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Guidance *orders,* coercive *orders: dynamics and relevance of* the defence *of obedience in international criminal law*

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ABSTRACT

The article examines the superior orders defence in international criminal law, distinguishing between "guidance" and "coercive" orders as criminological and legal factors of criminal obedience. Excluding any justifying effect, it identifies the limited exculpatory relevance of orders in relation to mistake of fact, mistake of law, and duress, with particular focus on instinctive obedience as the basis of an autonomous defence. Article 33 of the Rome Statute is interpreted as the mature codification of such a defence, grounded in a balance between general prevention and personal culpability.

KEYWORDS

Superior orders; International criminal law; Individual criminal responsibility; Grounds for excluding criminal responsibility; Rome Statute.

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Guidance Orders, Coercive Orders: Dynamics and Relevance of the Defence of Obedience in International Criminal Law

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1. Preamble: defining the scope of this contribution, and a promise of much more to come.

The ABIDE research project – Rule of Law and the Problem of Responsible Obedience – has provided an opportunity for a rich and fruitful interdisciplinary exchange, open to the expertise and experience of those who, by profession, are well acquainted with the

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responsibility of obedience. The author has drawn from this a wealth of insights, suggestions, and ideas, which have already been briefly developed in a number of papers presented at the project's conferences and seminars. They are intended to be further elaborated in a forthcoming monographic contribution, the structure of which will, broadly speaking, be as follows.

An analysis of the institutional, criminological and socio-psychological reasons underlying the constant invocation, by those accused of committing an international crime, of a defence centred on compliance with a superior's order will be accompanied, symmetrically, by a consideration of the political-criminal and legal-doctrinal reasons that have generally led to the very limited success of such defences.

From this perspective, by reconciling the empirical and criminal law dimensions, we shall define the scope of the potential exculpatory relevance of a criminal order (once any possible justifying relevance has been ruled out), seeking to determine whether, and under what conditions, a distinct and specific exculpatory value may be attributed to compliance with a criminal order in and of itself; that is to say, beyond those cases in which this requirement constitutes an occasional factual prerequisite for more general grounds for the exclusion of culpability recognised in criminal law doctrine, such as mistake of fact or of law, or psychological coercion.

Having set out the theoretical framework, we shall trace – with an eye to both the statutory provisions and the broad and varied case law – the historical evolution of the rules governing compliance with a superior's order in international criminal law, with the aim of ascertaining which paradigms of criminal relevance and, more frequently, irrelevance to this specific case, among those previously identified, have gradually been emphasised. We shall conclude that certain conventional accounts – such as those which emphasise the alternation between the three models of superior respondeat, absolute liability, and the manifest illegality standard – risk failing to recognise how, beneath the surface, the same paradigm has always operated: that centred on the specific exculpatory rationale of compliance with the order as such. This paradigm has been expressed differently depending on the national or international scope of jurisdiction, the changing historical and cultural context, and the objective (types of offences) and subjective (types of defendants) factors. It is a single paradigm of which Article 33 of the Rome Statute ultimately appears to be the most mature and concise crystallisation.

In the second part of this work, we shall reconsider the criminological findings from which we began, from the opposite—and perhaps more promising—perspective of preventing criminal obedience by holding those in positions of command accountable. Other findings that emerged from the ABIDE project will be utilised here, particularly those aimed at fostering –

through strategies of education, training, proceduralisation and the redefinition of hierarchical structures – healthy dynamics in superior-subordinate relationships, inspired by democratic principles and geared towards preventing criminal acts.

The study is expected to conclude, as envisaged, by returning to the sphere of international criminal law, with an assessment of the possibility of considering such good practices as a benchmark for reasonable and necessary preventive measures, the failure to adopt which could give rise to command responsibility under Article 28 of the Rome Statute.

In this contribution, given the draconian space constraints, very little of this will be able to emerge. We shall therefore focus briefly – drawing on a core bibliography – on the criminological and legal implications of the relevant aspects of a defence based on compliance with a superior's order; on their possible attribution, on the one hand, to more general defences and, on the other, to an ad hoc defence based on a superior's order, with its own specific rationale; and, finally, on the interpretation of Article 33 of the Rome Statute as a possible first explicit crystallisation of such a defence in international criminal law.

2. The relationship between order and obedience as a structural constant of international crime

The issue of compliance with a criminal order is a constant feature of the criminological framework of *collective violence* and, consequently, of its legal qualification as an international crime[2] .

The order-obedience dyad – understood in its static sense, as an expression of a hierarchical relationship – is, in fact, the linchpin that underpins the organisational structure which serves as the organisational precondition for the commission of such crimes. At the same time, the order-obedience dynamic acts as a 'driving force' that imparts to this structure the necessary force to transform the ideological *inputs* and plans of *the* radical *elites* at the top into concrete acts of large-scale violence, carried out by 'militants' often identifiable with military,

[2] As early as the 15th century, before an assembly resembling an international tribunal tasked with judging widespread violations of the laws of war and humanity – the so-called Breisach Tribunal – the central issue was that of criminal command: its legal or factual binding force on the subordinate and, conversely, the claim to responsible disobedience in accordance with a higher ethic, in this specific case directly coinciding with divine precepts. See E. GREPPI, *I crimini dell'individuo nel diritto internazionale*, UTET Giuridica, Turin 2012, pp. 3 ff.

paramilitary or police structures, through the mediation of officials and commanders in intermediate positions[3] .

Furthermore, when seeking to investigate the psychological mechanisms that prompt blind obedience and, consequently, the commission of acts of blatant and unprecedented inhumanity, it again emerges that the physical perpetrators – often ordinary, "ordinary", not suffering from mental illnesses or personality disorders – are driven to this, among other things, by the perceived persuasiveness and coerciveness of the superior order, stemming from the normative, hierarchical, and ideological-communicative significance[4] that this particular form of instigation acquires within the structures and dynamics described above.

To summarise extremely briefly, it can be argued that, from these perspectives, the order performs, largely simultaneously, a dual function: that of *a guidance order* (as regards its persuasiveness), and that of *a coercion order* (as regards its coerciveness).

2.1. The guidance *order, the* coercive *order*

As highlighted by social psychology[5] , the order is persuasive and orienting – it is a *guidance* order – in that it offers, indeed *ad personam*, precise and clear rules of behaviour – a normative 'comfort' – in an extraordinary situation that would otherwise be distressing due to its irreducibility to ethical and legal frameworks practised in different, ordinary and pacified scenarios. Consider a context of war, or at any rate of massive brutality, where the fundamental precept 'do not use violence', or even 'do not kill', is daily and perceptibly called into question: physical aggression, once an exception, manifests itself as the rule, so that one is led to ask, if anything, when and how to kill. The order, in fact, defines parameters to which the individual tends easily to conform because individuals are naturally driven to conform to the rules of the

[3] A. CERETTI, *Collective Violence and International Crimes*, in A. CASSESE (ed.), *Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford 2009, pp. 6 ff.

[4] Discussed, from a philosophy of language perspective, by S. DI PIAZZA, in this volume.

[5] S. MILIGRAM, *Obedience to Authority. An Experimental View*, Harper Collins, New York 2017, pp. 123 ff. (consulted in the Kindle edition). With extensive bibliographical references, see also: P. ZIMBARDO, *L'effetto Lucifero. Cattivi si diventa?*, Raffaele Cortina Editore, Milan 2020, pp. 628 ff. and pp. 7266 ff. (consulted in Kindle ed.); P. BOCCHIARO, *Psicologia del male*, Laterza, Bari 2009, esp. pp. 563 ff. and 1670 ff. (consulted in Kindle ed.).

group to which they belong (*conformism*)[6] , as non-conformism is socially far more costly. This also draws on a tendency to resolve the suffering caused by cognitive and evaluative dissonance through ethical and emotional comfort (*moral disengagement*), either by shifting responsibility onto the authority issuing the order – with a consequent sense of 'relief'[7] – or, over time, through mental processes of normalisation, routinisation and bureaucratisation of the evil already committed (albeit following initial reactions of disgust)[8] . Furthermore, the 'guidance' order induces and reinforces the conviction of acting 'for the greater good'[9] – including through the skilful use of euphemistic language[10] – and, therefore, the motivation to act, in a context where the framework of ethical references appears distorted (partly because it is shaped by propaganda, the tone of which may echo in the command itself, aimed at dehumanising enemies and classifying them as belonging to an extremely threatening *out-group*[11]). This function of ethical legitimisation is all the more effective the more the order appears consistent with the legal system in force in that context or, in any case, with perceptible and widespread practices (of power).

The power of these messages is amplified when, due to their role and the circle to which they belong (e.g. within the ranks of the police or the army, within prison facilities, etc.), the individual to whom the order is addressed is, within certain limits, physiologically compelled to exercise violence, on behalf of the State which holds the monopoly on it, or for the very defence of the Nation. For those who perform such functions, responsibly interpreting the order means exercising the ability to discern the nuanced boundary between a physiological use and a pathological abuse of violence: an evaluative process far more complex and sophisticated,

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[6] A. SMEULERS, *Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-level Perpetrators: A Social-Psychological Approach to Superior Orders*, in *Journal of International Criminal Justice*, Vol. 17, No. 1, 2019, pp. 105–123, pp. 115 ff.

[7] Ibid., pp. 113 ff.

[8] Ibid., pp. 117 ff.; See also A. BANDURA, *Moral Disengagement in the Perpetration of Inhumanities*, in *Personality and Social Psychology Review*, vol. 3, no. 3, 2019 (1999), pp. 193–209; A. BURGIO, M. LALATTA COSTERBOSA, *Orgoglio e genocidio. L'etica dello sterminio nella Germania nazista*, DeriveApprodi, Rome 2016, pp. 285 ff., where the concept of *deliberate obtuseness* is developed, following an openly Arendtian framework.

[9] A. SMEULERS, *Why Serious International Crimes*, op. cit., pp. 108 ff., with interesting testimonies.

[10] Ibid., p. 216, where it is noted, for example, that the genocide of the Jews was bureaucratically termed the 'final solution to the Jewish question' and the racist South African regime 'apartheid'; not to mention, of course, the countless and imaginative euphemisms used to describe torture.

[11] Ibid., p. 117.

and certainly less instinctive, than that aimed at recognising the inherent wrongness of any violence as such[12] .

When speaking of the *coercive* order, however, the reference is not to the capacity to convey norms and values, but rather to the coercive nature of the command – that is, to how it can stimulate, at the level of 'rapid' thought – instincts of obedience in 'disciplined' subordinates towards an almost automatic execution within hierarchical structures whose institutional aims demand maximum readiness and dynamic responsiveness to higher *inputs*[13] ; or in any case – at the level of 'slower' thought – by virtue of a more or less explicit and serious threat of negative consequences in the event of disobedience, such as the risk of military, disciplinary or criminal sanctions (sometimes amounting to a firing squad), or the prospect of an unjust harm not provided for by law (e.g. the threat of being killed alongside the victims of the ordered crime), directed at the subordinate by the person demanding obedience (or by others cooperating with him).

2.2. International criminal law and the order-obedience relationship: between general prevention and individual responsibility

While it is true that in regime crimes the highest moral responsibility lies at the very top, far removed from the places where the bodies and dignity of the victims are ravaged, it is equally true that, without an army of loyal executioners driven by the orders emanating from those heights, conveyed through intermediate channels by an administrative and military apparatus, no international crime would be possible: 'Hitler could not have waged his war of aggression alone'; and the statesmen, military leaders, diplomats and businessmen he employed cannot, for this reason, be regarded as innocent 'if they were aware of what they were doing'[14] .

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[12] Ibid., p. 108.

[13] Ibid., pp. 111 ff.

[14] Trial of the Major War Criminals before the International Military Tribunal – Judgment, 1 October 1946 – published in Nuremberg, 1947, p. 226. The evidence supporting the thesis that the Nazi extermination machine was driven by free choices to comply with orders—often characterised even by excessive zeal and brutality—is well organised, thereby challenging the frequent alibi of 'blind obedience': M. BURGIO, M. LALATTA COSTERBOSA, *Orgoglio e genocidio*, op. cit., pp. 15 ff.

International criminal law is that branch of criminal law whose prohibitions and sanctions are directly defined by international sources and apply regardless of their incorporation into domestic law. Therefore, it applies regardless of whether the orders issued comply with them. In short, it is a legal system that appears precisely designed to undermine the effectiveness of both the *'guidance* order' and the *'coercive* order'; to act as an antidote to the psychological, relational and situational dynamics that make both these forms of order so effective in guiding the behaviour of the subordinate. Against the persuasiveness of the former, it sets a higher precept that communicates norms and values inspired by principles of humanity and *neminem laedere*; against the coerciveness of the latter, which exploits psychological automatisms induced by disciplinary measures and more or less veiled forms of threat, it sets the counter-threat of a criminal sanction ([15]).

Nevertheless, criminal law – including international criminal law – insofar as it is geared towards defining a profoundly personal responsibility, founded also on the requirement that a choice other than the criminal one be feasible, cannot fail to take into account, where they exist, the reality of those psychological and social, relational and situational dynamics that make it difficult to resist the conditioning induced by the order[16]. In short, criminal law cannot *a priori*

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[15] «If […] a group of individuals, for reasons and in ways that history has only partially clarified, decides to alter the parameters of legality as a consequence of a shift in moral imperatives and the norms governing human coexistence, it is the duty of the law to oppose such actions, lest it risk its own negation—that is, the defeat of the very values for the protection of which it exists and is applied» (Military Court of Appeal of Rome, 7 March 1998, K. Hass and E. Priebke, in www.giustiziamilitare.difesa.it); «Here we shall add that, in civilised countries, the rejection of the defence of "superior orders" as a complete exemption from criminal responsibility has now become general. This was also acknowledged by the General Assembly of the United Nations, being one of the principles of the London Charter and of the judgment in the case against the Major War Criminals (Resolution of the Plenary Session, No. 55, dated 11 December 1946). Perhaps it is not a vain hope that the more this conviction becomes rooted in the minds of men, the more they will refrain from following criminal leaders, and the rule of law and order in relations between nations will be strengthened accordingly» (District Court of Jerusalem, the Attorney General v. Adolf Eichmann, Criminal Case No. 40/61).

[16] D. PROVOLO, *Esecuzione dell'ordine del superiore e responsabilità penale*, CEDAM, Padua 2011, pp. 218; 223 ff.; M. MINOW, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence*, in *McGill Law Journal / Revue de Droit de McGill*, Vol. 52, No. 1, 2007, pp. 5 ff.; 20 ff.

ignore the normative dilemma[17] (arising from the antinomy between the rules and institutions 'closest' to the individual, in relation to which that order demands obedience, and other, far more remote rules pertaining to a different legal and value system, which would require disobedience) and/or motivational disorientation (arising from conflicting pressures), and/or motivational deviation (arising from an alteration of ethical, normative and operational frameworks, or in any case from contingencies and relationships that reduce the possibilities for 'slow thinking'), which may afflict the person receiving the command. If one were to disregard these dynamics entirely and a priori, it would no longer be a matter of criminal law, but merely a repressive mechanism, inspired by the blind logic of indiscriminate, symbolic and exemplary punishment.

The resources of international criminal justice, structurally scarce in relation to the enormity and the ramified multi-subjectivity of mass crimes, would moreover end up concentrating their efforts on the lowest-ranking perpetrators, almost elevated to the status of scapegoats in a strategy of symbolic and cathartic stigmatisation of mechanisms that not infrequently overwhelm and crush them[18] ; thereby diverting the threat of punishment from far more relevant and appropriate targets.

There is yet another aspect. Adopting a positive general-preventive perspective – aimed, that is, at fostering the internalisation of precepts by virtue of their value-based and cultural significance, so as to encourage compliance through ethical and psychological impulses that do not necessarily stem from the fear of being punished in the event of transgression – it becomes clear that international criminal law cannot issue directives on order and obedience that are radically incompatible with the inescapable logic of any military structure or, in any case, a

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[17] K. AMBOS, *Treatise on International Criminal Law,* Vol. I: *Foundations and General Part,* Oxford University Press, Oxford 2013, p. 376. On the general issue of conflicts of duty, see A. BARATTA, *Antinomie giuridiche e conflitti di coscienza. Contributo alla filosofia e alla critica del diritto penale*, Giuffré, Milan 1963, pp. 7 ff.; 50 ff. and *passim*. For a selective yet detailed examination of the most authoritative and long-standing voices in international criminal law (Lauterpach, Dinstein, Green), invoking the need for the order received to have some bearing on *the mens rea*: D.H.N. JOHNSON, *The Defence of Superior Orders*, in *Australian Year Book of International Law*, Volume 9, Brill /Nijhoff**,** Leiden**,** 1985, pp. 300 ff.

[18] A. SPENA, Excusiology. *Tentativo di una traduzione penalistica dell'effetto Lucifero,* in *Studi sulla questione criminale*, no. 1, 2020, pp. 65–98, pp. 75 ff., particularly in relation to the Abu Ghraib affair, with references to Zimbardo's psychology, in an attempt at a criminal law analysis, to which A. DI MARTINO provides a counterpoint in *Contesto e individuo nel sistema di giustizia penale internazionale. Contrappunto in riflessioni sparse*, in *Studi sulla questione criminale*, no. 1, 2020, pp. 99–117.

strongly hierarchical structure, to the extent that, if followed, such directives would divert such structures from their assigned institutional purpose. Rules formulated in this way could not be recognised or implemented within such structures (e.g. at the level of formation, training and internal *enforcement*), but would instead suffer dysfunctional crises of cultural or logistical rejection. In short: international criminal law cannot demand disobedience (barring exceptions) as an absolute rule within institutional contexts where the rule can only be, conversely, prompt obedience (with exceptions), since they require strict discipline designed to coordinate the entire structure as if it were a single body responsive to imminent dangers and immediate decisions. This strict discipline is particularly necessary in war, with the aim of preserving the lives of the soldiers themselves and the interests of the nation they represent. The strong capacity for guidance and motivational pressure of such a discipline cannot be undermined, since, by its very nature, it must lead the soldier, when necessary, even to the ultimate sacrifice of life[19] .

Ultimately, it comes down to one of two things: when, God willing, war is abolished in law and in practice, and there is no longer any need for public security – and we therefore no longer require armies or the police – it will be possible to deny any justificatory role to orders, treating any directive, issued by anyone at any time, as open to challenge; however, as long as armies and police forces are necessary, there will be a need for regulations governing orders from superiors that take into account how armies and police forces inevitably operate, given that they are, precisely, called upon to wage war and to grapple with the pressures of the relationship between authority and the individual.

3. The most precise (international) criminal law interpretations of guidance *orders and* coercive *orders*

On a more strictly technical level, how does (international) criminal law characterise the criminal order–obedience dichotomy, with the aim of resolving, within a regulatory framework and in a balance that is both feasible and consistent with the system, the aforementioned equilibrium between preventive and individualistic imperatives?

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[19] See M. MINOW, *Living Up to Rules*, op. cit., pp. 20 ff.; H. MCCOUBREY, *From Nuremberg to Rome: Restoring the Defence of Superior Orders*, in *International and Comparative Law Quarterly*, Vol. 50, 2001, pp. 386–394, p. 391

As already highlighted in Yoram Dinstein's seminal 1965 work *[20] *, the criminal order, depending on how it manifests itself in the specific case, and on how the specific case manifests itself (taking into account factors relating to the subordinate's motivational process, relations with the superior, situational data, etc.), may take the form of broadly defined exculpatory defences, each characterised by a more general scope (such that the order is merely a contingent requirement): psychological *duress*, *mistake of law* and *mistake of fact*. We shall attempt to highlight, however, how, at least at a theoretical and systematic level, there are other possible expressions of the relevance of the criminal order as such, where the *distinctive feature* of its exculpatory scope can be discerned, albeit linked to the basis of the defences of mistake of law and duress. Finally, we shall consider the provisions set out in Article 33 of the Rome Statute, attempting to situate them within the framework of what has been established.

3.1. The exculpatory, not justifying, significance of the superior's order

First, it is necessary to define the scope of the inquiry, distinguishing it from a sphere in which the execution of a criminal order is certainly irrelevant: that of grounds for justification. This obviously presupposes that in international criminal law too, a distinction can be drawn – as is the case in *civil law* systems and, albeit with less clarity, in *common law* systems[21] – between *justification* and *excuse*[22] .

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[20] Y. DINSTEIN, *The Defence of 'Obedience to Superior Orders' in International Law*, Oxford University Press, Oxford 2012, pp. 80 ff.

[21] G. P. FLETCHER, *The Individualisation of Excusing Conditions*, in *Southern California Law Review*, 1974, Vol. 47, pp. 1269–1309; F. CONSULICH, *Lo statuto penale delle scriminanti*, Giappichelli, Turin 2018, pp. 221 ff.; E. GRANDE, *Justification and Excuse (le cause di non punibilità nel diritto angloamericano)*, in *Digesto delle Discipline Penalistiche*, Vol. VII, UTET, Turin 1990, pp. 309–361; A. ESER, *Justification and Excuse*, in *The American Journal of Comparative Law*, Vol. 24, No. 4, 1976, pp. 621–637; E. AMATI, V. CACCAMO, *Le cause di esclusione della responsabilità penale*, in VARIOUS AUTHORS, *Introduzione al diritto penale internazionale*, 2nd ed., Giuffré, Milan 2010, pp. 256 ff.; E. MEZZETTI, Necessitas non habet legem? *Sui confini tra "impossibile" ed "inesigibile" nella struttura dello stato di necessità*, Giappichelli, Turin 2001, pp. 63 ff.

[22] A. CASSESE, *Justifications and Excuses in International Criminal Law*, in A. CASSESE, P. GAETA, J. R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford 2002, pp. 951 ff. K. AMBOS, *Treatise*, op. cit., pp. 304 ff. The distinction between justification and excuse, and considerations regarding their mutual incompatibility, is already clearly evident in the *Einsatzgruppen* case, Military Tribunal II, U.S.A. v. O. Ohlendorf et al., 4 March 1949, 468.

Justified conduct is understood to mean conduct which, whilst abstractly falling within the scope of a criminal offence, is nevertheless rendered lawful by another provision of the legal system which, when assessed objectively, takes precedence over the criminal provision. This precedence derives from the conduct's function in protecting interests considered, in the specific case, to be of greater importance than those protected by the criminal provision. Excused conduct, on the other hand, remains intrinsically unlawful: it retains the negative value typical of the offence and is not justified by a countervailing and prevailing value. However, the perpetrator cannot be required to refrain from it, since it is determined by pressures or contingent alterations in the motivational processes to which any 'law-abiding citizen' lacking heroic impulses, and normally respectful of the legal system, would have succumbed. Under these conditions, the criminal choice does not, therefore, reveal an attitude of reprehensible opposition to the legal order deserving of punishment, also in view of the functions fulfilled by punishment.

First and foremost, precisely because it is radically at odds with the legal system, the criminal order cannot render lawful the conduct of the person carrying it out. Although not without a certain degree of support, discernible in a historical-comparative approach[23] , this interpretation is unacceptable and largely outdated even in domestic law.

In Italy, for example, the unquestionable order (Article 51(3) of the Criminal Code) was conceived as having the capacity to render criminal obedience lawful, on the assumption that the offence committed was offset by a more significant interest in military discipline. For some time, however, it has been pointed out that there can be no objective interest of the legal system in the implementation of criminal orders, since administrative legality—rather than blind obedience—is a constitutive principle of the rule of law[24] . In German legal doctrine, even when it is accepted that an unlawful order may serve as a justification, this is done on the assumption that it leads to the commission of minor offences, the tolerance of which is reasonably justified by the need for rapid and coordinated action by hierarchical bodies responsible for safeguarding

[23] With regard to France, and the (admittedly criticised) theory of *obéissance passive*, see, among others, D. PROVOLO, *Esecuzione dell'ordine*, op. cit., pp. 168 ff.

[24] T. PADOVANI, *Diritto penale*, 14th ed., Giuffré, Milan 2025, pp. 300 ff. For a comprehensive, recent and monographic perspective: D. PROVOLO, *Esecuzione dell'ordine*, op. cit., pp. 73 ff.; T. TRAVAGLIA CICIRELLO, *Dovere e ordine scriminante. Contenuti e limiti dell'art. 51 c.p.*, Giappichelli, Turin 2020, pp. 29 ff. On this point, see also A. SPENA, in this volume

private and public assets. Conversely, a criminal act committed in accordance with an order is not considered justified[25] .

Indeed, if the legal system were to deem the criminal order lawful, it would *effectively* declare that it recognises the criminality of its own organs of power, and thus of itself as potentially criminal: a kind of paradoxical extrajudicial confession which, as history teaches us, is distasteful even to the worst regimes.

The notion, moreover, that an order attributable to a state legal system could actually legitimise the commission of international crimes appears even more untenable when viewed against the founding mission of international criminal law, which is above all to oppose aberrant legal systems and practices of public power. This paradox would extend to other areas of law: one cannot mount a legitimate defence against a lawful offence; it is obviously lawful to assist in the commission of another person's lawful act; one cannot claim compensation for having suffered a justifiable loss[26] . If, therefore, to be clear, the criminal order justified the execution, the girl who, in defending herself, killed the soldier who was carrying out the order to rape her would be liable for murder (perhaps even, given the context, considered a war crime) (subject to the relevance of any putative defence). In this very case, we would face difficulties in punishing, in addition to the soldier, the person who issued that order, and anyone else who facilitated its execution, even though they were not personally bound by the duty of obedience. In any event, that woman could never claim any form of compensation.

Generally in criminal law, and all the more so in relation to international criminal law, the hypothesis of a 'justifying' criminal order has therefore very quickly appeared untenable[27] . In short, any exculpatory value of the order cannot be assessed in relation to the evaluation of the unlawfulness and criminality of *the material element* of the international crime, but, at most, with regard to personal aspects pertaining to the so-called *mens rea* of the person required to

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[25] H.H. JESCHECK, T. WEIGEND, *Lehrbuch des Strafrechts*, Duncker & Humblot, Berlin 1996, pp. 393 ff. Similarly, C. ROXIN, L. GRECO, *Strafrecht, Allgemeiner Teil*, Band I, in C. H. BECK (ed.), *Grundlagen Der Aufbau der Verbrechenslehre*, Munich 2020, pp. 909 ff.

[26] K. AMBOS, *Treatise*, op. cit., 306

[27] P. GAETA, *The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law*, in *European Journal of International Law*, No. 10, 1999, pp. 172–191, pp. 175 ff.; A. CASSESE et al., *Cassese's International Criminal Law*,[3rd]ed., Oxford University Press, Oxford, 2013, pp. 228 ff.; M. CHERIF BASSIOUNI, *Introduction to International Criminal Law*, Martinus Nijhoff Publishers, Leiden-Boston 2014, pp. 406 ff.; D. PROVOLO, *Esecuzione dell'ordine*, op. cit., pp. 214 ff.

obey[28] . It follows that any exculpatory effect remains confined to the subordinate, whose conduct is unavoidable by virtue of legitimate defence, whilst also taking on the nature of a tort giving rise to an obligation to pay compensation.

As previously announced, we shall therefore now consider the possible expressions of exculpatory relevance of the criminal order in international criminal law.

3.2. The guidance *order giving rise to a factual error*

Starting from the *guidance* order, it may first of all give rise to an *error as to the facts*, which excludes intent, when – in its function of guiding the action and qualifying the facts – it causes a misperception of the situations and events on which the conduct acts, such that the subordinate does not realise that he is committing, in every constitutive aspect, the typical act of an international crime[29] . An example is that of the pilot who, during an international conflict, carries out an order to bomb a site indicated by his superior as a depot for missile launchers and other weapons, whereas in reality – a circumstance not perceptible to him – it is an area inhabited exclusively by defenceless civilians, who are thus unintentionally massacred.

Such a psychological and cognitive dynamic excludes liability on the part of the subordinate, even if one could reproach him for the fact that, had he paid greater attention, he might have realised the erroneous nature of the key elements of the order. Such a reproach would, in fact, take on 'culpable' characteristics, and fault (*negligence*, but also *inadvertent*

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[28] T. PADOVANI, *Le ipotesi speciali di concorso nel reato*, Giuffré, Milan 1973, pp. 171 ff.; ID., *Ordine criminoso e obbedienza gerarchica nel diritto penale italiano*, in *Dei Delitti e delle Pene*, 1987, pp. 477–493, pp. 484 ff.

[29] An acquittal on the grounds of lack of *mens rea*, due to an error on the material element arising from a mistake of law induced by an order, would undoubtedly have been granted if the judges of the British Military Court in Hamburg, in their decision of 12 and 13 February 1946, had deemed well-founded the factual allegation put forward by the defence counsel of First Lieutenant G. Grumpelt (the so-called 'Scuttled U-Boats' case). He was accused of having sunk two U-boats handed over to the Allies by the German command and, in so doing, of having committed the war crime of violating the terms of a surrender or armistice. The defendant, in fact, put forward a plea of absence of mens rea and of superior orders, asserting that he had not been aware of the terms of the act of surrender which rendered the order received unlawful, since these had not been communicated to him in any way. Furthermore, he told having received the order to scuttle all U-boats, without having been informed of any revocation of that order. Ultimately, the defendant alleged an error regarding a legal prerequisite of the criminal offence committed (the terms of the surrender agreement of 4 May 1945), induced by the order to scuttle received, which was not in itself necessarily unlawful (and by the failure to specify the terms of that surrender).

recklessness) is not a sufficient requirement for attributing an international crime. Liability might only arise if the pilot, whilst harbouring doubts, had in fact perceived and ultimately, by obeying, accepted the risk that the order was false or erroneous, and that the site was indeed inhabited by civilians, since in such cases there would be *dolus eventualis*, sufficient to ground liability for an international crime (even if not under the Rome Statute)[30] .

In attempting to define the *rationale* behind these rules in relation to the premises outlined in the preceding paragraphs, it becomes clear why international criminal law may choose to refrain from imposing punishment in such cases, attributing primary significance to the offender's lack of culpability. The subordinate who errs in fact does not know what he is doing; therefore, he does not know that he is committing what is 'wrong' according to the evaluative criteria conveyed by the international criminal law precept; on the other hand, the order received does not intend to alter the framework of those criteria (given that, even if falsely, it does not foreshadow the commission of that 'wrong'). There is, therefore, no reason or possibility to exert that motivational counter-pressure in relation to the situational data and psychological dynamics typical of contexts of mass violence: the precept of international criminal law makes no sense in the eyes of someone who, due to a perception of reality distorted by superior directives, is completely unaware that they are violating it. There is therefore no reason to expect that individual to comply with the provision itself, under threat of punishment.

This observation leads to a further reflection. The fact that the mistake of fact was induced by an order, within the context of a strict hierarchical relationship, does not suggest any reason to deviate from the general rules on *mistake of fact*. Since the meaning of the defence, in this case, is closely linked to the ultimate psychological effect – namely, the offender's failure to understand what they are doing – nothing changes when the cause of that effect varies: that is, whether it stems from a spontaneous perceptual dysfunction, or from a misleading instruction by another, perhaps of an imperative nature[31] . At most, the assumption of a misleading order may acquire evidentiary significance, providing documentary support for the subordinate's allegation of a *mistake of fact*.

The relational and situational conditions in which the subordinate (military, paramilitary, etc.) operates might, if anything, make it even more difficult for them – compared to an ordinary citizen who has made a mistake in everyday situations – to assess the factual plausibility of the

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[30] For a broader context, SEE A. VALLINI, *'La* mens rea', in AA.VV., *Introduzione al diritto penale internazionale*,[5th]ed., Giappichelli, Turin 2025, pp. 179 ff.

[31] On this point, see T. PADOVANI, *Le ipotesi speciali*, *op. cit*., pp. 102 ff.

order received; they might therefore mean that, once intent is ruled out due to factual error, it becomes more difficult to hold them liable for negligence *in the broad sense*. On the basis of this consideration, for example, some authors consider it no coincidence that Article 51(3) of the Italian Criminal Code, in establishing the exculpatory value of factual error induced by the order, does not expressly provide for residual punishment for negligence, as is the case in other provisions that also deal with grounds for excluding intent[32] ; and it is for similar reasons that, when considering the scope of *review* of the exculpatory order, referred to in the final paragraph of the same provision, it is generally held that this always concerns aspects of formal legality, but not those of merit or substantive legality, which are more difficult for a subordinate to assess critically [33] . In any event, these are irrelevant considerations from the perspective of international criminal law, which, as noted above, does not recognise liability for negligence (except in relation to the liability of the superior, pursuant to Article 28(a)(i), who is, however, the one who issues the orders).

Even in phenomenological terms, it is a wholly contingent (and statistically rare) circumstance that an order should induce a factual error. In accordance with the aims it pursues, an order usually seeks to guide the recipient as to what they must actually do, not to mislead them through deception. It is, of course, possible for an order to be deceptive because it is, in turn, the result of an error on the part of the commander, but this would be an anomaly that hierarchical structures are designed to avoid, especially in contexts such as war, where the accuracy of decisions and procedures is vital. One can also imagine the singular case of a superior who exploits their position to deceive subordinates in order to make them do what they would not otherwise do (an iconic example being General Jack D. Ripper in Stanley Kubrick's film *Dr Strangelove*[34]), but this is, once again, an anomaly that falls outside the logic of the structure, which cannot systematically and effectively coordinate its apparatus through an altered representation of reality.

3.3. The guidance *order leading to an error regarding the prohibition*

[32] See, in particular, and for a comprehensive overview, the contribution by A. SPENA in this volume.

[33] D. PROVOLO, *Esecuzione dell'ordine, op. cit*., pp. 79 ff.

[34] *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb*, 1964. The theme of the criminal order, and of responsible obedience and disobedience, is also explored by the same director (a great analyst, more generally, of violence and power) in his earlier masterpiece *Paths of Glory*, 1957.

The situation is different where the *guiding* order induces an error regarding the prohibition: that is, the scenario in which the command received does not alter the representation of the facts, but rather, implicitly or explicitly, confers upon those consequences a licence of lawfulness, in the form of an obligation, in radical opposition to the prohibition on engaging in the conduct prescribed by international criminal law. In such circumstances, the subordinate might effectively become convinced that what they are asked to do is legally required or, in any case, legitimate, thereby ignoring the existence of a superior precept of exactly the opposite nature.

This is a frequent scenario[35] and – this time, indeed – consistent with the very function of the order, which is to persuade the subordinate to act as desired by the superior, so that the latter may pursue their aims in the most precise and prompt manner: conveying a perception of the full lawfulness of the prescribed act is strictly functional, in normative, ethical and psychological terms, to facilitating its execution and, therefore, to the full operation of hierarchical structures.

Well then: this is precisely the situation in respect of which international criminal law feels the urgent need to exert a countervailing force of a cultural, evaluative and motivational nature. It would therefore be inconceivable that, in such cases, an excuse might work in the subordinate's favour; not, at least, always and in every instance. Indeed, even when the agent does not realise that they are formally contradicting a requirement of international criminal law (and the associated value judgement), the requirement to act otherwise—which underpins the preliminary judgement of reprehensibility prior to liability—may nevertheless be mitigated. Nevertheless, he is not mistaken either about the facts or the implications of his actions, knowing full well that he is carrying out precisely that 'something' which can be classified as a criminally relevant 'wrong'. The problem then becomes to what extent international criminal law can accept that he does not perceive that this 'something', of which he is fully aware, is criminal and cannot be legitimised by any legal system or command.

Furthermore, as we shall soon see, error regarding the prohibition induced by an order within highly structured hierarchical relationships—in which a critical re-examination of the

[35] Even under the force of rules that appeared to deny any exculpatory function to a superior's order, such as those applicable to the Nuremberg trials (see *below*), the judges outlined a possible defence where the order had caused a mistake regarding a forgivable prohibition, in that «the nature of the ordered act is [not] manifestly beyond the scope of the superior's authority»: see also for references K. AMBOS, *Treatise*, op. *cit*., 379.

order's legitimacy is more difficult and less feasible—calls for a more lenient and derogatory regime than that generally applied to error regarding the prohibition *tout court*.

Ultimately, if international criminal law has always been concerned with criminal orders, it is – on the one hand – to fulfil the preventive purpose that defines its meaning, namely to counteract the normative disorientation that such an order causes in those who receive it, as well as – on the other hand – due to the circumstance, relating instead to personalistic considerations, that a mistake regarding the prohibition induced by a criminal order may be 'more excusable'. To put it even more briefly: although it is true that a criminal order is not always accompanied by a subordinate's error regarding the prohibition, and vice versa, nevertheless the order's capacity to induce an error regarding the prohibition forms part *of the rationale* for an *ad hoc* regulation of the criminal order by international criminal law.

3.4. The coercive *order as a cause of* instinctive obedience*, or of* duress

Where the order does not give rise to any false perception (in fact or in law) in the recipient, it may nevertheless function as a *coercive* order; that is, to push the recipient to knowingly commit evil – to resist the ethical-psychological, cultural and normative processes aimed at inhibiting the commission of evil – by virtue of a superior and opposing motivational pressure, which can be *broadly* described in terms of *coercion* or *comp*ulsion, though not necessarily irresistible.

Coercion may arise, first and foremost, from the fact that the order is accompanied, explicitly or implicitly, by the threat of serious and unlawful consequences for the life or safety of the disobedient party, or of persons dear to them. In such a case, however, the order does not take on an autonomous character: it becomes one of the factual prerequisites—not even the most significant one—of a broader ground for exclusion of liability, namely *duress* (*psychological coercion*), the scope of which extends well beyond the phenomenon examined here[36] .

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[36] N. SELVAGGI, *Dubbio sulla criminosità dell'ordine e responsabiltà penale internazionale,* in E. MEZZETTI (ed.), *Diritto penale internazionale*, Vol. II, *Studi*, 2nd ed., Giappichelli, Turin 2010, p. 207 ff. The possible existence of *duress*, particularly as a consequence of a *coercive order*, has in fact been considered on several occasions by international courts, although the applicability of this defence has almost always been ruled out, whether for factual reasons (as in the *Einsatzgruppen* case, cit., 471 ff., where, moreover, a clear distinction is

It is clear that, in this area too, international criminal law cannot relinquish its general-preventive function, but rather finds its justification – as already noted – in the need to provide a motivational 'antidote' to the criminogenic pressures typical of contexts in which mass violence arises from the individual contributions of many[37] . However, this function is reflected in the particular balance between *individual autonomy* and *prevention* that characterises the specific doctrine of *duress*, and which therefore falls outside the scope of this study.

3.4.1. The autonomous rationale of the defence: instinctive obedience

There is, nevertheless, another way in which an order can bring about a criminogenic 'motivational alteration', not necessarily due to a contextual and abnormal threat, but rather because of its intrinsic characteristics. In particular, the order may elicit that disposition towards instinctive and immediate obedience (*instinctive obedience*) which develops, partly due to training and instruction geared towards this end, within highly hierarchical organisations (*primarily* the military), which, even at a formal, legal, logistical or practical level, may deny subordinates the time, opportunities, authority and procedures to critically examine the orders received [38] . This attitude is, in fact, functional to the institutional aims (in themselves lawful)

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drawn between the scope of *coercion* inherent in the relationship of subordination as such, and actual *duress*), or due to debatable legal interpretations. See Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, *Sentencing Judgment*, IT-96-22-T, 29 November 1996, § 47 ff., effectively challenged in equally famous *dissenting opinions*, such as that of Cassese, from which the following observation is worth quoting here: «… in the case-law, duress is commonly raised in conjunction with superior orders. However, there is no necessary connection between the two. Superior orders may be issued without being accompanied by any threats to life or limb. In these circumstances, if the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order. If, following such a refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised, and superior orders lose any legal relevance. Equally, duress may be raised entirely independently of superior orders, for example, where the threat comes from a fellow serviceman. Thus, where duress is raised in conjunction with manifestly unlawful superior orders, the accused may only have a defence if he first refused to obey the unlawful order and then only carried it out after a threat to life or limb» (Appeals Chamber ICTY, Prosecutor v. Drazen Erdemovic, Judgment of: 7 October 1997, Separate and Dissenting Opinion of Judge Cassese, §15).

[37] On this point, see DI MARTINO, *Contesto e individuo*, op. cit., pp. 101 ff.

[38] M. MINOW, *Living Up to Rules*, op. cit., pp. 20 ff. Within the framework of Italian military criminal law, see the observations of D. NOTARO, *Esecuzione dell'ordine militare e disobbedienza responsabile*, in *La legislazione penale*, 27 February 2025, pp. 8 ff.

of the organisation itself (*primarily*: the conduct of an armed conflict), which are hardly compatible with moments of reflection, critical review, or executive discretion that delays and disrupts[39] .

On a psychological level, this attitude operates on a plane that does not necessarily coincide with the cognitive and evaluative plane involved in weighing up the lawfulness or reliability of the order's content, and is also distinguishable from the plane where emotional reactions of fear are triggered by some form of threat. *Instinctive obedience* is, in short, an automatic reaction, inherent in extremely effective and coercive disciplinary mechanisms typical of certain institutions[40] , and can best be interpreted as a conformist predisposition, a propensity to adapt immediately to the logic of the structure to which one belongs. This raises once again the question of to what extent, when and under what conditions one can expect 'resistance' from the individual in question, for the purposes of criminal censure.

Whilst taking on distinct and peculiar characteristics, this implication nevertheless tends to interact intimately with the horizon of meaning, on the one hand, of the *coercive* order determining a psychological compulsion, and on the other hand, of a *guidance* order inducing an error regarding the prohibition[41] .

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[39] C. GABELLINI, *L'adempimento all'ordine, tra responsabilità e obbedienza*, in *La legislazione penale*, 8 January 2025, pp. 4, 7, in relation to the new geopolitical, strategic and operational contexts in which the armed forces find themselves operating, in war and in peace. With reference to passages from ECHR judgments, see the contribution by L. ACCONCIAMESSA in this volume.

[40] The reference to M. FOUCAULT, *Sorvegliare e punire*, Einaudi, Turin 2014, is obvious.

[41] The close correlation between these two levels of significance within the legal framework is evident from the reasoning set out in the judgment delivered in the case of H. Kappler and others, Territorial Military Court of Rome, judgment no. 631 of 20 July 1948: «the defendants belonged to an extremely rigid organisation, where one very easily acquired *a mindset inclined towards unquestioning obedience*...Such a condition had resulted in a sort of criminal legal incapacity, such as to remove their conduct from the normal rules of assessment. The mindset, geared towards prompt obedience, which the defendant had developed whilst serving in an organisation with extremely strict discipline; the fact that orders of the same content… had previously been carried out in the various areas of operation; the circumstance that an order from the Head of State and Supreme Commander of the Armed Forces, *by virtue of the great moral force attached to it, cannot fail to diminish, especially in a soldier, that freedom of judgement necessary for a proper assessment*: these are elements which lead one to believe…that *it cannot be stated with certainty that Kappler had the awareness and intention to obey an unlawful* order' (our italics). It goes without saying that, in this specific case, the argument is entirely untenable, both in fact and in law, given the gross criminality of the so-called Fosse Ardeatine massacre.

The overlaps with *duress* persist because the disposition towards obedience is also encouraged, amongst other things, by the threat of sanctions for disobedience, which functions in tandem with other disciplinary techniques more focused on training, repetition, meticulous monitoring, the denial of discretion, standardisation and pressure towards conformity, the fostering of an *esprit de corps*, and the denial of individuality (etc.). In principle, it can be argued that the distinction arises from different tendencies in motivational processes: where these are guided by a conscious weighing up of the negative consequences of disobedience, through the activation of 'slow' thinking, we are operating more within the realm of *coercion*; whereas, on the other hand, if they are more strongly influenced by instinctive reactions to the command (and are therefore driven more by unconscious factors, by 'fast' thinking), what is most evident is *instinctive obedience*. It remains true that the two processes can interfere: a disposition towards obedience can make the subordinate more sensitive, so to speak, to the pressures of the threat that compels obedience, whilst the perception—albeit subliminal—of sanctions or negative consequences following disobedience contributes to conformist instinctuality. At the procedural level, then, it will be very difficult, in individual cases, to distinguish one motivational process from the other, or which of them has prevailed, given that they are confined to an intimate and often multifactorial sphere, which is confusing and conflictual for the individual themselves.

To simplify matters, with a view to making the issue accessible within the framework of practicable law, it can be asserted – with the support of studies based on international criminal law case law – that the paradigm of *duress* appears inductively more evident where the order is accompanied by a threat that is not ordinary, not physiological, not institutional (not covered in training and education, not provided for by the legal system, not established in practice) of negative consequences in the event of disobedience, intended to compound those that are, by contrast, ordinary and institutional (consider, for example, the threat of death, or of consequences for the family, or of unlawful dismissals, etc.)[42] ; or, in any event, in the event of the prospect of sanctions recognised – or even merely tolerated, or de facto enforced – by the legal system and its institutions, but having such a grave impact on fundamental rights as to be unlawful according to supranational standards (for example, the threat, albeit 'legalised', of a firing squad). Conversely, the rules on *duress* have no basis for application where it is established that disobedience would have been followed, at most, by the ordinary and

[42] M. JOYCE, *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, in *Leiden Journal of International Law*, Vol. 28, No. 3, 2015, pp. 623–642, p. 625.

proportionate disciplinary or criminal sanction established by the legal system for insubordination and communicated through training and instruction, so that it cannot be assumed that, in the specific case, there was a 'threat of unjust harm' exceeding that which ordinarily governs the subordinate's automatic responses. Moreover, where there is no present danger of an 'unjust' offence against fundamental rights, in particular life and physical integrity, we are – in every legal system, including international criminal law – *a priori* outside the paradigm of *duress*: the pressure induced by the threat of a legal sanction (which is also recognised under international *standards*) can therefore only be assessed in terms of the role it plays within the more complex criminal context of inducing *instinctive obedience*.

It is also important to define the links with the concept of error regarding the prohibition. On a factual level, the mechanisms of uncritical obedience are often accompanied by a failure to perceive unlawfulness, precisely because they inhibit the very question of the order's unlawfulness, and elicit reactions that 'accept as valid' the impulse to act. They also influence the assessment of any such *error iuris poenalis*, diminishing the requirement for knowledge of the prohibition to the extent that they undermine, in legal or factual terms, the capacity and practical possibility of obtaining more detailed legal information.

Moreover, even the legal system most inclined to excuse *instinctive obedience* cannot accept such an excuse where the subordinate has actual knowledge of the prohibition[43] : the awareness of committing a criminal act triggers a precise and intense counter-motivation, in light of which the legal system is inevitably compelled to demand resistance to the pressures driving obedience.

In reality, in most cases, legal systems hold that mere awareness of the prohibition being violated is sufficient to render obedience reprehensible, in accordance with the logic typical of the most widespread *Schuldtheorie*: except that, given how such awareness may be diminished within strict hierarchical relationships, where the order exerts a strong guiding/persuasive function, these principles are applied in more lenient terms than would apply to any other error regarding the prohibition. In this case, whilst in ordinary circumstances an error regarding the incriminating provision is considered readily blameworthy when it is not particularly obscure and the agent possesses at least an average level of socialisation – and even more so in the case of professionals, from whom a specific commitment to staying informed within their field is

[43] See, for example, § 47 of the German Military Penal Code of 1872, which was applied in the famous 'Leipzig trials'.

expected –[44] , the *standard* of culpability for an error regarding a prohibition induced by a superior's order in a subordinate predisposed to prompt obedience becomes more lenient, and tends to coincide with the presence of manifest criminality.

Ultimately, knowledge of or the possibility of knowing the prohibition constitutes a discretionary limit on the applicability of a defence centred on *instinctive obedience*; conditions of *instinctive obedience*, in turn, make a mistake regarding the prohibition more likely and, in any case, influence the extent of the defence, rendering it more lenient than that defined by the ordinary rules governing errors regarding prohibitions. This very close interaction explains why, in the most widespread doctrinal analyses, as well as in case law, the specific features of the *coercive* order giving rise to *instinctive obedience* emerge only sporadically and with little definition; this phenomenon is usually taken into account in the context of reasoning relating to the *guiding* order giving rise to a mistake regarding the prohibition.

3.5. Aside: the pressure of the order as a ground for excluding criminal responsibility

In certain cases, the psychological pressure induced by the criminal order, particularly when integrated into a broader 'situation', seems to go so far as to permit an assessment of the lack of criminal responsibility of the subordinate due to a genuine *mental disorder*[45] . To reach such a conclusion, however, evidence of an actual mental impairment is required in the person obeying the order, which is clinically significant or at least such as to radically exclude the capacity to understand the basic social significance of one's acts and/or to control one's actions: not just any emotional disturbance can, of course, exclude criminal responsibility and, with it, punishment. Where such evidence is established, however, the defence of obedience will still not apply, since the order is reduced to a mere factual premise, alongside others, of a mental defect attributable to the provisions that deal with it more generally. Indeed, apart from being statistically remote, the scenario under discussion cannot be elevated to a structural implication of hierarchical relationships, which are systematically designed to coordinate the conduct of subordinates who, evidently, act in full possession of their faculties.

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[44] In this regard, see A. VALLINI, *Culpa iuris*, in M. DONINI (ed.), *Enciclopedia del diritto, I tematici*, II, *Reato colposo*, Giuffrè, Milan 2021, pp. 359 ff.

[45] Emblematic in this regard is the case dealt with in Cass. pen., 10 March 1947, Caroelli et al., an unpublished judgment but whose contents are reported in A. CASSESE et al., *Cassese's International Criminal Law*, cit., p. 235. See also, on this point, the remarks by A. SPENA, *Excusiology*, op. cit., pp. 88 ff.

4. Article 33 of the Rome Statute as the codification of the defence of superior orders

There is no scope here for an in-depth examination of the models which, in traditional approaches, are considered to have succeeded one *another* in defining the conditions of relevance and irrelevance of a *'superior order' defence* in international criminal law[46] . It suffices here to note, in succinct and assertive terms, how the paradigm of autonomous relevance of the defence of compliance with a superior's order, outlined in §3.4 – characterised by its own distinct *rationale*, and essentially coinciding with a special case of error regarding the prohibition, the margins of which depend on the persuasiveness of its source (*guidance*

[46] They identify a historical and legal progression between the criteria of *superior respondeat*, *absolute liability*, and the *manifest illegality standard*; see, among many others, Y. DINSTEIN, *The Defence*, op. cit., pp. 21 ff.; D. ROBINSON, S. VASILIEV, E. VAN SLIEDREGT, V. OOSTERVELD (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge 2024, pp. 376 ff.; D. PROVOLO, *Esecuzione dell'ordine*, cit., pp. 228 ff.; K. AMBOS, *Treatise*, op. cit., 377 ff. Conversely, P. GAETA, *The Defence of Superior Orders*, op. cit., pp. 174 ff., distinguishes between two paradigms: that of the 'absolute liability approach', which normally applies in international criminal law (and therefore, in his view, reflects a custom), and that of the 'conditional liability approach', more typical of national criminal justice systems. The 'superior respondeat' paradigm is traditionally expressed in the words of L. OPPENHEIM, *International Law: A Treatise*, Longmans, Green & Co., London 1906, pp. 264 ff.: «In cases where members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders alone are responsible». This is a rule dating from well before the emergence of international criminal law, referring to a State's ability to punish, by virtue of domestic laws, war crimes committed by enemies; in its absoluteness, it lacks a firm basis in domestic law itself, and was immediately subject to considerable criticism in legal scholarship (see Y. DINSTEIN, *The Defence*, op. cit., pp. 38 ff.). It would appear to entail a sort of *iuris et de iure* presumption regarding the existence of an excusable error concerning the prohibition on the subordinate's part, or, in any case, regarding the applicability of an excuse based on the fact that either the legal system, a priori, does not require conduct other than obedience, or on the fact that, in practice, hierarchical relationships and the resulting psychological pressures are structured in such a way as to make disobedience humanly impossible. At Nuremberg (Art. 8 of the 1945 Nuremberg IMT Charter; Art. 4(b) Control Council Law No. 10, 1945), in Tokyo (see Art. 6 of the Charter of the International Military Tribunal for the Far East, 1946), and also in relation to the experience of the so-called *ad hoc* international tribunals (Art. 7(4) of the ICTY Statute (1993), Art. 6(4) of the ICTR Statute (1994)), the emergence of the absolute liability standard is usually traced back to this period. This standard appears to exclude a priori any defence where the order has led to an error at least regarding the unlawfulness of the assigned tasks; or perhaps, even better, to presume absolutely the knowledge of the criminal nature of certain orders. The order may, at most, serve as a mitigating factor.

order) and, likewise, on the coercive context (*coercion* order) – emerges as a constant that persists, beneath the surface, amidst the apparent succession of approaches and disciplines.

In fact, with regard to international crimes, as implemented by regulations and practices that in various ways reflect the framework of international criminal law – and without prejudice to the applicability of other and different defences of *duress* and error as to the facts[47] – the superior's criminal order has, over time, proven capable of constituting, in exceptional cases, an excuse, and only for the subordinate, by virtue of the unenforceability of disobedience, provided that the following conditions are met cumulatively: (1) the existence of a rigid hierarchical relationship, which entails a lack of discretion and scope for review, and which therefore inhibits, in the person receiving the order, the exercise of critical 'slow' thinking (' -

[47] Article 8 of the Nuremberg Charter did not exhaust the scope of the potential relevance of a superior's order. The International Military Tribunal, in a sort of *obiter dictum,* makes a fleeting and ambiguous reference to the possible relevance of duress that might be caused by the order, admitting in abstract terms the possibility of an excuse should the command have deprived the recipient of any residual moral choice (Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, Nuremberg, 1947, p. 224; see M. MINOW, *Living Up to Rules*, op. cit., pp. 19 ff.). This openness, in the sense of a personalisation of the blame placed on the person carrying out the order, was subsequently codified in Principle IV of *the Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (Nuremberg Principles), adopted by the UN International Law Commission in 1950. See also, on the possible relevance of duress related to, and transcending, the order, the *Einsatzgruppen* case, cit.). From the outset, the Nuremberg trials also focused on the elements of knowledge and/or intent in the criminal act, to the extent that it could be inferred that, were these elements of criminal intent to be lacking in a given case—perhaps due to an error regarding the facts induced by the order itself—the individual could not have been punished for lack of the necessary subjective requirements. As regards the *ad hoc* tribunals, the leading case concerning duress involving a criminal order remains that of *Erdemovic*, cited *supra*.

order *coercion'* profile); (2) the failure to perceive the criminality, where not manifest[48] , of the commanded behaviour ('order *guidance'* profile)[49] .

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[48] The Leipzig verdicts (see M. PISANI, *La grande guerra, i crimini di guerra e i processi di Lipsia*, in *Criminalia*, 2008, pp. 63 ff.), handed down at a time in history when there was still a certain preference for the 'superior respondeat' paradigm, reveal how the criterion of manifest criminality was already emerging then as an indicative piece of evidence of the subordinate's knowledge of the prohibition, such as to preclude the application of the defence of superior orders under § 47 of the German Military Penal Code then in force: so much so that, not infrequently, these trials are cited as substantial examples of a 'manifest illegality' approach (P. GAETA, *The Defence of Superior Orders*, op. cit., p. 175). Take, for example, the 'Llandovery Castle' case, where the fact that the defendants were army officers, and the criminal nature of the conduct ordered of them, 'universally known to all', are cited as evidence of that awareness of unlawfulness which, exceptionally, led to the punishment of the obedient subordinate (Y. DINSTEIN, *The Defence*, op. cit., p. 16; see also R. CRYER, *Dithmar and Boldt (Llandovery Castle)*, in CASSESE (ED.), *Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford 2009, p. 645; E. MEZZETTI, *Le cause di esclusione della responsabilità penale nello Statuto della Corte Internazionale Penale*, in *Rivista Italiana di Diritto e Procedura Penale*, no. 4, 2000, pp. 237–265, p. 262). The provisions of the Nuremberg and Tokyo Charters, as well as those of Control Council Law No. 10 and the *ad hoc* tribunals (*supra*, note 45), must be understood in the context of a paradigm shift in criminal law: for the first time, crimes against humanity became punishable, in respect of which it is difficult to conceive of an excusable mistake even under more lenient models of culpability (see *below* in the text), and, in any case, allegations of facts that were for the most part manifestly atrocious were taken into account. Furthermore, with rare exceptions, these tribunals were directed at defendants belonging to the highest political, administrative and military echelons; their professional and institutional standing thus justified a general presumption that they were aware of the criminal nature of the orders received. It is no coincidence that at Nuremberg – as also in the aforementioned *Eichmann* trial, where a logic of absolute liability also emerges – orders issued directly by Hitler and addressed to high-ranking officials, who were sometimes involved in the genesis of openly criminal chains of command, were highlighted.

[49] What we have been saying is already evident from the arguments put forward by the Prosecutors before the International Military Tribunal at Nuremberg and during the subsequent trials, all of which centred on the idea that Article 8 of the Charter had codified what was already established in the law of war, namely that no soldier has ever been able to invoke a manifestly criminal order as a defence (Y. DINSTEIN, *The Defence*, pp. 125 ff., 175 ff.). In the grounds for the judgment against the Major War Criminals, it was emphasised once again that the *rationale* behind Article 8, far from being innovative, reflected a well-established law of nations, since «That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment» (Trial of the Major War Criminals before the International Military Tribunal at Nuremberg, 14 November 1945–1 October 1946, cit., p. 224). In other words: given the intrinsic inhumanity of the acts defined by the Charter and forming the subject of the charge, no regulation whatsoever, even if historical, would ever have

A final observation: the few cases in which criminality was deemed not to be manifest involved individuals of low rank, as well as war crimes[50]. Such crimes are not, in fact, characterised by a component of violence *wholly unlawful* by virtue of its radical inhumanity (such as that found, instead, in crimes against humanity and genocide). The fundamental demerit of *a war crime* lies, instead, in an excess of violence, including lethal violence (in relation to normative limits concerning the manner of the action, proportionality and necessity in relation to the effects), or in an *aberration* of violence (regarding the targets), compared to that which is permitted and inherent in an armed conflict; so that *the Anlaß* regarding the criminality of the act does not derive from the requirement to use violence against other human

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provided an excuse (in a similar vein, problematically, P. GAETA, *The Defence of Superior Orders*, cit., p. 180, note 24). In the closing speech of the trial of *the Einsatzgruppen*, the prosecution stated, indeed, that «normally, a subordinate is entitled to assume that orders issued to him by his superiors are lawful and do not require him to commit crimes in execution thereof; and we cannot hold the subordinates responsible for making careful enquiries or elaborate research into the background of the order to ensure that it is in fact lawful. But this general presumption in favour of subordinates has no application where, on its face, the order is *palpably criminal*. These principles have been concisely set forth in the decision of the German Supreme Court at Leipzig in the so-called Llandovery Castle Case». Echoes of this approach resound in the conviction judgment, where it is expressly stated that the defence of ignorance of the criminality of the order cannot be invoked where «the nature of the ordered act is manifestly beyond the scope of the superior's authority» (The Einsatzgruppen Case, Military Tribunal II, Case No. 9, pp. 376, 470–471). As has also been noted, in post-war national judgments handed down in countries that had been under German occupation, concerning war crimes attributed to the occupying forces—perhaps by virtue of *ad hoc* legislative amendments relating also to the regulation of the superior's orders—the defence was almost always excluded, almost never (and if so, only approximately) asserting that this was imposed by the establishment of a principle of absolute liability, by virtue of the impact of Article 8 of the London Charter, but essentially aligning with pre-existing national case law centred on the criterion—whether substantive or procedural—of manifest criminality (P. DE SENA, *Ordini superiori, immunità funzionale e gravi violazioni dei diritti dell'uomo dinanzi ai giudici interni,* in *Rivista di diritto internazionale*, 1994, pp. 957 ff., p. 972).

[50] Indeed – whilst proceeding from the legal premise of absolute liability – the possibility of invoking a mistake of law induced by a superior's order has emerged in relation to war crimes consisting not of 'atrocities', but of highly codified offences centred on the violation of 'technical' rules, or on the conduct of war: *mala quia prohibita*, it may be argued, although in this case elevated to the status of war crimes. See, for example, the British Military Court held at Hamburg, Germany, on 12 and 13 February 1946, Trial of Oberleutnant Gerhard Grumpelt, as well as, and even more clearly, the judgement handed down at Nuremberg, in application of Control Council Law No. 10, by an American military tribunal in the case of United States of America v. Wilhelm von Leeb, et al., 27 October 1948 (High Command case). In that case, the defendants were essentially acquitted on the grounds that the order received lacked manifest criminality, due to the lack of clarity in *the ius in bello* regarding the possibility of using prisoners of war for the construction of fortifications for military purposes.

beings, as such, but is mediated by a weighing up of the parameters within which that violence, a daily instrument of warfare, is not criminal. This assessment requires a certain degree of intellectual sophistication, varying according to the nature of the war crime committed and the degree of strictness of the parameters of lawfulness[51] , and is more or less required depending on the professional level of the accused. It may well, quite understandably, be lacking, especially in a soldier called upon to endure the *stress* of war, subjected to extremely intense contextual and hierarchical pressures, lacking the tools – cultural, educational, cognitive – needed to scrutinise those orders, and constrained by the limited time available and the urgency of survival.

It should also be noted that the contextual element of war crimes – namely the armed conflict – is not in itself characterised by an intrinsic criminal nature, unlike the contextual elements of crimes against humanity – the widespread and systematic attack on the civilian population – and genocide – the *pattern* of conduct aimed at the destruction of the *target* group. Armed conflict, in fact, even when arising from a criminal act of aggression, is subject to rules governing its conduct, which presuppose a normalised dimension. Thus, in relation to *war crimes*, *knowledge* of the contextual element – necessary for a finding of intent – does not in itself convey the image of manifest criminality, as is the case with the other *core crimes*[52] .

Turning, finally, to the jurisdiction of the International Criminal Court, it therefore seems more plausible the view that Article 33 of the Rome Statute has brought to light and reasonably defined the regulatory frameworks just mentioned, which existed prior to Nuremberg and were, in fact, operational in the immediate post-war period and thereafter[53] , rather than the view – albeit authoritative and carefully reasoned – of those who regard that provision as a regression towards *a 'superior respondeat'* logic[54] , compared to customs that are supposedly inspired by a rigid paradigm of *absolute liability*[55] . In doing so, the Rome Statute would ultimately have succeeded in distilling that dimension of obedience which may exceptionally become the

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[51] E. AMATI, *L'efficacia esimente dell'ordine del superiore in relazione ai crimini di guerra nel diritto interno e nel diritto internazionale*, in *L'indice penale*, 2001, pp. 958 ff., 970 ff.

[52] F. CECCARONI, *Colpevole d'obbedienza. l'ordine del superiore nel sistema di giustizia penale internazionale*, in *La legislazione penale*, 8 January 2025, pp. 6 ff.. The arguments skilfully outlined in this article address the concerns raised, for example, by N. SELVAGGI, op. cit., pp. 215 ff.

[53] MCCOUBREY, *From Nuremberg to Rome*, op. cit., p. 394.

[54] Y. DINSTEIN, *The Defence*, op. cit., p. XIX ff.

[55] P. GAETA, *The Defence of Superior Orders*, op. cit., pp. 188 ff. Of the opposite view, regarding the structure of customary law, DE SENA, op. cit., pp. 973 ff.

subject of a defence characterised by a *rationale* distinct from that of other more general defences, if only because of its structural hybridity.

4.1. In the Rome Statute, compliance with a criminal order is not justified

First, the Statute does not attribute to the unlawful order the capacity to justify obedience. Article 33, in fact, in principle holds the person who carries out that order fully responsible ('The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless […]'). The only exception provided for, and strictly limited, relates to psychological and enforceability considerations, which do not affect the objective lawfulness of the conduct: these are, in fact, explicitly linked to a ground for excluding *mens rea* (as we shall see shortly, Article 33 is situated, within the structure of the Statute, as a special case of *mistake*). Moreover, pursuant to Article 25(3)(b) of the Statute, a criminal order is a specific form of punishable participation by the superior in the crime of the person obeying, who, therefore, cannot be said to have committed a lawful act; whereas, pursuant to Article 25(3)(a) of the Statute, the person issuing the order may even be deemed the indirect perpetrator of the criminal conduct committed by the executor.

It is significant, moreover, that Article 25(3)(b) does not specify that *the act of ordering* is relevant 'regardless of whether that other person is criminally responsible', as Article 25(3)(a) does: the Statute therefore presupposes that the perpetrator always commits a criminal act, never a lawful one. Within the framework of Article 25(3)(a), however, the possible non-punishability of the person through whom another commits the offence ('committing a crime through another person') is consistent with the logic *of mediated perpetration*, which is extended to the exploitation of individuals who are subjectively not punishable (mental incapacity, minority, etc.). It follows that the reference to a possible lack of liability on the part of the person 'through whom the act is committed' does not in any way imply, even in that context, the lawfulness of carrying out the criminal order, not least because, if that were the case, the liability of the indirect perpetrator himself would consequently cease to apply.

In a clarification relating to the Al Hassan case[56] , the Trial Chamber of the International Criminal Court asserts that the exemption under Article 33 may apply only to the commission

[56] Trial Chamber X, The Prosecutor v. Al Hassan ag Abdoul Aziz ag Mohamed ag Mahmoud, Trial Judgment, No. ICC-01/12-01/18, Date: 26 June 2024, §1776.

of, and not to participation in, an international crime, on the basis of a literal reading: Article 33(1) refers to a person who commits a crime («The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order'), and in the wording of Article 25(3)(b) of the Statute, the verb *'to commit*' is said to concern only cases of perpetration, not participation (which are instead dealt with in Article 25(3)(c) and (d), in other words: *aids, abets, assists, contributes*). This appears paradoxical, if we infer from it that this defence may be invoked by the obedient subordinate who has committed a more serious act (as the perpetrator of the crime), and not by the one who has committed a less serious act (having merely contributed to another's crime)[57] . In fact, another passage seems to suggest that the Court is, if anything, concerned with discussing the *lawfulness* of the order, rather than the criminal significance of its execution; and that therefore, in excluding the application of Article 33 to a command resulting in mere participation in another's crime, it primarily wishes to imply that, in such cases, the order might not even be criminal (whereas, under the provision cited, one that urges the recipient to commit a crime would always be so). Perhaps the Court has in mind the scenario in which a superior orders a subordinate to carry out duties falling within the scope of their normal responsibilities (for example, transporting certain weapons to a specific location during a conflict), whilst it is the subordinate who twists the execution of the order in such a way as to contribute to another's crime, without that purpose having been taken into account by the commander. Thus, to continue with the example, the weapons transported might be abandoned at that location, at the mercy of a band of murderous mercenaries who will use them to massacre civilians. In such a case, the order remains *lawful*, but the conduct in carrying it out is criminal, as it develops in an unforeseen manner and constitutes *aiding and abetting*. The discrepancy between the lawfulness of the order and the unlawfulness *of aiding and abetting* (etc.) stems, in short, from the fact that such forms of individual liability, occurring at stages sometimes distant from the commission of the criminal act and potentially consisting of acts that are neutral in themselves, remain subject to a lawful order as long as it concerns the acts themselves, and not the 'link' to the crime of others that confers criminal relevance upon them.

In any case, for present purposes the Court certainly does not suggest that an unlawful order could render participation in another person's crime lawful (though not the commission of the crime itself), as if it were a *justification*; on the contrary, it envisages, at most, that the

[57] See the contribution by F. CECCARONI in this volume.

execution of an order that is lawful in itself may nevertheless give rise to a form of criminal participation in another person's act (and indeed, it even seems to doubt unreasonably that such participation could even be excused).

4.2. The distinct levels of operation of the 'order-under-duress' *and 'order-by-mistake' defences*

Furthermore, the Statute regulates *duress* separately (Art. 31(1)(d)), in which the order could also play a role in practice[58] . This too is a choice consistent with the long-standing approach which, quite rightly, distinguishes between the two cases, bringing the order accompanied by an irregular, pathological threat against the disobedient party under the general rules governing psychological coercion.

Similarly, the Statute regulates elsewhere the *mistake of fact* (Art. 32(1)), which, as has been noted, has long been regarded as a wholly contingent consequence of a criminal order. It is, in short, an element that does not form part of the specific legal significance of the latter, and even if it is caused by the order, there is no reason why its legal status should differ from that of *a mistake of fact* arising from any other cause.

4.3. The specificity of the defence under Article 33, due to the measured combination of guidance *and* coercion *in the balance with general-preventive considerations*

Ultimately, far from offering grounds for justification, Article 33 conveys a general-preventive message and counter-motivation, establishing, as a rule, that a criminal order – when it does not constitute physical coercion and does not give rise to an error regarding the facts – cannot in itself serve as an excuse, so that, in principle, disobedience is required[59] , especially on the part of those who are aware of the criminal nature of what is commanded of them. An exception is made (*'unless* […]') where it instead gives rise to an error regarding the

[58] Trial Chamber IX, The Prosecutor v. Dominic Ongwen, Trial Judgment, ICC-02/04-01/15, 4 February 2021, §§2581 et seq., where duress is treated quite distinctly from the defence of superior order (see §2672, where it is noted that the defence had, on the contrary, 'overlapped' the two concepts).

[59] G. MORGANTE, *La responsabilità dei capi e la rilevanza dell'ordine del superiore,* in A. CASSESE, M. CHIAVARIO, G. DE FRANCESCO (eds.), *Problemi attuali della giustizia penale internazionale,* Giappichelli, Turin 2005, pp. 169 ff.

prohibition[60] , in which case, subject to other conditions, an excuse might apply – whilst the general rule denying the excusing force of *of ignorantia iuris poenalis* (Article 32(2)) remains, in principle, confirmed.

In short: Article 33 ultimately delineates a special case of error regarding the prohibition, which is exceptionally excusable. This fundamental nature of the defence is revealed by the structure and the wording of the Statute: the provision establishing the normal irrelevance of *mistake of law*, namely Article 32(2), refers to Article 33 with the explicit intention of identifying therein a second exception, in addition to the one constituted by *mistake of law* which 'negates the mental element required by [the] crime', that is, the error of law giving rise to an error of fact. Furthermore, among the constituent requirements of the defence set out in Article 33, the circumstance that 'the person did not know that the order was unlawful' is expressly included.

4.3.1. The prerequisite of a coercive order *and a role of strict subordination*

This exception takes account of those aspects – relating to the scope of a *coercive* order and a *guidance* order – which have already been discussed above in terms of their capacity to render the message conveyed by the order particularly persuasive, and the pressure exerted by it particularly strong.

Indeed, the legal error caused by the criminal order, and which may be excusable, is only that of a person acting 'under a legal obligation to obey orders of the Government or the superior in question', meaning 'all explicit or implied oral or written demands addressed to a certain person or groups of persons, individually or by referring to their functions'[61] . In short, the exemption applies to those operating within a hierarchical structure formalised in the internal legal system, within which they are normally required to obey superiors who exercise power

[60] O. TRIFFTERER, S. BOCK, *Article 33*, in K. AMBOS (ed.), *Rome Statute of the International Criminal Court: Article by Article Commentary*, Beck, Hart, and Nomos, Munich 2022, p. 1418 ff.; P. GAETA, *The Defence of Superior Orders*, cit., pp. 188 ff.; C. GARRAWAY, *'Superior orders and the International Criminal Court: Justice delivered or justice denied*', in 'International Review of the Red Cross', Vol. 81, No. 836, 1999, pp. 785–794, p. 791; Trial Chamber X, The Prosecutor v. Al Hassan, Trial Judgment, op. cit., §1777.

[61] *Ibid*. Trial Chamber X, The Prosecutor v. Al Hassan, Trial Judgment, op. cit., §1778, 1781.

and control over them[62] . The *rationale* identified is that which has already been extensively revealed: the intended recipient of Article 33 of the Statute is the individual trained, and institutionally assigned, to *instinctive obedience*; the order capable of rendering a more responsible attitude and a more cautious consideration *unenforceable* is only that accompanied by the coercive force and institutional authority of an official authority. Just as one cannot excuse someone who realises they are committing a crime, by virtue of the *'Appelfunktion'* (appeal function) exercised by such awareness, there is likewise no reason to excuse uncritical and irresponsible compliance carried out outside a discipline of obedience and a formalised relationship of subordination, characterised by special requirements of coercion and persuasion[63] .

4.3.2. The limit of enforceability of manifest criminality

Where there is a mistake regarding the prohibition and the aforementioned conditions of institutionalised readiness to obey, Article 33 of the Statute considers disobedience unenforceable up to the limit of the manifest criminality of the ordered conduct, recently defined by the Court as 'an objective standard of such a nature that the unlawfulness of the order must be obvious and self-evident to a reasonable person in the circumstances'[64] .

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[62] O. TRIFFTERER, S. BOCK, *Article 33*, cit., p. 1418 ff., in whose view it could also be a civilian hierarchical structure; provided – as the Court has recently clarified – that it is such as to 'mimic' the characteristics of a 'military structure', which was undoubtedly the primary consideration of the drafters of the Statute: Trial Chamber X, The Prosecutor v. Al Hassan, Trial Judgment, op. cit., §1779.

[63] See, *mutatis mutandis*, with reference to Article 51 of the Italian Criminal Code: Italian Supreme Court, Section V, Sotgiù, 12 October 2023, the "Asso 28" case. The captain of a civilian vessel flying the Italian flag, having rescued 101 people – including children and pregnant women – from a makeshift boat, instead of contacting the competent authorities and initiating the rescue procedures prescribed by international and national regulations, chose to obey a self-styled 'Libyan customs officer'. He ordered him to transport the migrants into Libyan waters to hand them over to patrol boats of the local coastguard, in violation of the prohibition on collective refoulement provided for at international level and by the Italian Law on Immigration itself. The captain will be convicted under Article 591 of the Criminal Code and Article 1555 of the Navigation Code (the case is also of interest for issues relating to the putative nature of the order, which cannot be addressed here: see C. PAGELLA, *Sulla responsabilità penale del Comandante che conduca in Libia i migranti soccorsi in mare: il caso ASSO 28*, in *Diritto penale contemporaneo. Rivista trimestrale*, 2/2024, pp. 122 ff.).

[64] Trial Chamber X, The Prosecutor v. Al Hassan, Trial Judgment, *cit*., §1780; O. TRIFFTERER, S. BOCK, *Article 33*, cit., p. 1419.

Of interest is the established absolute presumption of manifest criminality regarding crimes against humanity and genocide[65] ('for the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful'), which reflects what has already been highlighted *above* regarding the reasons why the defence in question applies primarily to war crimes (in relation to the crime of aggression, further clarification would be required which cannot be accommodated within the scope of this contribution).

As a criterion for a defence based on the individualisation of culpability, the *'reasonable person'* against whom manifest criminality is measured – whilst not being influenced by the mental processes of the actual agent (it is, in fact, an objective *standard*) – must be understood in relation to the historical circumstances that hinder scrutiny (for example, situations of severe agitation or other contingent pressures), as well as to the agent's role and the body of knowledge and skills that this entails. It follows that, for individuals holding senior positions, who are better educated, better prepared, more experienced and better able to perceive the legal and factual implications of the order, the possibility of a criminal order that is not manifestly so will be exceptional. The intended beneficiaries of the defence referred to in Article 33 of the Statute are, in short, those who are not only subordinates but also occupy the lowest ranks of the organisation, and/or who, through no fault of their own, are characterised by a lower level of education or inadequate training, or who suffer the effects of logistical errors, approximate procedures, or their own ill-considered deployment in dealing with overly complex situations[66] .

This observation leads us to note that, conversely, the Rome Statute places a marked emphasis on holding senior figures accountable, highlighting the preventive role of the proper exercise of command powers and independently sanctioning, pursuant to Article 28, the failure

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[65] Trial Chamber X, The Prosecutor v. Al Hassan, Trial Judgment, cit., §§1781, 1783, specified that, where the same act in question may qualify simultaneously as a crime against humanity (or genocide) and a war crime, it must in any case be presumed to be manifestly criminal.

[66] The jurisdiction of the International Criminal Court therefore potentially extends to such persons as well, despite the many rules that lead to a 'selection from the top' of defendants, such as those concerning *mens rea* – A. VALLINI, *La* mens rea, op. cit., pp. 200 ff.– or certain procedural rules (see Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", Situation in the Democratic Republic of the Congo, No. : ICC-01/04, 13 July 2006, regarding the assessment of the admissibility of the case on the grounds of its gravity pursuant to Article 17(1)(d)).

of a military or civilian superior to adopt preventive (or punitive) measures[67] . One might therefore ask whether such measures should also include interventions[68] – training and organisational – relating to training, logistics, procedures and organisational structure – aimed at improving subordinates' ability to question orders and recognise their criminal nature, thereby promoting responsible obedience even among lower ranks.

The answer would seem to be yes, but the premises would be too numerous, and the implications too complex. As mentioned, we intend to discuss this on another occasion and in greater detail.

[67] G.-J. J. KNOOPS emphasises the symmetrical relationship between the doctrine of command responsibility and that of superior orders in *Defenses in Contemporary International Criminal Law,* Transnational Publishers, New York 2001, pp. 42 ff.

[68] M. MINOW, *Living Up to Rules*, op. cit., pp. 36 ff.