

GUILTY OF OBEDIENCE.
SUPERIOR ORDERS IN INTERNATIONAL CRIMINAL LAW.

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Summary: 1. Atrocities and “ordinary men”. – 2. Superior orders in international criminal law. – 3. The presumption of manifest criminality. Notes on the role of context. – 4. The legitimacy of defences in the context of war crimes. – 5. Adapting Italian Law to the Rome Statute: Future Perspectives.

1. Superior orders lie at the crossroads of questions that touch upon the very foundations of the international criminal justice system. *Would I have been a rebel or an executioner?* Pierre Bayard poses this question today¹: in a hypothetical journey through time, he wonders what role he might have played in a system bent on violence, had he been born in the troubled years of totalitarianism. Conformity, obedience, ideology: recurring ingredients capable of transforming “ordinary men”² into sentient cogs in death factories. Authority and power become tools bent to unspeakable ends, giving rise to that sinister alchemy of evil so powerfully evoked by the dull, mechanical, inhuman soundscape of *The Zone of Interest*, Jonathan Glazer’s recent film – a sound that recalls the horror of history.

The studies of Sherif, Asch, Milgram, Zimbardo, Latané and Darley, to mention only the most famous, offer disturbing answers to Bayard's question. These findings are particularly uncomfortable for criminal lawyers, at least in their traditional role, given their traditional focus on individual responsibility rather than systemic dynamics.

When an entire political, judicial and administrative apparatus becomes a vehicle for institutionalised violence, the boundary between what is lawful and what is unlawful can become difficult to discern. Individuals, whose

* This article is based on a paper presented at the conference “L’adempimento all’ordine, tra responsabilità e obbedienza. Profili di diritto penale militare e internazionale”, held in Pisa on 23 September 2024.

¹ P. Bayard, *Aurais-je été Résistant ou Bourreau?*, Paris 2018.

² The reference is to the well-known C. Browning, *Ordinary Men: Reserve Police Battalion 11 and the Final Solution in Poland*, London 1992.

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conduct is permitted or imposed by the law in force, driven by the duty to obey their superiors, sometimes become disoriented by the overlap between systemic injustice and formal legality. In fact, the basis of responsibility for those who act in a context of mass crimes is, as is well known, at the heart of a problem that is not only legal, but first and foremost ethical and philosophical. As has been amply demonstrated, even within totalising structures of power and hierarchy, there remains, at the individual level, a degree of autonomy that allows individuals to be held responsible for their choices and actions. To deny this assumption would be to undermine the very legitimacy of the system upon which international criminal punishment is based. However, this individualising paradigm – which constitutes the very guarantee of responsibility in the context of mass crimes – does not exempt us from considering whether individuals actually had the *possibility* to act differently. Where this possibility is lacking, there is a risk of slipping into highly standardised modes of attribution of responsibility: yet, even in the face of the dark cloud of atrocities, the personal element of the offence must remain central to the assessment of responsibility.

It is therefore no coincidence that one of the most frequently invoked *defences* in international criminal trials is that of superior orders. The psychological pressure exerted on the individual by the duty to obey a superior may lead to an exemption from criminal liability, as a result of the state of subordination to which the agent was subjected.

However, international criminal law has, since its inception, rejected the excuse of superior orders. A turning point seems to have been reached with the Rome Statute, which to a certain extent recognizes superior orders as a ground for excluding criminal responsibility, with the express exception of crimes of genocide and crimes against humanity. Hence the need to understand the rationale behind the differentiation established by Article 33(2) of the Rome Statute, also with a view to adapting domestic criminal law.

2. With regard to the relevance that superior orders may assume in determining individual spheres of responsibility, different approaches have been developed that seek to balance two opposing needs: on the one hand, the preservation of military discipline; on the other, the strengthening of preventive and repressive mechanisms. The so-called *respondeat superior* approach attributes responsibility for the crime exclusively to the superior who issued the order. By contrast, the so-called absolute responsibility

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approach does not, in principle, recognise any exculpatory value in the order itself for those who carried it out. Finally, the conditional liability approach denies the relevance of the excuse when certain conditions are met, such as the knowledge or knowability of the criminal nature of the order, or its manifest illegality.

International criminal law has, since its inception, rejected the excuse of superior orders. The military tribunals of Nuremberg and Tokyo appear, in fact, to operate within the logic of absolute responsibility: at most, superior orders may be considered a mitigating circumstance.

The statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda follow the same approach. Both Article 7(4) of the ICTY Statute and Article 6(4) of the ICTR Statute provide that acting pursuant to an order of a government or superior does not relieve the perpetrator of criminal responsibility, “but may be taken into account in mitigation of punishment if the International Tribunal so decides in the interests of justice”.

It should nevertheless be noted that, where the order is carried out in circumstances amounting to necessity, its potential excusing value has occasionally been acknowledged. However, these generally concern exceptional cases with specific historical and political characteristics: suffice it to recall the more rigorous approach to orders under duress later adopted by the judges of the ICTY in the Erdemović case.

The Rome Statute, which established the International Criminal Court, appears instead to recognise superior orders as a possible ground for excluding criminal responsibility. Article 33 of the Statute, after stating that committing an act pursuant to an order of a government or superior does not in itself relieve a person of responsibility, provides that this rule does not apply where: (a) the person was under a legal obligation to obey the orders of the government or superior in question; (b) the person did not know that the order was unlawful; and (c) the order was not manifestly unlawful. This model appears to be based on the so-called conditional liability approach.

In essence, this constitutes an excuse: punishability may be excluded when the error is appreciable in terms of the agent’s culpability, owing to the unenforceability of refusal to comply where the subordinate lacks the supervisory or control powers necessary to perceive the criminal nature of the order.

However, Article 33(2) of the Rome Statute provides that orders to commit genocide or crimes against humanity are always considered

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manifestly unlawful. As a result, the scope of the rule appears to be limited essentially to war crimes. Many commentators argue that this limitation is largely justified on political grounds: the intention was to protect military personnel in particular, given that, during armed conflict, hierarchical obedience plays a crucial role in maintaining discipline. Indeed, from a substantive perspective, war crimes, crimes against humanity and genocide do not differ significantly in terms of the structure of the offence.

Nevertheless, the solution adopted by the Statute has been criticised by those who view it as a potential loophole for impunity. According to this view, an order from a superior should never constitute a ground for excluding responsibility, but may at most operate as a mitigating circumstance.

Conversely, it has also been observed that the criminal nature of an order may not always be apparent to the individual, even in cases involving genocide or crimes against humanity.

On closer inspection, the rationale of protecting military personnel does not appear entirely convincing. It might have been preferable – as proposed by the United States delegation – to construct the defence on a subjective basis, relying on the military status of the individuals concerned. The duty of prompt obedience imposed by military hierarchy would thus have justified such a limitation, while maintaining the objective threshold of manifest illegality. After all, crimes against humanity or acts of genocide may also be committed – and in practice often are – by members of the armed forces.

Ultimately, however, it is worth asking whether the solution adopted by the Statute truly represents a departure from previous approaches, or whether they are all ultimately expressions of the same underlying logic: that of manifest illegality. It is therefore necessary to reflect on the rationale for this differentiation, also from the perspective of implementing international criminal law at the domestic level, in order to avoid unjustified slippage towards forms of objective or systemic liability.

3. It is therefore necessary to question the basis of the presumption of manifest illegality established by Article 33(2) of the Statute with regard to genocide and crimes against humanity.

It should be noted that the conduct resulting from an order may not always appear, at least in concrete terms, to be manifestly criminal. A presumption based on the abstract legal classification of the offence (genocide or crimes against humanity) therefore risks diminishing the role of the factual

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circumstances and precluding an individualised assessment of the perpetrator's situation, reducing him or her to being merely "guilty of obedience". Indeed, a crime such as persecution – as well as that of apartheid – may appear to correspond to an "internal" legal order that is discriminatory in itself but nevertheless establishes the formal legitimacy of both the act and the order imposing it. In such circumstances, the perpetrator may experience a "disorder of values and perception" that could lead to an inexcusable error as to the unlawfulness of the act. Similarly, a crime such as enforced disappearance may also be committed through a refusal to provide information, which may appear, at least formally, comparable to domestic offences such as refusal to perform official duties.

In addressing this issue, however, the central role of the so-called contextual element – around which the offences of the Rome Statute are structured – must be emphasised. The particular legal structure of these crimes consists, in fact, of two levels. The first concerns the commission of the underlying offences (such as murder, personal injury, rape, torture, and so on). The second concerns the context within which those acts are committed: for example, murder, rape or torture become crimes against humanity when committed as part of a "widespread or systematic attack directed against a civilian population".

The decision to presume the manifest illegality of genocide and crimes against humanity may therefore also be explained by the negative connotations associated with their contextual element. This element, involving a multiplicity of actors and forms of institutionalised violence, acts as a powerful amplifier of the wrongfulness of the individual acts. Crimes against humanity and genocide are characterised by a contextual element with a particularly strong negative connotation, which ultimately colours even the individual case with an unmistakable dimension of macro-criminality, as it necessarily forms part of a perceptible framework of massive violence and discrimination. Consequently, even where the individual act, taken in isolation, does not in itself express a particularly marked degree of wrongfulness, its objective and subjective connection with such an oppressive context makes it difficult to assume that the agent could remain entirely unaware of the illegitimacy of his or her conduct and of the order that imposed it. At the very least, such a context is likely to give rise to doubt regarding the legitimacy of the order.

The irrelevance of superior orders in such cases is therefore consistent with the very foundations of international criminal law, which operates as a

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safeguard against individual misperceptions within a broader macro-criminal system. Among the most troubling questions of the twentieth century was the need to punish acts that were intolerably unjust yet formally imposed by existing law or by the duty of obedience to authority. International criminal law emerged from the tensions embodied in Radbruch's formula and later found renewed and autonomous legitimacy when justice that once stood above the law was gradually transformed – particularly with the adoption of the Rome Statute – into a legal instrument capable of judging the perversion of state power. Although the contemporary system of international criminal justice no longer needs to seek its legitimacy in natural law, this sense of self-evidence and universal recognisability still appears to permeate the crimes covered by the Statute.

4. Crimes against humanity are not the perversion of otherwise tolerated violence, but a form of massive violence against civilians. This is not the case with war crimes, where the contextual element is provided by the correlation with armed conflict, i.e. a context of legalised violence, regulated at most by humanitarian law. War crimes aim to repress, as part of a tradition of civilising war, what is fundamentally considered an excess within a form of otherwise legal violence, from which civilians must be protected. In contrast, the logic of crimes against humanity draws much more on a human rights tradition that seeks to condemn the violent revolt of the state against populations.

The fact that the Statute allows exculpation only in the limited cases of war crimes that are not manifestly unlawful is perhaps linked precisely to the context in which such crimes are committed. In general, the criminal nature of the conduct may be less obvious, and therefore more prone to excusable error, than in the case of certain war crimes that primarily concern violations of the rules of *ius in bello*. War crimes represent a highly heterogeneous category, which includes cases with a similar degree of reprehensibility to crimes against humanity and genocide, but also others that are objectively less offensive. This is particularly true for violations of *ius in bello*, rules that are often subject to ambiguous interpretations and applicable in contexts of war where violence, including murderous violence against the enemy, is widely accepted; rules, however, that fall outside the core of crimes whose wrongful nature is immediately recognisable and which reflect a globally shared ethical condemnation.

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As noted in the literature, the limitation based on “manifest criminality” also serves to mitigate the lack of strictness in the law whenever the subordinate was unaware of the unlawful nature of the order. There is, in fact, a direct relationship between the degree of precision with which the criminal offence is defined and the excusable nature of obedience to a superior’s order. The requirement of manifest criminality thus operates as a limit to the liability of the subordinate whenever the offence lacks sufficient specificity and clarity. For example, Article 8(2)(b)(XVII) criminalises the “use of asphyxiating, poisonous or other gases, and of all liquids, materials or similar devices”. It would hardly be reasonable to expect the mere executor to review the legality of the order in order to determine whether “similar devices” actually fall among those prohibited and therefore constitute a crime.

Obviously, even in the context of war crimes, there are cases characterised by an obvious 'pre-legal' negative value, such as crimes deliberately directed against the civilian population. Significant in this regard is the view that widespread and systematic atrocities against civilians in war are ultimately better addressed as crimes against humanity and, therefore, better understood as part of a tradition of human rights aimed at reducing the violence of rulers against populations. Moreover, ICC case law also holds that if an individual war crime corresponds to a crime against humanity, the excuse cannot be applied, as it is *ipso facto* manifestly criminal.

It should also be noted that, for certain offences consisting in violations of technical rules governing the conduct of hostilities, it may be difficult for the mere executor to determine whether an order is manifestly unlawful, nor can such unlawfulness always be regarded as immediately apparent. For example, Article 8(2)(b)(ii) criminalises “intentionally directing attacks against civilian objects, that is, objects which are not military objectives”. In practice, however, it may be difficult to ascertain whether an order to strike a given target actually constitutes a crime, since the identification of legitimate military objectives generally lies within the competence of the military leadership.

Similar doubts may arise with regard to the manifest unlawfulness of the “improper use of the white flag, of the flag or of the military insignia and uniform of the enemy” (Art. 8(2)(b)(vii)) or the “destruction or seizure of enemy property, unless such destruction or seizure be imperatively demanded by the necessities of war” (Art. 8(2)(b)(xiii)). In short, these offences presuppose a certain reliance on the superior’s powers of control and

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discretion – particularly evident in notions such as *military necessity* – which may reasonably justify the possibility of an excuse.

After all, it would hardly be realistic to expect the mere executor to exercise the same level of scrutiny regarding compliance with the rules governing military operations as that required of the commander. In other words, the excuse may be justified by the greater difficulty faced by subordinates in perceiving the concrete wrongfulness of the act when they lack – as is generally the case within military hierarchies – the powers of verification and control necessary to assess the criminal nature of the order.

This may also represent an attempt to create a kind of “buffer” for political decisions that may only be regarded as criminal *ex post*. Indeed, “what counts as war and what does not is ultimately decided by individuals”: as an expression of political power, the authority to designate a military operation as “war” lies in the hands of those who wield power, whether duly constituted governments or groups that proclaim themselves autonomous.

From this perspective, the excusability of error regarding the legality of an order – limited by the requirement of manifest criminality – may be interpreted as a gateway to the political dimension of certain strategic decisions.

One final observation. The openness to excusable error in cases of war crimes is likely linked to the harmonising vocation of the Rome Statute. The Statute is characterised by a highly detailed and casuistic codification of war crimes, which does not merely identify the most serious cases likely to engage the Court’s jurisdiction, but also encompasses less significant offences, intended above all to encourage corresponding adjustments within national legal systems.

Earlier experiences of international criminal justice reveal no comparable degree of typification. Those systems – centred on the primacy of international tribunals over domestic jurisdictions – lacked this downward or systemic dimension, this role that indirectly promotes the harmonisation of criminal law.

Seen in this light, the approach adopted by the Rome Statute may not represent a genuine departure from previous practice, as it remains broadly consistent with the philosophy that inspired the Nuremberg Military Tribunal itself. In that context, the principle of absolute responsibility was justified by the exceptional nature of the historical circumstances and the gravity of the crimes prosecuted. In reality, however, it presupposed an implicit assessment of the manifest criminality of the acts under jurisdiction and incorporated the

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notion— already widespread in comparative law prior to Nuremberg – that the perpetrators “could not have been unaware” of their criminal nature.

Today, the systemic dimension of the Rome Statute and, in particular, its harmonising function in synergy with national legal systems through the principle of complementarity, requires engagement also with cases of lesser gravity. This helps to explain why the scope of the excuse has been slightly expanded, albeit in a limited manner.

More generally, however, beyond this limited deviation resulting from functional and systemic considerations, the Rome Statute still appears to confirm a system aimed at preventing exemptions from responsibility for international crimes based on obedience to orders. In this sense, it remains consistent with the ascriptive logic that also underpins the legitimacy of international criminal law.

5. Both the Rome Statute and Italian criminal law are therefore modelled on the so-called *conditional liability approach*, which recognises the relevance of the excuse when certain conditions are met, such as the lack of knowledge of the unlawful nature of the order and the absence of its manifest illegality.

Even in domestic law, the excuse is in fact constructed according to an intermediate approach reflecting the logic of normative culpability and the requirement of the manifest illegality of the order. In this framework, the order does not operate as a justification: it does not objectively render the commission of an international crime lawful, but may instead function as an excuse insofar as, although unlawful, it misled the subordinate as to the lawfulness of what was commanded. Both systems therefore ultimately rely on an assessment of the reprehensibility of the subordinate’s conduct: obedience to a superior’s order tends to exclude the subordinate’s responsibility only where the illegality of the command was neither objectively manifest nor subjectively known to the person executing it.

It is true that Article 51(4) of the Italian Criminal Code literally refers to the case of the “unquestionability” of an unlawful order (“A person who carries out an unlawful order is not punishable when the law does not allow them to question its lawfulness”). However, the prevailing interpretation understands this notion of “unquestionability” as reflecting the logic of normative culpability. In other words, it entails a judgment of subjective excusability of obedience to an order which, although *contra ius*, left no time or room for the subordinate to assess its lawfulness within highly hierarchical public sectors

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characterised by duties of prompt obedience, such as the military or the police.

Accordingly, the excuse cannot apply where the criminal nature of the order was in any case knowable – or a fortiori known – as is precisely the case when the unlawfulness of the order is manifest. In such situations, manifest illegality operates as an objective limit to the applicability of the excuse. In short, a subordinate who fails to recognise the criminal nature of the order may still be considered culpable precisely because, given his or her personal capacity for judgment, he or she failed to perceive a clearly and incontrovertibly wrongful act.

In other words, Italian law has long had regulations in line with the provisions of the Statute. However, due to the continuing failure to implement the Statute in domestic law – which, for example, does not recognise 'crimes against humanity' – there is no presumption of manifest criminality limited to genocide and crimes against humanity, as mentioned above. In a Europe stained with blood and with a war on the shores of the Mediterranean, it is imperative to reiterate the need to bring Italian law into line with the Statute in substantive terms and, in this perspective, it is necessary to question *the appropriateness* of incorporating that presumption of manifest criminality.

First of all, it should be noted that Italian case law considers crimes that conflict with the most basic principles of humanity, such as acts of genocide or crimes against humanity, to be manifestly criminal. Nevertheless, it should be noted that the criterion of manifest criminality, which is not easy to understand, has not always led to unambiguous outcomes. Indicative of this is the Kappler case – relating to the massacre at the Fosse Ardeatine – in which the military criminal court of Rome adopted an essentially subjective criterion.

“The Court considers that the order to kill ten Italians for every German killed in the Via Rasella attack, which resulted [...] in the order to kill 320 people in relation to 32 deaths, although unlawful in that those shootings constituted murders for the reasons set out above, cannot be said with certainty to have appeared so to Kappler. [...] This deduction, the mental habit of prompt obedience that the defendant had formed while serving in an organisation with extremely strict discipline, the fact that orders with the same content had previously been carried out in various areas of operation, the circumstance that an order from the Head of State and Supreme Commander of the armed forces, due to the great moral force attached to it, cannot fail to diminish, especially in a military man, the freedom of judgement necessary for proper scrutiny, are elements which lead the Court to believe that it cannot be stated with certainty that Kappler was aware of and willing to obey an unlawful order”.

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Kappler was nevertheless sentenced to life imprisonment – for killing ten more people than required by the order – but the case highlights the problematic nature of a criterion which, if left entirely to judicial discretion, can lead to outcomes of this kind. The case is also emblematic of the confusion of values and perceptions that arises in the agent in a scenario of macro-crime, i.e. how 'manifest criminality' in a context of mass crimes is even more problematic than in a context of ordinary crime. This is because institutional, psychological and ideological factors lead to an evaluative imbalance on the part of the individual, who acts in the belief that their behaviour is lawful – or even necessary – even for crimes that can be considered *mala in se*.

Ultimately, there is a risk that overly subjective parameters, oriented towards individual perception, tend to remove responsibility from the individual. If the need for an objective criterion is not recognised, the tool for dismantling the apparatus of a deviant state, i.e. for fulfilling the very purpose of an international criminal justice system, is lost.

The subjective criterion referred to in the Kappler case was, however, superseded by subsequent case law, which instead adopted an objective approach, with reference to the parameter of the “average” person; a criterion that should, as a rule, also apply to genocide and crimes against humanity (where these are codified in the Italian system).

In any case, implementing Article 33 of the Statute through a specific provision containing the presumption of manifest criminality for crimes against humanity and genocide means introducing a limit to judicial discretion consistent with the international criminal law perspective. This was the approach taken by the Palazzo-Pocar Commission's draft code of international crimes³: a choice in line with that adopted by the German VStGB:

§ 3 VStGB - Acting on orders or instructions

Ohne Schuld handelt, wer eine Tat nach den §§ 8 bis 15 in Ausführung eines militärischen Befehls oder einer Anordnung von vergleichbarer tatsächlicher Bindungswirkung begeht, sofern der Täter nicht erkennt, dass der Befehl oder

³ The final report and the draft text are available at the following link: <https://www.sistemapenale.it/it/documenti/codice-dei-crimini-internazionali-pubblicata-la-relazione-della-commissione-palazzo-pocar>. For a general overview of the proposed Code, see E. Fronza, C. Meloni, *The Draft Italian Code of International Crimes*, in *Journal of International Criminal Justice* 2022, 1027 ff.

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die Anordnung rechtswidrig ist und deren Rechtswidrigkeit auch nicht offensichtlich ist.

[A person is not guilty who commits an act referred to in paragraphs 8 to 15 – *i.e. a war crime* – in execution of a military command or an order of comparable binding force, provided that he does not recognise the unlawfulness of the command or order and that such unlawfulness is not also obvious].

The intention was therefore to avoid solutions that would be more permissive than the statutory requirements, even though the resulting tension with the principle of culpability was considered compatible with the broad discretion enjoyed by the legislature in defining the objective conditions for the applicability of excuses. In this case, however, the reasonableness of the legislative choice appears to derive from its consistency with international standards, including customary ones, which have shaped the cornerstones of the most significant developments in international criminal law.

What is certain, however, is that – although consistent with the logic and the very foundations of the legitimacy of the international criminal justice system – the presumption of manifest criminality based on abstract legal categories risks precluding an individualised assessment of the position of the person executing the order.

When moving from the “micro-pathologies” of the hierarchical relationship of authority – on which Article 51 of the Criminal Code is based – to criminal orders issued within power structures oriented toward criminal purposes, intermediate executors may be required to perform tasks that are not intrinsically criminal but acquire such a character within the context of a complex collective activity. It should be noted, however, that within the system established by the Rome Statute, considerations of prosecutorial policy may guide the discretion of the ICC Prosecutor in deciding not to pursue cases that appear marginal within the broader macro-criminal context under investigation and insufficiently serious.

In domestic legal systems, by contrast, where criminal proceedings generally lack comparable margins of discretion, it remains necessary to consider mechanisms capable of tailoring punishment to a more individualised approach. *De iure condendo*, therefore, it is necessary to assess how this need might be addressed, possibly through the introduction of specific mitigating factors in sentencing capable of reflecting the “need for punishment” in accordance with standards of proportionality, as an implication of the principle of culpability.