927), 57; Lauterpacht, supra n. 6, at 61.

The German government itself contended at the Peace Conference that such an extradition would contradict Section 9 of the German *Criminal Code*.¹²⁶ Consequently, the Allied Powers accepted the German government's contention and decided to let the German Supreme Court at Leipzig try German war criminals. However, the Allies reserved to begin with their independent proceedings, depending on the progress of German trials.

Thus, the trials, which had been decided under the Versailles Treaty, were finally conducted by German national courts, which applied the German national laws. On the issue of the superior orders defense, the German Supreme Court naturally applied the relevant provisions of the German criminal law. Therefore, the judgments of the Leipzig Trials should not be deemed to directly reflect the concurrent international law. Nonetheless, the trials were conducted under the Versailles Treaty and drew much attention of the relevant countries. This section will examine the Leipzig Trials as a significant precedent that influenced subsequent discussions on the superior orders defense.

The Leipzig Trials ended up with the conviction of only six of the accused.¹²⁷ The Supreme Court expressed its view on the superior orders defense in the *Dover Castle*¹²⁸ and *Llandovery Castle* cases.¹²⁹

In the *Dover Castle* case, Karl Neumann, the First Lieutenant of the German Navy, was indicted for having torpedoed and sunk the English hospital ship *Dover Castle* from the submarine he commanded. Neumann contended that he had only carried out the order of the German Admiralty. The court first emphasized the importance of military discipline in the army and expressed its basic idea that only superiors would bear responsibility if an execution of orders violated criminal law.¹³⁰ This idea conformed to Paragraph 1, Section 47 of the German *Military Criminal Code*. The court also expressed the view that the idea was in accordance with 'the legal principles of all other civilized states', including Section 443 of the concurrent British Manual of Military Law.¹³¹

¹²⁶Document 57, German Counterproposals of May 29, 1919, in A. Luckau, *The German Delegation at the Paris Peace Conference* (New York: H. Fertig, 1971), 370.

¹²⁷The Allied Powers listed 896 of the accused, whereas the list prepared by the German government showed 45 accused (J. Descheemaeker, 'Le Tribunal Militaire International des grands criminels de guerre', *Revue générale de droit international public* 50 (1946), 213). Only 12 out of the listed accused were eventually tried at Leipzig (*ibid*).

¹²⁸Judgment in the Case of Commander Karl Nemann, Hospital Ship 'Dover Castle', in 'Judicial Decisions Involving Questions of International Law', *American Journal of International Law* 16 (1922): 704–8.

¹²⁹Judgment in the Case of Lieutenants Dithmar and Boldt, Hospital Ship 'Llandovery Castle', *id.*, 708–24.

¹³⁰*Ibid.*, 707.

¹³¹*Ibid.* However, as was seen in Sect. 2.1, the United Kingdom, the United States, France, and the Soviet Union among those 'civilized states' had not fully clarified the 'the legal principles' on the superior orders defense. With regard to Section 47 of the German *Military Criminal Code*, see M. Mayer, 'Der rechtswidrige Befehl des Vorgesetzten', in *Festschrift Paul Laband* (Tübingen: Verlag von J. C. B. Mohr, 1908), 148–62; O. Thielke, *Gehorsam und Schuld des Staatsbeamten*

Having said so, the court pointed out that there were two exceptional cases on Section 47 of the German *Military Criminal Code*: one was where the accused had deviated from the orders that he/she had received, and the other was where the accused was conscious of the illegal character of the conduct in question. Then, the court judged that the *Dover Castle* case did not fall in these exceptions. Neumann thought that the measure taken by the German Navy against the hospital ship was a legal reprisal in light of the circumstances prevailing at the time. The court decided that he was not responsible for having executed orders without the knowledge of their illegality.¹³²

The judgment in the *Llandovery Castle* case convicted the accused. However, it was basically the same with the judgment in the *Dover Castle* case on the problem of the superior orders defense. It is noteworthy that the *Llandovery Castle* judgment decided on the knowledge of illegality of the accused by referring to an additional test – the test of whether or not the illegality of the conduct in question is universally known:

It is true that according to para. 47 of the 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. According to No. 2, however, the subordinate obeying such 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 favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But this case was precisely one of them, for in the present instance, it was perfectly clear to the accused that killing defenceless people in the life-boats could be nothing else but a breach of the law.¹³³

Further, Neumann insisted that he had been forced by his superiors to execute the illegal act. However, the court did not recognize the existence of such coercion.¹³⁴

Eventually, only six were convicted in the Reipzig Trials, and they were meted out with comparatively light punishments. The Allied Powers called off the proceedings at the German Supreme Court and expressed their intention to execute Articles 228–30 of the Versailles Treaty on their own.¹³⁵ However, eventually, they

und des Soldaten bei gesetzwidrigen Befehlen des Vorgesetzten (Königsberg: Druck von Karg und Manneck, 1911), 62–72.

¹³²Judgment in the Case of Commander Karl Nemann, Hospital Ship ‘Dover Castle’, ‘Judicial Decisions Involving Questions of International Law’, *American Journal of International Law* 16 (1922): 707–8.

¹³³Judgment in the Case of Lieutenants Dithmar and Boldt, Hospital Ship ‘Llandovery Castle’, *id.*, 721–2.

¹³⁴*Ibid.*, 722–3.

¹³⁵*Journal du droit international* (1921): 1077–8; ‘Vermischtes, Deutsche Juristen!’, *Deutsche Juristen - Zeitung* (1922): 106–7; Jescheck, *supra* n. 40, at 67. Regarding the criticism of the

did not request Germany to extradite the suspects.¹³⁶ Public opinion in Germany resisted strongly. It was difficult to collect evidence from abroad and the Reipzig Trials were considerably behind schedule.¹³⁷ By the time the Allied Powers changed its policy to realize the provisions of the Versailles Treaty to the letter, international arguments on war crimes punishment had fairly toned down.¹³⁸

2.2.3 Conclusion

International rule-making on the superior orders defense had been in its infancy until World War I. The countries that suffered serious damages because of a submarine sink-on-sight policy of Germany during the war expressed their categorical denial of the superior orders defense in the Washington Treaty. However, the same countries unconditionally allowed the said defense in the draft Rules. The countries that participated in the drafting of the Washington Treaty bore in mind the attacks carried out by German submarines without any warning given to merchant vessels. It is understandable to some extent that the treatment of the superior orders defense in this legal instrument was rather stringent. In any event, the relationship between the provisions of this Treaty as well as the draft Rules on one hand and general international law on the other was not fully clarified.

In such circumstances, it seemed difficult from the beginning to set up general rules on international law with respect to the superior orders defense. The Versailles Treaty did not even introduce a provisional rule that widely allowed the discretion of courts. The Treaty was concluded without any relevant stipulation on the issue. Finally, the German national court conducted partial proceedings on war crimes during the war. The court expressed that the superior orders defense should be allowed mainly on the test of the knowledge of illegality.

It is worth noting that such a position of the German national court was similar to that of the civil courts of the United Kingdom and the United States, the countries that were directly involved in the drafting of the Nuremberg Charter. As seen in Section 1 of this chapter, the British and US civil courts had conditionally been recognizing the superior orders defense on the tests of the knowledge of illegality and/or manifest illegality toward the end of World War II. It can be said that these

Reipzig Trials by the Allied Powers (for instance, E. Clunet, 'Les criminels de guerre devant le Reichsgericht, à Leipzig', *Journal du droit international* (1921): 440–2; Descheemaeker, *supra* n. 127, at 213), the German Minister of Justice made a refutation that the Allies were not positive on mutual assistance on criminal matters with Germany ('Vermischtes, Das Reichsgericht und die Prozesse gegen die sog. Kriegsverbrecher', *Deutsche Juristen – Zeitung* (1922): 611–2; Bell, *supra* n. 125, at 61–2. See also C. Mullins, *The Leipzig Trials* (London: H. F. & G. Witherby, 1921), 43.

¹³⁶Jescheck, *supra* n. 40, at 67. In France and Belgium, there were some trials *in absentia* (*Journal du droit international* (1921): 781–2, 1076–7).

¹³⁷Battle, *supra* n. 2, at 5–6; Cave, *supra* n. 4, at xxviii.

¹³⁸Mullins, *supra* n. 135, at 23. Jescheck, *supra* n. 40, at 67.

three countries held common positions in restrictively allowing the superior orders defense.

The German trials were a part of the postwar management of the Allied Powers and drew much international attention. The precedent of the Reipzig Trials should have had an even greater impact on the subsequent international rule-making as compared to the national judicial precedents of the other relevant countries. The drafters of the Nuremberg Charter might not have paid much attention to such national precedents in general. However, they should not have easily overlooked the fact that the Reipzig Trials supported conditional immunity in the superior orders defense.

The Execution of Illegal Orders and International
Criminal Responsibility

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