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Imputing The Intent Of A Superior To A Subordinate

April Yates

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
RWANDA GENOCIDE PROSECUTION

(In conjunction with the New England School of Law)

MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR

ISSUE #4
IMPUTING THE INTENT OF A SUPERIOR
TO A SUBORDINATE

Prepared by April Yates
December 2000

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- G. Telford Taylor, *Nuremberg and Vietnam: an American Tragedy* (1970).
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A. LAW REVIEWS AND JOURNALS

- J. Timothy Wu and Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability For The Actions Of Subordinates—The Doctrine Of Command Responsibility And Its Analogues In United States Law*, 38 Harv. Int'l L. J. 272 (1997).
- K. Ilias Bantekas, *The Contemporary Law Of Superior Responsibility*, 93 A.J.I.L. 573 (1999).
- L. Lara Leibman, *From Nuremberg To Bosnia: Consistent Application Of International Law*, 42 Clev. St. L. Rev. 705 (1994).

- M. Kif Augustine Adams, *What Is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 Stan. J. Int'l L. 271 (1993).
- N. Johan D. Van Der Vyver, *Prosecution And Punishment Of The Crime Of Genocide*, 23 Fordham Int'l L. J. 286 (1999).
- O. Alexander N. Sack, *War Criminals and the Defense of Superior Order in International Law*, 5 Law. Guild Rev. 11 (1945).
- P. Alexander K. A. Greenawalt, *Rethinking Genocidal Intent: The Case For A Knowledge-Based Interpretation*, 99 Colum. L. Rev. 2259 (1999).
- Q. H. Lauterpacht, *The Law Of Nations And The Punishment Of War Crimes*, 21 Brit. Y.B. Int'l L. 58 (1944).

B. CASES

- R. Prosecutor v. Erdemovic, 37 I.L.M. 1182, (1998).
- S. United States v. Calley, 22 U.S.C.M.A. 534; 1973 CMA LEXIS 627; 48 C.M.R. 19, (1973).
- T. In Re Yamashita, 327 U.S. 1; 66 S. Ct. 340; 1946 U.S. LEXIS 3090; 90 L. Ed. 499, (1946).

C. STATUTES

- U. Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

MEMORANDUM

TO: ICTR Prosecutor

FROM: April Yates, New England School of Law

SUBJECT: Imputing the Mental State of a Superior to a Subordinate to a Charge of Genocide

DATE: November 13, 2000

I. Introduction and Summary of Conclusions

D. Issue

This memorandum examines the following topic:

Can the mental state of a superior be imputed to a subordinate for the charge of genocide?¹

E. Conclusion

This memorandum examines leading cases that addressed the issue of the defense of superior orders. In each case the prosecutor did not make an effort to impute the mental

¹ See United Nations International Criminal Tribunal for Rwanda, Office of the Prosecutor, Legal Research Topic No. 4, Facsimile dated 27 August 2000. The memorandum will address the issue of whether a superior's intent can be imputed to a subordinate as well as the knowledge based standard applied through history.

state of a superior to a subordinate. The majority of the published legal material also fail to address the possibility. However, the material expresses the reluctance on the part of the courts to find a subordinate did not possess the required knowledge and intent at the time the acts were committed. Furthermore, if the orders carried out are facially illegal the courts are especially hesitant in accepting the defense of superior orders. Additionally, throughout history the standard most often applied is one of knowledge, specifically whether the defendant knew or should have known the order to be illegal. Again, the overwhelming cases in this area show the courts unwilling to accept the defense of superior orders if it is shown the defendant knew or should have known the order was illegal in nature.

II. Factual Background

The recent genocide in Rwanda was a culmination of many factors, but the catalyst was the plane crash that killed Rwandan President Juvenal Habyarimana.² The Tutsis were

² Virginia Morris and Michael Scharf, *The International Criminal Tribunal for Rwanda* 47 (1998). [Reproduced in the accompanying notebook at Tab E]

subsequently accused of shooting the plane down by the Hutus.³ By the end of the carnage, the Hutu soldiers, the militia as well as the Presidential Guard were responsible for the killing of over 500,000 Tutsis as well as any Hutus they considered as traitors.⁴ In November 1994, the United Nations Security Council established the International Criminal Tribunal for Rwanda.⁵ There are several cases, such as *Prosecutor v. Ntakirutimana, Ntkirutimana and Ruzindana*, in which it will prove invaluable to impute a superior's intent to a subordinate.

III. Legal Discussion

A. Aspects of and the Legal Basis Behind Command Responsibility and the Differences for Accountability from that of Subordinates

The standard that both superiors and their subordinates are held to when establishing their individual responsibility for genocide is one of "knowledge". However,

³ See generally *Id.* [Reproduced in the accompanying notebook at Tab E]

⁴ Virginia Morris and Michael Scharf, *The International Criminal Tribunal for Rwanda* 47 (1998). [Reproduced in the accompanying notebook at Tab E]

⁵ Virginia Morris and Michael Scharf, *The International Criminal Tribunal for Rwanda* 72 (1998). [Reproduced in the accompanying notebook at Tab E]

history has shown that intent can be imputed on the superior for the actions of his subordinates far easier than the reverse. There are a number of reasons behind this rationale, the first of which concerns the standards a superior is held to in performing his duties.⁶ A critical **role** of a superior is to prevent his subordinates from committing crimes and due to the trust civilians place on superiors it is only natural to hold them legally responsible when they fail to do so.⁷ Furthermore, because of their position it is presumed that superiors are aware of these duties and responsibilities and therefore should strive to carry them out to their best abilities.⁸ Also, the leader is the best line of defense in preventing subordinates from carrying out such atrocities.⁹ Deterrence is another aspect behind the reasoning of allowing one to impute a subordinate's intent to his superior.¹⁰ Consequently, considering the role discipline plays in a

⁶ Timothy Wu and Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinate—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 Harv. Int'l L.J. 290(1997). [Reproduced in the accompanying notebook at Tab J]

⁷ Timothy Wu and Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinate—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 Harv. Int'l L.J. 290(1997). [Reproduced in the accompanying notebook at Tab J]

⁸ Timothy Wu and Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinate—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 Harv. Int'l L.J. 290(1997). [Reproduced in the accompanying notebook at Tab J]

⁹ Timothy Wu and Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinate—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 Harv. Int'l L.J. 290 n.90.(1997). [Reproduced in the accompanying notebook at Tab J]

¹⁰ See generally *Id.* [Reproduced in the accompanying notebook at Tab J]

military system and the extent to which one is expected to obey orders¹¹ it seems only logical to hold a superior responsible for the actions of his subordinates.

A superior officer can be held criminally liable for the actions of his/her subordinates if the superior knew or should have known that commission of the crimes were imminent or had been committed and was remiss in taking adequate actions to prevent or discipline the subordinates.¹² The principles behind command responsibility are intentionally broad in order to assure accountability of superiors and prevent them from evading justice under the guise they were unaware of their subordinate's actions.¹³ The doctrine of command responsibility increases the extent to which a superior must proceed in assuring their subordinates are conforming to the laws of war.¹⁴

The Trial of General Tomoyuki Yamashita is one of the most celebrated cases involving command responsibility. The United States military commission found that Yamashita either voluntarily permitted or secretly ordered the crimes

¹¹ M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* 401, (1999). [Reproduced in the accompanying notebook at Tab I]

¹² Mark J. Osiel, *Obeying Orders* 192 (1999). (citing *Secretary-General's Report on Aspect of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, ¶ 56, Article 7(3), U.N. SCOR, 48th Sess., U.N. Doc.S/25704, Annex (1993). [Reproduced in the accompanying notebook at Tab F]

¹³ See generally *Id.* [Reproduced in the accompanying notebook at Tab F]

¹⁴ See generally *Id.* [Reproduced in the accompanying notebook at Tab F]

considering the magnitude of the crimes and subsequently found him guilty.¹⁵ The court in Yamashita also held that it is the responsibility of a commander to ensure his subordinates are not committing criminal acts and when the commander fails to do so, he/she can be held criminally liable for the criminal actions of the subordinates.¹⁶ Although the United States Supreme Court denied Yamashita's appeal, it is useful in this discussion to note the arguments made by both the majority and dissent. The two opinions mirror the two ideologies surrounding the doctrine of command responsibility.¹⁷

Chief Justice Stone held that Yamashita's appeal on the grounds that he had not committed or ordered the actions failed to take into account the fact that the charge was unlawful breach of duty.¹⁸ Chief Justice Stone also stated:

¹⁵ Timothy Wu and Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinate—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 Harv. Int'l L.J. 272, 274-275 n.14-15.(1997). Yamashita commanded a group of Japanese troops that committed horrendous atrocities against the people of the Filipino population and American prisoners of war. There was no concrete evidence Yamashita had either ordered or taken part in the war crimes, but the prosecution urged the commission to find that Yamashita had failed to control his troops and that the mens rea standard to be applied was one of criminal negligence. [Reproduced in the accompanying notebook at Tab J]

¹⁶ *In re Yamashita*, 327 U.S. 1 (1947). [Reproduced in the accompanying notebook at Tab T]

¹⁷ Timothy Wu and Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinate—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 Harv. Int'l L.J. 272, 274-275 n.14-15.(1997). Yamashita commanded a group of Japanese troops that committed horrendous atrocities against the people of the Filipino population and American prisoners of war. There was no concrete evidence Yamashita had either ordered or taken part in the war crimes, but the prosecution urged the commission to find that Yamashita had failed to control his troops and that the mens rea standard to be applied was one of criminal negligence. [Reproduced in the accompanying notebook at Tab J]

¹⁸ Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* 230 (1998). [Reproduced in the accompanying notebook at Tab D]

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the order or efforts of their commander would almost certainly result in violations..... Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.¹⁹

The majority's view adopts the "must have or should have known standard" by holding Yamashita's failure to control his subordinates was dereliction of his duties.²⁰

Justices Rutledge and Murphy dissented arguing there was no evidence showing Yamashita committed, ordered or knew of the crimes committed by his subordinates.²¹ Murphy specifically noted that the breakdown in communications between Yamashita and his subordinates was exactly the outcome the American forces were trying to achieve.²² It was also felt, by Murphy, that holding Yamashita criminally liable for the circumstances created by the triumphant forces did not serve justice or mirror the reality of the military.²³ The dissent's opinion reflects the ideology that the burden is on the prosecution to prove the commander knew

¹⁹ Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* 231 (1998).
[Reproduced in the accompanying notebook at Tab D]

²⁰ Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* 231 (1998).
[Reproduced in the accompanying notebook at Tab D]

²¹ See generally *Id.* [Reproduced in the accompanying notebook at Tab D]

²² See generally *Id.* [Reproduced in the accompanying notebook at Tab D]

²³ See generally *Id.* [Reproduced in the accompanying notebook at Tab D]

about his/her subordinate's crimes to hold the commander criminally liable.²⁴

The case of General Wilhelm Von Leeb, one of the officers in the German High Command Trial, was charged with atrocities and also addressed the issue of command responsibility.²⁵ General Von Leeb was accused of implementing orders from Hitler that called for the execution and abuse of Russian citizens.²⁶ The Tribunal in this case acquitted Von Leeb holding that a commander cannot be held responsible for every subordinate within his chain of command and the commander must commit some dereliction of duty.²⁷

The International Military Tribunal for the Far East also addressed the doctrine of command responsibility. In the Trial of Kimura, the Tribunal found that the commander consciously disregarded his duty to prevent the crimes of his subordinates and the fact that the commander had actually issued orders did not free him from his obligations to ensure the orders were carried out to prevent such

²⁴ See generally *Id.* [Reproduced in the accompanying notebook at Tab D]

²⁵ Timothy Wu and Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinate—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 Harv. Int'l L.J. 272, 274-275 n.14-15.(1997). [Reproduced in the accompanying notebook at Tab J]

²⁶ See generally *Id.* [Reproduced in the accompanying notebook at Tab J]

²⁷ See generally *Id.* [Reproduced in the accompanying notebook at Tab J]

crimes.²⁸ The Tribunal also found in the Trial of Matsui and the Trial of Hata that the atrocities were committed over such a long period of time and at such a large scale that the commanders either knew or were indifferent to the actions of their subordinates.²⁹

The Nuremberg Tribunal applied the doctrine of command responsibility to any individual who possessed power over others, including nonmilitary individuals.³⁰ This allowed for both the *Ministries* case as well as the *Roehling Enterprises* case.³¹ The Third Geneva Convention of 1949 also reiterated the fact that civilian as well as military leaders could be held responsible for any war crimes committed by their subordinates.³² The doctrine of command responsibility was maintained in the 1977 Protocol I to the 1949 Geneva Conventions in Article 86 and 87.³³

The Security Council for the International Criminal Tribunal for the former Yugoslavia takes the same position

²⁸ M. Cherif Bassiouni, *International Criminal Law: Enforcement* 84 (1987). [Reproduced in the accompanying notebook at Tab B]

²⁹ See generally *Id.* [Reproduced in the accompanying notebook at Tab B]

³⁰ Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 A.J.I.L 574 (1999). [Reproduced in the accompanying notebook at Tab K]

³¹ Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 A.J.I.L 574 (1999).

The *Ministries* case involved powerful officials within the Reich Government that could have opposed and possibly prevented the annihilation of the Jewish population. [Reproduced in the accompanying notebook at Tab K]

³² Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* 232 (1998). [Reproduced in the accompanying notebook at Tab D]

³³ M. Cherif Bassiouni, *International Criminal Law* 87 (1987). [Reproduced in the accompanying notebook at Tab B]

as Protocol I in that commanders can be held criminally liable if they actually knew their subordinates were committing war crimes and took no action to stop them.³⁴ Protocol I provides the “reasonableness” standard to commanders, expecting them to take all conceivable measures in which to prevent subordinates from committing war crimes.³⁵ Radovan Karadzic and Ratko Mladic were both indicted by the International Criminal Tribunal for the former Yugoslavia.³⁶

Therefore, under the doctrine of command responsibility a superior can be held criminally liable if he/she fails to control and prevent his/her subordinates from committing criminal acts. A superior can also be held liable if he/she knew or should have known that subordinates either committed or were going to commit war crimes and failed to stop them from occurring. Furthermore, the legacy of the Nuremberg and the Far East Tribunals as well as the Geneva Convention allow for the criminal liability of both military and

³⁴ Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* 233 (1998). [Reproduced in the accompanying notebook at Tab D]

³⁵ Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* 233 (1998). [Reproduced in the accompanying notebook at Tab D]

³⁶ Timothy Wu and Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinate—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 Harv. Int’l L.J. 272, 274-275 n.14-15.(1997). [Reproduced in the accompanying notebook at Tab J]

civilian superiors under the doctrine of command responsibility.

B. Superior Orders

1. Defining the Defense of Superior Orders

When one commits an act that is considered illegal or wrong by larger community standards they are committing a crime of obedience under the orders of a superior.³⁷ The entire world served as the larger community in the case of Nazi Germany.³⁸ Although Nazi Germany produced some of the largest documented cases of the total devastation of human life, the subordinates acted under orders that were at the time legal under German law.³⁹

To move an act of obedience to one of a crime of obedience one must show the actor knew their orders were either illegal or outside the bounds of accepted moral principles.⁴⁰ One may plead their actions were legal or that the actions served a larger purpose, such as the protection

³⁷ Herbert Kelman and V. Lee Hamilton, *Crimes of Obedience: Toward A Social Psychology of Authority and Responsibility* 46 (1989). [Reproduced in the accompanying notebook at Tab C]

³⁸ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

³⁹ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

⁴⁰ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

of the country and that it was therefore their duty to carry out the orders.⁴¹ If however, there is evidence of a cover-up or evidence that great lengths were taken to carry out the actions in secrecy then awareness becomes an issue and the defense of superior orders is less likely to succeed.⁴²

There may actually be instances when the subordinate genuinely believes the orders are perfectly legal and the ambiguous nature that surrounds crimes of obedience lends itself to such mistaken belief.⁴³ Many times a subordinate will not even entertain the thought that orders given him/her by a superior are illegal especially in the confines of strict official settings,⁴⁴ as in the case of *United States v. Kinder*.⁴⁵ So there are in fact instances in which a subordinate will be warranted in pleading a defense of superior orders.⁴⁶

However, the defense of superior orders fails if the subordinate knew or should have known the orders were

⁴¹ Herbert Kelman and V. Lee Hamilton, *Crimes of Obedience: Toward A Social Psychology of Authority and Responsibility* 46 - 47 (1989). [Reproduced in the accompanying notebook at Tab C]

⁴² Herbert Kelman and V. Lee Hamilton, *Crimes of Obedience: Toward A Social Psychology of Authority and Responsibility* 47 (1989). [Reproduced in the accompanying notebook at Tab C]

⁴³ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

⁴⁴ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

⁴⁵ Mark J. Osiel, *Obeying Orders* 192 (1999). ((citing *U.S. v. Kinder*, 14 C.M.R. 742, 750 (1953) (holding defendant soldier excused from liability for obeying an unlawful order "under circumstances where he might entertain a doubt as to the lawfulness of the order ..."). [Reproduced in the accompanying notebook at Tab F]

⁴⁶ See generally *Id.* [Reproduced in the accompanying notebook at Tab F]

illegal.⁴⁷ Under military law soldiers are judged under the “reasonable person” standard when evaluating what the soldier should have known under the circumstances.⁴⁸ Furthermore, the higher the rank of the officer the less likely the defense of superior orders will prevail due to the fact they are held to higher standards in the contemplation of the legality of orders.⁴⁹

A majority of cases may also involve instances in which the subordinate had motives other than the duty to obey such as personal gratification or as a way of advancing one’s career.⁵⁰ Sometimes the actions of the subordinate will confer a level of participation that far exceeds one’s duty.⁵¹ Moreover, subordinates may sometimes commence the implementation of orders, which may distort the line between implementation and the actual establishment of policy.⁵² A subordinate who carries out an order with great vigor may also suggest a level of involvement that reaches beyond the

⁴⁷ See generally *Id.* [Reproduced in the accompanying notebook at Tab F]

⁴⁸ See generally *Id.* [Reproduced in the accompanying notebook at Tab F]

⁴⁹ See generally *Id.* [Reproduced in the accompanying notebook at Tab F]

⁵⁰ Herbert Kelman and V. Lee Hamilton, *Crimes of Obedience: Toward A Social Psychology of Authority and Responsibility* 48 (1989). [Reproduced in the accompanying notebook at Tab C]

⁵¹ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 49 (1989). [Reproduced in the accompanying notebook at Tab C]

⁵² See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

subordinate's actual duty,⁵³ as in the case of *United States v. Calley*.⁵⁴

Under any of these scenarios the motives of the subordinate are questionable and therefore it is unlikely one could legitimately claim the actions were a result of orders.⁵⁵ If personal motives or involvement are shown on the part of the subordinate the defense of superior orders is likely to fail.⁵⁶ Under these circumstances by examining the actions of the subordinate as well as his motives and knowledge of the circumstances, it would be far easier to impute the superior's intent to that of a subordinate. If the court denies the defense of superior orders it may still serve as a mitigating factor.⁵⁷ Therefore, subordinates have very little to lose in claiming a defense of superior orders in that the defense may at the very least reduce one's sentence.⁵⁸

In certain circumstances, it is thought the subordinate either knew or should have known the orders were illegal due

⁵³ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

⁵⁴ *United States v. Calley*, 48 C.M.R. 19 (1973). His defense of superior orders was not accepted and the jury felt that regardless of his orders a reasonable person would have known the orders were illegal and summarily refused to obey. [Reproduced in the accompanying notebook at Tab S]

⁵⁵ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 49 (1989). [Reproduced in the accompanying notebook at Tab C]

⁵⁶ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

⁵⁷ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

⁵⁸ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

to the atrocious nature of the orders.⁵⁹ This was more than evident in the case involving the commander of a Confederate prison camp who subjected Union soldiers to unimaginable conditions⁶⁰, the Wirz case will be addressed in further detail later in the memorandum. In combat situations, however, the line between legal and illegal conduct tends to blur.⁶¹ For instance, serving in the military requires obedience to orders if the military operations are to succeed.⁶² Specifically, in the lower ranks subordinates are expected to follow orders and the unquestioning carrying out of these orders is a necessary practice of the military.⁶³

⁵⁹ Telford Taylor, *Nuremberg and Vietnam: and American Tragedy* 49 (1970). [Reproduced in the accompanying notebook at Tab G]

⁶⁰ Telford Taylor, *Nuremberg and Vietnam: and American Tragedy* 45 (1970). [Reproduced in the accompanying notebook at Tab G]

Evidence showed that the prisoners were virtually without shelter, so many froze in the winter and burned in the heat of summer. Both human waste and corpses consistently fouled the sole source of water. The food was inadequate despite the fact that food was abundant in the country surrounding the camp and also considering neighboring farmers were turned away when they attempted to bring the prisoner's food. More than 14,000 soldiers died as a result of hunger, exposure and disease. Wirz was found guilty of conspiring to destroy the lives of Union soldiers and murder in violation of the laws and customs of war. He was summarily sentenced to hang. ((citing The proceedings of the military commission in the Wirz case were published in House Executive Documents, vol. 8, No. 23, Serial No. 1381, 40th Cong. 2d Sess. (1868). There is vivid contemporaneous account of Andersonville and Libby prisons in A.C. Roach, *The Prisoner of War and How Treated* (Indianapolis, 1865). The play based on the trial, by Saul Levitt, is published by Dramatists Play Service, Inc. Those interested in the subject may also want to read McKinley Kantor's novel *Andersonville*, published in 1955.))

⁶¹ See generally *Id.* [Reproduced in the accompanying notebook at Tab G]

⁶² See generally *Id.* [Reproduced in the accompanying notebook at Tab G]

⁶³ Telford Taylor, *Nuremberg and Vietnam: and American Tragedy* 49 (1970). [Reproduced in the accompanying notebook at Tab G]

Nevertheless, it is not only a soldier's right but also his/her duty to disobey illegal orders.⁶⁴ Especially when those illegal orders involve acts as horrendous as genocide. Considering genocide cannot be carried out by an individual but must be carried out through collective direction it would appear difficult for an individual to show ignorance as to the legal nature of the crime. Whereas the legality of other orders, such as shooting on a navy vessel, may prove to be more difficult. British common law also held this principle in the seventeenth century *Axtell's Case*.⁶⁵ An officer was tried for treason in the murder of King Charles I and claimed the defense of superior orders.⁶⁶ The court denied the defense on the grounds that even a common soldier would have known the illegal nature of the offense.⁶⁷

2. Possible Solutions To Imputing the Intent of a Superior to a Subordinate

Genocide is a crime of specific intent, as such the act must be foreseeable and the perpetrator must wish the act to

⁶⁴ Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* 241 (1998).
[Reproduced in the accompanying notebook at Tab D]

⁶⁵ See generally *Id.* [Reproduced in the accompanying notebook at Tab D]

⁶⁶ See generally *Id.* [Reproduced in the accompanying notebook at Tab D]

⁶⁷ See generally *Id.* [Reproduced in the accompanying notebook at Tab D]

occur.⁶⁸ Under accepted common law, a defendant that knew with practical certainty the consequences of his actions then the defendant could be found to have satisfied the requisite intent despite whether or not the consequences are purposely sought.⁶⁹ As mentioned earlier, the history on the defense of superior orders notably fails to address imputing the intent of the superior to his subordinate. Throughout the majority of history the defense of superior orders has been denied on the basis on the perpetrator's knowledge instead of actual intent. However, there have been some attempts to address the problem with the apparent lack of mens rea on the subordinate's part. One such attempt rises out of the voluntary participation of the subordinate in a criminal organization.⁷⁰ The International Military Tribunal employed this ideology against the SS, stating that the individuals had either joined or remained members while

⁶⁸ Johan D. Van Der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 Fordham Int'l L. J. 308 (1999). (citing ICC Statute, supra 11, art. 6) [Reproduced in the accompanying notebook at Tab N]

⁶⁹ Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case For A Knowledge-Based Interpretation*, 99 Colum. L. Rev. 2259 (1999). (((citing Glanville Williams, *The Mental Element in Crime* 20 (1965) ("Intention is a state of mind consisting of knowledge of any requisite circumstances plus desire that any requisite result shall follow from one's conduct, or else foresight that the result will certainly follow.")) Professor George P. Fletcher traces this doctrinal tradition to the nineteenth-century by reference to a famous Victorian case from 1868, *R. v. Desmond, Barrett and Others*. The accused attempted to liberate two prisoners by dynamiting a wall, knowing that there were people living nearby. Even though "it was no part of Barrett's purpose or aim to kill or injure anyone; the victims' deaths were not a means to his end; to bring them about was not his reason or part of his reason for igniting the fuse, but he was convicted on the ground that he foresaw their death or serious injury." H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 120 (1968))). [Reproduced in the accompanying notebook at Tab P]

⁷⁰ M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* 385-386 (1999). [Reproduced in the accompanying notebook at Tab I]

aware of the organization's criminal activities or had individually committed such crimes, themselves.⁷¹ However, the IMT required more than sheer membership in an organization to hold an individual guilty.⁷² Again, the IMT required either knowledge of the organization's criminal activities or actual commission of crimes by the individual while a member.⁷³ However, concerns over the presumption of innocence⁷⁴ and guilt by association may plague this type of strategy⁷⁵. Although, many countries have laws providing for organizational criminal responsibility under either common law or models that allow for the combination of participation, intent and some existing conduct.⁷⁶

Secondly, intent may be inferred through the subordinate's knowledge and willful behavior.⁷⁷ If the act is carried out by the subordinate with the knowledge that it could not be carried out legally and with the objective of

⁷¹ M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* 390 (1999). [Reproduced in the accompanying notebook at Tab I]

⁷² M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* 390-391 (1999). [Reproduced in the accompanying notebook at Tab I]

⁷³ M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* 391 (1999). [Reproduced in the accompanying notebook at Tab I]

⁷⁴ M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* 385-386 (1999). [Reproduced in the accompanying notebook at Tab I]

⁷⁵ M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* 390 (1999). [Reproduced in the accompanying notebook at Tab I]

⁷⁶ M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* 391 (1999). [Reproduced in the accompanying notebook at Tab I]

⁷⁷ Alexander N. Sack, *War Criminals and the Defense of Superior Order in International Law*, *Lawyers Guild Review* 12 (1945). [Reproduced in the accompanying notebook at Tab O]

carrying out the unlawful act then a defense of superior orders would fail.⁷⁸ Although, this would inevitably present the problem of what the subordinate actually intended. An individual could always claim they had the intention to carry out that individual criminal act but not the larger act of genocide. Still yet, there is an argument that where the violation is obviously illegal in nature and the subordinate still chooses to commit the act then the defense of superior orders is immaterial.⁷⁹ But again, the prosecution would face the question of the exact intent of the subordinate and whether he had a larger goal in mind.

The International Criminal Tribunal for the Former Yugoslavia has found that special intent can be inferred from a number of factors, including the political atmosphere and policy behind the acts and the repetitive nature of the acts.⁸⁰ Likewise, the International Criminal Tribunal for Rwanda held in the *Akayesu* case that intent can be based on the defendant's preparation of actions that are continuous

⁷⁸ Alexander N. Sack, *War Criminals and the Defense of Superior Order in International Law*, Lawyers Guild Review 12 (1945). [Reproduced in the accompanying notebook at Tab O]

⁷⁹ H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, The British Year Book of International Law 73 (1944). [Reproduced in the accompanying notebook at Tab Q]

⁸⁰ Johan D. Van Der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 Fordham Int'l L. J. 309 (1999). (citing ICC Statute, supra 11, art. 6) [Reproduced in the accompanying notebook at Tab N]

and methodical and aimed at a specific group.⁸¹ Furthermore, the ICTR went on to hold that intent can also be inferred by looking at the character and extent of the crimes along with evidence showing the acts were directed towards one particular group while excluding others.⁸² While there might be some obstacles in using the approaches mentioned earlier, the approach already taken by the ICTY and ICTR seem the most promising. Additionally, considering the wide scale commission of these crimes in Rwanda it would be more difficult to rebut this approach.

3. International Law From Nuremberg to Yugoslavia

Prior to World War II, there was no international agreement concerning the defense of superior orders.⁸³ In 1749, British law allowed for the defense of superior orders

⁸¹ Johan D. Van Der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 Fordham Int'l L. J. 310 (1999). (citing ICC Statute, supra 11, art. 6) [Reproduced in the accompanying notebook at Tab N]

⁸² Johan D. Van Der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 Fordham Int'l L. J. 310 (1999). (citing ICC Statute, supra 11, art. 6) [Reproduced in the accompanying notebook at Tab N]

⁸³ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 49 (1989). [Reproduced in the accompanying notebook at Tab C]

only when the orders were in fact legal.⁸⁴ However, in 1914 both British as well as American military law allowed for the complete defense of superior orders.⁸⁵

The military code of Germany, on the other hand, had never allowed superior orders as a complete defense.⁸⁶ In 1872, the first German military code codified the idea that if a subordinate obeys an order he/she knows to be illegal the subordinate will be held as an accomplice.⁸⁷ The German fought in World War II under the following version:

If the execution of a military order in the course of duty violates the criminal law, then the superior officer giving the order will bear the sole responsibility thereof. However, the obeying subordinate will share the punishment of the participant: (1) if he has exceeded the order given to him, or (2) if it was within his knowledge that the order of his superior concerned an act by which it was intended to commit a civil or military crime or transgression.⁸⁸

Although, this version was upheld after World War I, it was not enforced after World War II due to the fact the crimes committed during the war were legal under German law.⁸⁹

⁸⁴ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 49 (1989). [Reproduced in the accompanying notebook at Tab C]

⁸⁵ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

⁸⁶ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

⁸⁷ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

⁸⁸ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 72 (1989). [Reproduced in the accompanying notebook at Tab C]

⁸⁹ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

During the Second World War the Americans and British changed their war crimes codes greatly reducing the scope of the defense of superior orders.⁹⁰ The Allies also announced during the war their intentions regarding the prosecution of war criminals.⁹¹ Two historic developments also emerged providing that responsibility was individual in nature, thereby denying the claim of immunity as head of state and also the denial of the defense of superior orders.⁹²

Even though the Nuremberg Tribunal convicted many of the leading war criminals the judges did not apply the so-called Nuremberg principle of individual responsibility to those individuals in lower ranks.⁹³ The prosecution in the Nuremberg Tribunal felt that although some of the defendants were subordinate to still higher officials they were extraordinary individuals.⁹⁴ The Tribunal found that none of these defendants played minor roles in the criminal

⁹⁰ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 73 (1989). [Reproduced in the accompanying notebook at Tab C]

⁹¹ M. Cherif Bassiouni, *International Criminal Law* 26 (1987). [Reproduced in the accompanying notebook at Tab B]

⁹² M. Cherif Bassiouni, *International Criminal Law* 26 (1987). [Reproduced in the accompanying notebook at Tab B]

⁹³ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 73 (1989). [Reproduced in the accompanying notebook at Tab C]

⁹⁴ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 73 (1989). [Reproduced in the accompanying notebook at Tab C]

activities and considering their rank within the military their culpability was greater than the average soldier.⁹⁵

The General Assembly affirmed the expanded concepts of international law recognized by the Charter of the Nuremberg Tribunal and the many judgments of the Tribunal and began the drafting of those principles.⁹⁶ In 1950, the International Law Commission adopted a report containing the principles laid out in the Charter of the Nuremberg Tribunal.⁹⁷ Principle I asserts: "Any person who committed an act which constitutes a crime under international law is responsible therefore and liable for punishment."⁹⁸ According to Principle II, the fact that an internal law may not impose liability for a crime under international law does not relinquish the individual from criminal responsibility.⁹⁹ Conversely, Principles III and IV provided that one could not escape criminal liability for the mere fact the individual either acted as head of state or as a result of superior orders.¹⁰⁰

⁹⁵ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

⁹⁶ M. Cherif Bassiouni, *International Criminal Law: Enforcement* 44 (1987). [Reproduced in the accompanying notebook at Tab B]

⁹⁷ See generally *Id.* [Reproduced in the accompanying notebook at Tab B]

⁹⁸ See generally *Id.* [Reproduced in the accompanying notebook at Tab B]

⁹⁹ M. Cherif Bassiouni, *International Criminal Law: Enforcement* 44 (1987). [Reproduced in the accompanying notebook at Tab B]

¹⁰⁰ See generally *Id.* [Reproduced in the accompanying notebook at Tab B]

Adolf Eichmann, who was tried in Israel, argued that the many guilty acts were actually committed by the state and therefore individuals could not be held criminally liable for them.¹⁰¹ The Supreme Court of Israel denied this defense and referred to Article IV of the Geneva Convention and the Nuremberg Principles finding that the possibility of an individual escaping liability from heinous acts on the theory the acts were committed by the State would fail to further justice.¹⁰² Other high-ranking Nazi officials such as Joachim Von Ribbentrop, Germany's foreign minister, claimed the defense of superior orders.¹⁰³ The Nuremberg Tribunal denied this defense holding that Hitler had not waged the war on his own and that he had the cooperation of many throughout the military and civilian population.¹⁰⁴ Consequently, when these individuals knowingly took part in his plans they became criminally liable regardless of the fact they were given these tasks by another.¹⁰⁵ Interestingly, Dr. Goebbels, the Minister of Propaganda,

¹⁰¹ William Schabas, *Genocide in International Law* 322 (2000). [Reproduced in the accompanying notebook at Tab H]

¹⁰² William Schabas, *Genocide in International Law* 322 (2000). [Reproduced in the accompanying notebook at Tab H]

¹⁰³ Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* 241 (1998). [Reproduced in the accompanying notebook at Tab D]

¹⁰⁴ See generally *Id.* [Reproduced in the accompanying notebook at Tab D]

¹⁰⁵ See generally *Id.* [Reproduced in the accompanying notebook at Tab D]

published an article condemning Allied bombing operations in which he dismissed the defense of superior orders.¹⁰⁶

The Security Council, regarding crimes committed in the former Yugoslavia, followed the Nuremberg Principle that one can be held individually responsible for war crimes.¹⁰⁷ Article 7, subparagraph 1 provides: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."¹⁰⁸ Subparagraph 4 provides: "The fact that an accused person acted pursuant to an order of a Government or a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."¹⁰⁹

¹⁰⁶ Telford Taylor, *Nuemberg and Vietnam: an American Tragedy* 48 (1970).

Dr. Joseph Goebbels published an article condemning Allied bombing operations, in which he declared:

No international law of warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment by pleading as his defence that he followed the commands of his superiors. This holds particularly true if those commands are contrary to all human ethics and opposed to the well-established usage of warfare.

(citing *Deutsche Allgemeine Zeitung*, 28 May 1944. [Reproduced in the accompanying notebook at Tab G])

¹⁰⁷ Lara Leibman, *From Nuremberg to Bosnia: Consistent Application of International Law*, 42 *Clev.St.L.Rev.* 705. [Reproduced in the accompanying notebook at Tab L]

¹⁰⁸ Statute of the International Criminal Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994). [Reproduced in the accompanying notebook at Tab U]

¹⁰⁹ Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* 91 (1995). [Reproduced in the accompanying notebook at Tab A]

Considering the treatment of the defense of superior throughout history as well as the Nuremberg precedent, Rwanda should be able to reduce instances in which a defendant can claim this as a defense. Furthermore, as established in the cases of the Nazi officials, genocide is not a crime waged by one perpetrator but a collective unit. If looking strictly at both the widespread documentation and the scale of the crimes committed in Rwanda, it should not be difficult for the prosecution to show a defendant's intent to commit genocide.

4. United States Cases

There have been a number of well-known cases throughout U.S. history that addressed the defense of superior orders. One such case occurred just prior to the War of 1812 when the ship *Independence* was docked in Boston Harbor.¹¹⁰ A civilian proceeded past the ship and began to yell abusive language at a marine by the name of Bevens.¹¹¹ The marine ran his bayonet through the civilian and was charged with

¹¹⁰ Telford Taylor, *Nuremberg and Vietnam* 43 (1970). [Reproduced in the accompanying notebook at Tab G]

¹¹¹ See generally *Id.* [Reproduced in the accompanying notebook at Tab G]

murder.¹¹² Evidence was produced at trial showing Bevans' actions were within orders given to him by the marines.¹¹³ Still, Justice Story informed the jury that the defense of superior orders was not allowed and thus the jury convicted Bevans.¹¹⁴

Another well-known case involved the commander of a Confederate prison camp who subjected Union soldiers to deplorable conditions.¹¹⁵ Wirz claimed that his actions were governed by orders from the officer in charge of all the Confederate prison camps.¹¹⁶ Although the court found that Wirz had indeed acted under orders of a superior they still

¹¹² Telford Taylor, *Nuremberg and Vietnam* 43 (1970). [Reproduced in the accompanying notebook at Tab G]

¹¹³ See generally *Id.* [Reproduced in the accompanying notebook at Tab G]

¹¹⁴ Telford Taylor, *Nuremberg and Vietnam* 44 (1970). [Reproduced in the accompanying notebook at Tab G]

¹¹⁵ Telford Taylor, *Nuremberg and Vietnam* 45 (1970). [Reproduced in the accompanying notebook at Tab G]

Evidence showed that the prisoners were virtually without shelter, so many froze in the winter and burned in the heat of summer. Both human waste and corpses consistently fouled the sole source of water. The food was inadequate despite the fact that food was abundant in the country surrounding the camp and also considering neighboring farmers were turned away when they attempted to bring the prisoner's food. More than 14,000 soldiers died as a result of hunger, exposure and disease. Wirz was found guilty of conspiring to destroy the lives of Union soldiers and murder in violation of the laws and customs of war. He was summarily sentenced to hang. ((citing The proceedings of the military commission in the Wirz case were published in House Executive Documents, vol. 8, No. 23, Serial No. 1381, 40th Cong. 2d Sess. (1868). There is vivid contemporaneous account of Andersonville and Libby prisons in A.C. Roach, *The Prisoner of War and How Treated* (Indianapolis, 1865). The play based on the trial, by Saul Levitt, is published by Dramatists Play Service, Inc. Those interested in the subject may also want to read McKinley Kantor's novel *Andersonville*, published in 1955.))

¹¹⁶ See generally *Id.* [Reproduced in the accompanying notebook at Tab G]

argued Wirz was a willing participant and had not acted under duress.¹¹⁷

Except for the period from 1914 - 1944, the United States has resisted the defense of superior orders if the subordinate knew or should have known that the superior had in fact issued an illegal order.¹¹⁸ In *United States v. Calley*, the defense offered the defense of superior orders for his part in the "My Lai Massacre" in 1968.¹¹⁹ Lieutenant Calley claimed he acted as he was ordered to do by his Captain and lacked the intent to kill.¹²⁰ His defense of superior orders was not accepted and the jury felt that regardless of his orders a reasonable person would have known the orders were illegal and summarily refused to obey.¹²¹ The U.S. Army's Law of Land Warfare does not provide for the defense of superior orders unless the subordinate did not know and could not have reasonably known the orders were illegal.¹²²

¹¹⁷ See generally *Id.* [Reproduced in the accompanying notebook at Tab G]

¹¹⁸ M. Cherif Bassiouni, *International Criminal Law: Enforcement* 76 (1987). [Reproduced in the accompanying notebook at Tab B]

¹¹⁹ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 10 (1989). [Reproduced in the accompanying notebook at Tab C]

¹²⁰ *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), aff'd, 48 C.M.R. 19 (C.M.R 1973). [Reproduced in the accompanying notebook at Tab S]

¹²¹ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 10 (1989). [Reproduced in the accompanying notebook at Tab C]

¹²² See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

Under the United States view if a reasonable person would know an order to be illegal and is not acting under duress then the defendant may not defend his actions under the doctrine of superior orders. Furthermore, if there is additional evidence showing the defendant acted willingly and still made the moral choice to carry out the orders then the defense of superior orders would again fail. Focusing again on the crimes carried out in Rwanda, there appears to be irrefutable evidence that the majority of the perpetrators carried out this widespread massacre with great enthusiasm, thereby reducing their chances of a successful defense under superior orders.

5. French and German Cases

As in the United States, there are a number of celebrated cases throughout European history that have addressed the defense of superior orders as well. The Barbie Trial involved a lieutenant in the SS that eventually became chief of the Gestapo for Lyons, France.¹²³ Barbie was

¹²³ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 32 (1989). [Reproduced in the accompanying notebook at Tab C]

known to enjoy his work a great deal and personally took part in the torturing of victims.¹²⁴ When finally brought to trial in 1987, Barbie claimed his actions were that of a minor official and were carried out under orders from his superior.¹²⁵ The French court did not accept Barbie's argument and sentenced him to life in prison.¹²⁶

The defense of superior orders was also raised in a case involving shooting incidents along the Berlin Wall.¹²⁷ The guards in the first trial were charged with manslaughter in the shooting death of an individual as he crossed the area between East and West Berlin.¹²⁸ Two of the defendants were acquitted because the court found they had not had the intent to kill.¹²⁹ Another defendant was convicted of attempted manslaughter due to the fact he had fired directly at the victim.¹³⁰ The last defendant was convicted of manslaughter because he had actually fired the fatal shots.¹³¹ The second case involving a shooting incident at

¹²⁴ See generally *Id.* [Reproduced in the accompanying notebook at Tab C]

¹²⁵ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 73 (1989). [Reproduced in the accompanying notebook at Tab C]

¹²⁶ Herbert Kelman and V. Lee Hamilton, *Crimes Of Obedience: Toward A Social Psychology of Authority and Responsibility* 33 (1989). [Reproduced in the accompanying notebook at Tab C]

¹²⁷ Kif Augustine Adams, *What is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 *Stan. J. Int'l L.* 271. [Reproduced in the accompanying notebook at Tab M]

¹²⁸ See generally *Id.* [Reproduced in the accompanying notebook at Tab M]

¹²⁹ See generally *Id.* [Reproduced in the accompanying notebook at Tab M]

¹³⁰ Kif Augustine Adams, *What is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 *Stan. J. Int'l L.* 271. [Reproduced in the accompanying notebook at Tab M]

¹³¹ See generally *Id.* [Reproduced in the accompanying notebook at Tab M]

the Berlin Wall, Hapke and Ealther were convicted of manslaughter in the death of Michael Schmidt.¹³² Judge Tepperwien found that German law did not require guards to shoot-to-kill and the victim had not posed a threat to the guards.¹³³ However, Judge Tepperwien suspended their sentences due to their expression of remorse and the atmosphere the defendants had grown up, where one was often punished for questioning authority.¹³⁴

The view taken by both the French and German governments closely mirrors that of the United States. If a order is facially illegal and the defendant is not acting under any type of duress then it is very difficult to rely on a defense of superior orders. If the prosecutor for the ICTR can show that a defendant was not subject to personal persecution if he chose to disobey or that the defendant demonstrated a lust for carrying out the order then it would be difficult for the defendant to claim a defense of superior orders.

6. Distinguishing Superior Orders From Duress

¹³² Kif Augustine Adams, *What is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 Stan. J. Int'l L. 271. [Reproduced in the accompanying notebook at Tab M]

¹³³ See generally *Id.* [Reproduced in the accompanying notebook at Tab M]

¹³⁴ See generally *Id.* [Reproduced in the accompanying notebook at Tab M]

Confusion between the defense of superior orders and the defense of duress often emerges when trying defendants.¹³⁵ The Nuremberg Charter initially forbid any defense of superior orders, but the Nuremberg Tribunal provided for a defense in the absence of moral choice.¹³⁶ Additionally, the American Military Tribunal rejected the defense of superior orders in *Einsatzgruppen* due to the failure of the defendant to provide adequate evidence of duress.¹³⁷

The defense of duress was allowed by German courts in the prosecutions for euthanasia¹³⁸, but was later rejected in the trial of personnel of the Treblinka concentration camp.¹³⁹ The court found that there was no credible evidence that an individual would have had life or limb threatened for refusing to participate in the extermination of prisoners.¹⁴⁰ Evidence had been presented that members of

¹³⁵ William Schabas, *Genocide in International Law* 330 (2000). [Reproduced in the accompanying notebook at Tab H]

¹³⁶ William Schabas, *Genocide in International Law* 330 (2000). [Reproduced in the accompanying notebook at Tab H]

¹³⁷ See generally *Id.* [Reproduced in the accompanying notebook at Tab H]

¹³⁸ See William Schabas, *Genocide in International Law* 334 (2000). (citing Dick de Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of their Post-War Prosecution in West Germany, The 'Euthanasia' and 'Aktion Reinhard' Trial Cases*, The Hague, London and Boston, Martinus Nijhoff, 1996, pp. 206-8. [Reproduced in the accompanying notebook at Tab H]

¹³⁹ William Schabas, *Genocide in International Law* 334 (2000). (citing Dick de Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of their Post-War Prosecution in West Germany, The 'Euthanasia' and 'Aktion Reinhard' Trial Cases*, The Hague, London and Boston, Martinus Nijhoff, 1996, pp. 269-274. [Reproduced in the accompanying notebook at Tab H]

¹⁴⁰ See generally *Id.* [Reproduced in the accompanying notebook at Tab H]

the SS who disagreed with genocide suffered only slower advancement within the ranks or were sometimes transferred.¹⁴¹

Erdemovic is probably the most celebrated case to emerge from the International Criminal Tribunal for the former Yugoslavia.¹⁴² Writing for the majority, Judge Gabrielle McDonald held that duress does not allow for a complete defense when the crime involves the killing of innocent human beings.¹⁴³ The fact that the court was divided three to two reveals the shaky ground on which this ruling was decided.¹⁴⁴

However, less than a year after the verdict in *Erdemovic*, it was decided that the Permanent International Criminal Court would allow duress as a defense to genocide.¹⁴⁵ According to the Rome Statute a defendant may claim a defense of duress: if at the time of the conduct the defendant was in fear of imminent death or a continuing serious bodily harm against himself (the defendant) or another and as long as he (the defendant) did not intend a

¹⁴¹ See generally *Id.* [Reproduced in the accompanying notebook at Tab H]

¹⁴² William Schabas, *Genocide in International Law* 335 (2000). [Reproduced in the accompanying notebook at Tab H]

¹⁴³ *Prosecutor v. Erdemovic*, 37 I.L.M. 1182 (1998). [Reproduced in the accompanying notebook at Tab R]

¹⁴⁴ William Schabas, *Genocide in International Law* 335 (2000). [Reproduced in the accompanying notebook at Tab H]

¹⁴⁵ See generally *Id.* [Reproduced in the accompanying notebook at Tab H]

greater harm.¹⁴⁶ Although a defendant may offer the defense of duress, the defendant must produce evidence to substantiate his/her claim.¹⁴⁷

While a defendant may carry out a superior's illegal order, many times if the defendant was subject to some type of duress while carrying out the order then this may have a factor in not only sentencing but charging a defendant as well. However, this is considered an affirmative defense thereby requiring the defendant to show that he had indeed acted under duress. Although a great deal of the individuals in Rwanda will likely claim duress, they will have a particularly difficult time, considering the burden to prove duress lies on the defendant.

¹⁴⁶ William Schabas, *Genocide in International Law* 336 (2000). [Reproduced in the accompanying notebook at Tab H]

¹⁴⁷ See generally *Id.* [Reproduced in the accompanying notebook at Tab H]