

Federica Ceccaroni

Neither Heroes nor Perpetrators: The Need for Punishment and the Individualisation of Criminal Responsibility in Contexts of Macro-Criminality

English version of the chapter *Né eroi né carnefici: bisogno di pena e personalizzazione del rimprovero nei contesti di macro-criminalità*, in Brigaglia M., Pino. G., Vallini A., *Obbedienza e responsabilità*, Roma Tre Press 2026, pp. 315–329.

ABSTRACT

This article examines the resilience of the principle of individual criminal responsibility in situations of macro-criminality, where obedience to superior orders intersects with systemic patterns of contextual coercion. Since it is not sustainable to demand heroism of the individual, it analyses the normative frameworks – both in international and domestic criminal law – capable of preserving the need for punishment without slipping into forms of strict liability. Particular attention is paid to those legal categories that may serve as gateways towards a more nuanced individualisation of responsibility, especially in scenarios characterised by systemic deviance and a lack of lawful means of resistance available to defendants.

KEYWORDS

(ENG) Obedience; Responsibility; Contextual coercion; Individualisation of criminal liability; Mass atrocity crimes.

Funded by the European Union - NextGenerationEU under the National Recovery and Resilience Plan (PNRR) – Mission 4 Education and research – Component 2 From research to business - Investment 1.1, Notice Prin 2022 indetto con DD N. 1409 del 14/9/2022, titled “Rule of Law and the Problem of Responsible Obedience (ABIDE)”, proposal code P20229FK2F - CUP B53D23032560001.

Neither Heroes nor Perpetrators: The Need for Punishment and the Individualisation of Criminal Responsibility in Contexts of Macro-Criminality

SUMMARY: 1. Obedience, responsibility and mass atrocity crimes: the law that would have us be Antigone – 2. Superior orders in the international criminal justice system. – 3. The filter in the Rome Statute: Prosecutorial discretion. 4. The individualisation of criminal liability in domestic criminal law: contextual coercion. – 5. Concluding remarks.

1. Obedience, responsibility and macro-crime: the law that demands we be like Antigone

‘Your law did not come from Zeus.’ With this line, Sophocles gives Antigone the arcane voice of a higher justice, ready to break Creon’s edict in order to honour her brothers and the gods. Since then, the drama of the young Theban woman has accompanied – as an inescapable archetype – every reflection on the relationship between authority and conscience, between legality and responsibility. In the twentieth century, that symbolic conflict materialised in the dehumanising space of the extermination camps: the modern, rationalised, and scientific bureaucratic machine made the ancient tragedy systemic, transforming obedience into an instrument of organised barbarism, into an orgy of cruelty.

Hannah Arendt, moreover, reminds us that Eichmann, like so many others responsible for Nazi atrocities, ‘was neither perverse nor sadistic’, but ‘terribly normal’. From this emerges forcefully the principle that obedience cannot become a right, for, where it is reduced to mere automatism, it severs the moral link between the individual and their actions. The Holocaust, in fact, was not the work of isolated sadists, but of zealous bureaucrats, of professionals integrated into an authoritarian hierarchical order. It was the logical outcome – not the accident – of instrumental rationality that measures efficiency, divides tasks, and dispenses ‘moral tranquillisers’ to its executors. In this context, dehumanisation is inextricably linked to the rationalising tendencies of bureaucracy. When one is merely a link in a chain, it is easy, from a

¹ Research Fellow in International Criminal Law at the University of Pisa.

psychological point of view, to justify one's actions. The person who poured Zyklon B into the gas chambers could take refuge in the alibi of the orders received. Taken to its extreme consequences, this atomisation of ethical judgement leads to reducing individual blame to a minimum, if not entirely nullifying it, dissolving personal guilt within the impersonal vastness of the system.

International criminal law arises, ultimately, from this rupture: it aims to shield the law from the risk of becoming an accomplice to systemic violence, and to respond to the pathology of power. A corollary of this has been the rejection of the defence of superior orders. Only with the Rome Statute has there been a partial opening towards superior orders as a ground for excluding criminal liability, with the express exception of crimes of genocide and crimes against humanity.

Yet, international criminal law cannot be founded on heroism as an ordinary condition of the duty to resist. We must avert the risk of sliding towards models of strict liability as much as towards forms of systemic deresponsibilisation. Between the alternative of heroism and liability, there may perhaps be room for a reasonable form of exemption from liability.

Starting from these questions, this paper attempts to identify mechanisms suitable for tailoring accountability according to genuinely individualised criteria, both from an international and a domestic perspective.

2. Superior orders in the international criminal justice system

There are three approaches to individual liability for the executor of a criminal order, reflecting the perpetual tension between the need for hierarchical cohesion and the demands of punishment. The 'superior respondeat' theory, according to which only the person who gave the order is liable, in accordance with the imperative to ensure the smooth functioning of the system. The theory of 'absolute liability', according to which obedience never serves as a defence and the subordinate is liable in all cases for the act. Finally, the model of 'conditional liability': the order may serve as a ground for exclusion only if certain requirements are met, such as the binding nature of the order, knowledge or the possibility of knowing its criminal nature, as well as the requirement that its criminality is not manifest.

From the very outset, international criminal law has viewed with suspicion the defence of superior orders: the Nuremberg and Tokyo tribunals, in fact, denied that obedience constituted a valid defence, as did the statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda. The Rome Statute, however, adopted a different criminal policy approach, with

Article 33 allowing for an exculpatory effect where three conditions are met: (a) a legal duty to obey; (b) lack of knowledge of the illegality of the order; (c) absence of manifest criminality in the order.

The same provision, however, in paragraph 2 severely restricts its scope of application: orders to commit genocide and crimes against humanity are presumed to be manifestly criminal, so that the defence is confined solely to war crimes. As already noted elsewhere², this distinction made by the Statute does not mark a real break with the Nuremberg paradigm, but is based on the same logic of *manifest criminality*. The absolute presumption that qualifies orders relating to genocide and crimes against humanity as ‘manifestly criminal’ is rooted in the *contextual element* that characterises them, endowed with a self-evident negative value, which imbues even the individual offence (the so-called ‘underlying offence’) with gross criminality, insofar as it is necessarily embedded within a perceptible framework of massive violence and discrimination. The irrelevance of superior orders in such cases is, in short, fully consistent with the very foundation of international criminal law, as an antidote to the individual’s failure to perceive the macro-criminal system to which the perpetrator ultimately contributes. From this perspective, manifest criminality is understood according to a largely objective criterion, as a functional tool for establishing individual liability and for punishing the commission of atrocious crimes masked by the pretext of hierarchical obedience.

The different approach to war crimes is justified, however, on grounds of political and military expediency, linked to the need to safeguard discipline during armed conflicts and the principle of hierarchy.

Moreover, war crimes are the perversion of violence that is otherwise tolerated: the contextual element is provided by their connection with an armed conflict, that is to say, a context of legalised violence, at most regulated by humanitarian law. War crimes also represent a highly heterogeneous category, which includes offences of similar gravity to crimes against humanity and genocide, but also others that are objectively less serious. One might consider, in particular, violations of the rules of *ius in bello*, norms often subject to ambiguous interpretations and which fall outside that core of crimes of intrinsically recognisable gravity. These are cases that presuppose a degree of reliance on the superior’s supervisory duties and margin of discretion – evident in concepts with flexible wording, such as ‘military necessity’ – which render the application of the defence reasonable. Indeed, the mere executor cannot be expected to have the same duty to ensure compliance with the rules governing military

² F. CECCARONI, *Colpevole d’obbedienza. L’ordine del superiore nel sistema di giustizia penale internazionale*, in *Leg. pen.*, 8.01.2025.

operations as that required of the commander. It is, moreover, more difficult for the subordinate to perceive the actual wrongfulness of the act if he lacks (as is generally the case in military discipline) the powers of verification and control necessary to understand the criminal nature of the order.

The clause allowing for the excusability of an error regarding the legitimacy of an order, provided it is not manifestly criminal, can also be interpreted as a safeguard against strategic and political decisions that only acquire criminal significance *ex post*. Given that even the classification of an action as ‘war’ depends on discretionary choices made by actors in positions of power, the provision introduces a mechanism for adapting to the political nature underlying certain operational scenarios.

Furthermore, the same clause also appears to be linked to the systemic function of the Rome Statute as an instrument of regulatory harmonisation. The Statute is characterised by a detailed codification of war crimes: it does not merely identify the most serious offences, which are likely to be the priority focus of the Court’s action, but also includes lesser offences, the inclusion of which is primarily intended to encourage corresponding adaptations in national legal systems. Such attention to the precise definition of crimes is entirely absent from earlier experiences in international criminal law, which, centred on the supremacy of international jurisdictions over domestic ones, lacked this top-down dimension.

The Statute’s approach is, therefore, not alien to the Nuremberg philosophy: it does not truly depart from that precedent, reflecting the same logic of manifest criminality. In that context, the principle of absolute liability was justified by the historical exceptionality of those events: although not expressly formulated, this approach presupposed an implicit assessment of the manifest criminality of the conduct under trial, incorporating the theory of ‘could not have failed to know’, which was already widespread in comparative law prior to Nuremberg. Today, the systemic dimension of the Statute as a programmatic and permanent instrument of international criminal justice necessitates consideration of less serious acts as well. In this context, the decision to broaden, albeit to a limited extent, the scope of the defences is understandable. This slight opening does not, however, alter the overall framework: the Statute remains firmly anchored to an ascriptive conception of individual criminal responsibility – which is also the basis for the legitimacy of international criminal law – designed to prevent obedience from serving as a shield against personal liability in contexts of macro-criminality.

3. *The filter in the Rome Statute: Prosecutorial discretion*

The presumption of manifest criminality, based on the abstract offence, serves as a safeguard for the legitimacy of international criminal law, helping to reinforce its symbolic and preventive function. At the same time, however, it risks stifling any possibility of an individualised assessment of the position of the person carrying out the order, who is sometimes sincerely convinced of acting ‘on the right side’. Moreover, intermediaries may be called upon to carry out tasks that are only apparently neutral, but which take on criminal significance as part of a broader criminal enterprise. Not infrequently, the order given concerns an executive aspect of the crime, sometimes remote from its actual commission: consider, for instance, logistical support activities, such as the order to organise the transfer of groups of people from one area to another (perhaps falsely justified on grounds of security for their own safety), or even to register individuals belonging to a specific ethnic group. These are acts which, in practice, may not appear manifestly criminal, often carried out by individuals who are distant, both physically and functionally, from the scene of the crime.

In line with the ‘underlying’ logic referred to above, however, such conduct must also be regarded as punishable, precisely because it is linked to a broader criminal context. The *mens rea* of these crimes necessarily implies an *Anlass* concerning the manifest criminality of the conduct, even when the conduct, viewed in isolation from its context, would not appear particularly harmful. The question, rather, is whether a corollary of this same approach should also be the punishment of ancillary contributions, characterised by reduced harmfulness and carried out in a climate of contextual coercion (see also *infra* § 4), insofar as they form part of an all-encompassing system that exposes the perpetrator to serious and scarcely bearable repercussions.

It should nevertheless be noted that, in the recent *Al Hassan* judgment, the International Criminal Court rejected the defence of superior orders and, in a significant *obiter dictum*, further restricted the scope of application of Article 33 of the Statute³. The Court stated that this defence may apply exclusively in cases of ‘commission’ under Article 25(3)(a), excluding its application to the other forms of participation provided for in subparagraphs (c) and (d).

³ ICC, *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Judgment, TC, 26.6.2024, § 1776: «The Chamber considers that the plain meaning of Article 33(1) illustrates that the defence of superior orders under Article 33 only applies to persons who incur responsibility under Article 25(3)(a) of the Statute by virtue of *committing* a crime, pursuant to an order, as opposed to persons who incur responsibility under Articles 25(3)(c) and (d) due to conduct that facilitated or contributed to the commission of a crime».

This is a highly restrictive interpretation, which further reduces the possibility of invoking the defence by adopting a strictly literal reading of the term ‘commission’. Yet the Statute itself, in many instances – consider, for example, Articles 55(2) and 58 – uses that term in a broader sense, encompassing contributory conduct. Such an exclusion therefore appears paradoxical, precisely because it is in cases of ‘remote’ complicity, where the subordinate’s contribution forms part of another’s conduct, that the order may appear less manifestly criminal.

In the same ruling, the Court further stated that orders qualifying as war crimes are to be considered manifestly criminal where the conduct ordered is simultaneously attributable to a crime against humanity. This principle raises concerns: it does not appear consistent to exclude exculpation on the basis of the mere abstract classification of the act, without taking into account whether the conduct is manifestly criminal.

It is precisely in the face of such rigid interpretations that there is a need to return to an approach more firmly rooted in factual reality and in the actual perception of the perpetrator, rather than in presumptions constructed on a purely typological basis. The individualisation of criminal responsibility can still find scope through the traditional concepts of mistake of fact or necessity, but above all through the discretion of the Prosecutor. This solution makes it possible to preserve the *raison d’être* of the international criminal justice system, preventing the introduction of excessively subjective criteria from resulting in precisely the impunity that the international community seeks to eradicate. Indeed, Article 53 of the Statute allows proceedings not to be brought when the case, whilst technically falling within the Court’s jurisdiction, lacks ‘sufficient gravity’ or when prosecution is not in the ‘interests of justice’. This results in a filter that allows marginal situations – characterised by low levels of awareness and insurmountable coercion – to be excluded from prosecution, and resources to be concentrated on the core instances of mass atrocity crimes. Considerations of equity do not operate at the substantive level, so that the system remains coherent, but are instead translated into a matter of procedural management.

In this way, whilst avoiding dangerous tendencies to absolve responsibility on the basis of obedience, the individual subordinate is not burdened with the weight of symbolic expectations that exceed their actual scope for choice. In other words, the foot soldier – who may have acted under systemic coercion – is spared imposed heroism, without thereby relinquishing the pursuit of senior leaders, the true architects of the criminal context.

4. *The individualisation of criminal liability in domestic criminal law: contextual coercion.*

The assessment of the legal relevance of superior orders inevitably depends on the legal system within which they are situated: it requires, in other words, engagement with the relevant legal framework, its logic of legitimation, and its systemic premises.

In the domestic legal system, which has not yet formally transposed the Rome Statute, the defence of superior orders is modelled on the intermediate criterion of manifest criminality. Superior orders do not constitute a ground for justification – that is, they do not render the act lawful – but may serve as a ground for excluding liability where they lead the subordinate into a non-culpable error regarding the lawfulness of the ordered act. The executor shall therefore not be held liable where the illegality of the order is neither manifest nor known (or knowable). It is true that, in Article 51(4) of the Criminal Code, the exculpatory relevance is literally referred to the case of the ‘non-questionability’ of the unlawful order, but the prevailing interpretation understands such ‘non-questionability’ as corresponding to the logic of normative culpability: that is to say, it concerns a judgement of the subjective ‘excusability’ of compliance with an order which, although unlawful, leaves no time or scope for assessments of lawfulness by the subordinate operating within highly hierarchical public sectors centred on duties of prompt obedience, such as the military and police services. Consequently, the defence is bound to fail when the criminal nature of the order is in any case ascertainable – or, *a fortiori*, known – as is the case where it is ‘manifest’, which constitutes an objective limit to the applicability of the defence. In short, a subordinate who has failed to recognise the criminal nature of the order is nevertheless culpable, precisely because of that personal attitude, for failing to perceive wrongdoing of evident gravity.

In other words, the Italian legal system has long been equipped with provisions in line with those of the Statute, albeit without incorporating the presumption of manifest criminality for crimes against humanity and genocide. Thus, Article 51 of the Italian Criminal Code – by failing to distinguish its scope of application, as Article 33 of the Statute does, on the basis of the abstract nature of offences – could, in theory, allow for the commission of crimes against humanity or acts of genocide to be excused if, at least in practice, they were not manifestly criminal. Whilst, in international criminal law, cases of ‘irresponsible’ obedience of lesser gravity may be filtered through the discretion of the Prosecutor (Article 53 of the Statute), in the domestic system, which is bound by the principle of mandatory prosecution, it is not unreasonable that the same selection should operate through an excuse, guided by criteria of fairness.

Indeed, when the entire institutional framework is compromised, limitations emerge that run deeper than those linked solely to the perceptibility – or manifest character – of the criminal nature of the order. As already highlighted, the assessment of whether obedience is excusable is inevitably system-dependent, that is, linked to the relevant legal framework. In the case of the International Criminal Court, excessively broadening the scope of exemption from liability at the substantive level would risk undermining the very founding logic and basis of legitimacy of the system. Nevertheless, provided that the programmatic function – including its complementary role – of international criminal justice is not altered, it is reasonable to envisage broader margins of tolerance in domestic criminal law in particularly serious pathological situations. Moreover, the model outlined in Article 51 of the Criminal Code and in sector-specific provisions is based on the assumption that a subordinate may invoke their duty to disobey by seeking the intervention of their superiors. If, however, the entire chain of command is involved in the criminal scheme, this remedy becomes purely theoretical: the aim of refusing the order ‘from within’ is, in fact, impracticable, because the system of legal safeguards on which ordinary law is based has been radically undermined. To expect, in such contexts, that the subordinate should refuse to obey is tantamount to demanding unreasonable heroism, within a regulatory framework designed for normal situations but wholly inadequate in the face of the systemic pathologies of hierarchical authority.

Such considerations therefore lead us to emphasise environmental coercion, understood as the complex of systemic pressures capable of creating a situation in which the order received is effectively irresistible. These are situations in which the subordinate, fearing the consequences of a possible refusal, loses the real possibility of freely determining their own course of action. Such a condition may amount to a state of necessity, which in cases of this kind may be deemed to arise from the threat of another (Article 54 of the Criminal Code). This approach makes it possible to distinguish between those who have voluntarily assumed a criminal role or have in any case gone beyond the limits imposed by the threat, and those who have acted under the influence of genuine intimidation, without thereby relinquishing the requirement for punishment that stems from international criminal law. Furthermore, it allows for an assessment, through the balancing of interests, of the relationship between the gravity of the offence committed and the extent of the harm the perpetrator would have suffered as a result of disobedience, thereby excluding from the scope of the defence more serious offences that the subordinate agreed to commit in order to avoid dangers of lesser harm.

Moreover, the issue is by no means alien to international criminal practice prior to the Rome Statute, that is, to an era in which it was not yet possible to filter cases through

prosecutorial discretion. Indeed, there is a significant body of case law – one need only consider the *Flick*⁴, *Ministries*⁵, and *Farben*⁶ cases – in which the climate of terror imposed by the Reich was deemed to constitute a state of necessity for certain defendants involved in the National Socialist industrial apparatus during the Nuremberg trials of industrialists:

«The evidence with respect to defendants Steinbrinck, Burkart, Kaletsch, and Terberger in our opinion, however, clearly established that there was in the instant case “clear and present danger” within the contemplation of that phrase. We have already discussed the Reich reign of terror. The defendants lived within the Reich. The Reich, through its hordes of enforcement officials and secret police, was always “present”, ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees»⁷.

Also worthy of note is the distinguishing criterion adopted by the courts: the absence of necessity for those who voluntarily joined the criminal programme – thus, for example, Flick and Weiss, driven by an interest in increasing corporate profits – and the possible applicability of the defence for those who were drawn into it by the apparatus of coercion, fearing immediate reprisals and with no real means of dissent. These are particularly significant indications which, setting aside the specific details of the case, highlight, from an individualised perspective, the absence of legitimate means of resistance and institutional support available to the defendants within systems entirely oriented towards criminal ends. Ultimately, this is the environmental coercion referred to above: a systemic pressure that acts upon the agent’s will, neutralising their capacity for self-determination, especially when state power itself becomes criminal.

Criminal law, including international criminal law, cannot tolerate the individual being transformed into a blind cog in the machinery of evil, nor can it demand unconditional heroism. Precisely for this reason, in circumstances characterised by such coercion and the practical impossibility of opposing an unlawful order, it is appropriate to provide for strictly limited grounds for exemption from liability.

⁴ U.S. Military Court, *United States of America v. Flick et al.*, Judgment of 22.12.1947, Vol. VI.

⁵ U.S. Military Court, *United States of America v. Ernst von Weizsaecker, et al.*, volume XIV, 30 June 1948 (The Ministries), pp. 1061-1097

⁶ U.S. Military Court, *United States of America v. Carl Krauch et al.*, No. 6, Judgment, 30 July 1948 (ig Farben Case).

⁷ U.S. Military Court, *United States of America v. Flick et al.*, op. cit., § 1200.

After all, it is the tragedy of Antigone itself that teaches us the value of limits: there is always the risk that it is not only ‘deviant’ power that falls into *ὕβρις*, but international criminal law itself, when it loses its sense of proportion and pursues punishment at any cost.

5. Concluding remarks

The observations outlined above reveal the tension between the statist foundation of the duty of obedience – which serves the smooth functioning of hierarchical mechanisms – and the assessments made by the international community regarding the need to restore individual responsibility for mass crimes, even when committed pursuant to superior orders. Yet the law cannot take refuge in forms of essentially strict liability, elevating heroism to a standard prerequisite for lawfulness.

In particular, it has been shown that when orders are issued within corrupt and collusive systems, they can exert such a conformist force as to drastically restrict the scope for moral and practical self-determination among lower- and middle-ranking personnel. At the international level, given the limited scope of application of superior orders defence, it is necessary to give greater weight to categories already provided for in the Rome Statute – from mistake of fact to necessity – as well as to the gravity test set out in Article 53. The latter serves to preserve the function of the international criminal justice system without undermining the substantive and symbolic importance of the principle that the existence of a hierarchical order is irrelevant for the purposes of excluding liability. Moreover, it allows criminal proceedings to focus on senior leaders, the architects of the criminal context, thereby avoiding the imposition on foot soldiers of a form of collective responsibility that would undermine the individualised logic of criminal law.

At the domestic level, in addition to the broader scope of application of Article 51(4) of the Criminal Code, particular emphasis has been placed on the concept of *contextual coercion*, which can be consistently subsumed under the state of necessity referred to in Article 54 of the Criminal Code. Where the entire hierarchical chain is permeated by systemic threat, a subordinate who has been drawn into the crime under overwhelming environmental pressures should be exempt from liability. Conversely, with regard to the willing perpetrators – those who have knowingly joined the criminal scheme – punishment retains an essential and foundational value, in that it seeks to prevent the resurgence and consolidation of a mentality that obscures the sense of individual responsibility.