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DEFENSE OF SUPERIOR ORDERS IN INTERNATIONAL CRIMINAL LAW
AS PORTRAYED IN THREE TRIALS: EICHMANN, CALLEY AND ENGLAND

For centuries of its existence mankind has engaged in the history of many bloody and hideous wars. However, people have come to realization that it is necessary to regulate the actions during the armed conflict and therefore since the early stages there have existed certain rules of conduct during the armed conflicts. To violate these rules means to cross an essential borderline of civilized and acceptable behavior. Such violations have been viewed as intolerable. When the time comes to prosecute grave violations of war fare; the perpetrators resort to the defenses, available to them, mostly in their attempts to avoid criminal responsibility or hoping at least to mitigate their punishment. Among such defenses is the defense of superior orders. In my research I would like to consider some critical issues that arise in connection with the superior orders doctrine as well as the attempts to use such defense in the three trials, - trial of Eichmann, trial of William Calley and the most recent of them, - Lynndie England's trial.

In the *Peless* case (*In re Eck and Others*) the Judge Advocate makes the following observation. "...superior orders...coming from a higher authority which the accused is by the law and custom of his service obliged to obey..."¹ Another attempt to define the doctrine was offered by Howard Levie who suggest that "defense of superior orders ... [is] the claim that the accused did what he did because of he was ordered to do so by a superior officer (or by his Government) and that his refusal to obey the order would have brought dire consequences upon him."² From these definitions we can see that the

superior orders doctrine is inseparably connected with the idea of obligation to obey higher authority due to the nature of one's service and possible consequences of disobedience. This reflects the inherent link of superior orders with a number of other concepts and problems essential in the consideration of the superior orders doctrine. These problems include: difficulty in detecting the unlawfulness in superior orders further complicated by the training practices that prepare soldiers not to question the orders of their superior officers; principle of moral choice and personal perception by each individual soldier regarding the received order; the limitations and requirements for the application of a superior orders defense.

First I will consider the question when superior orders can be regarded as unlawful. In the military service, starting with such initial stages as training, the soldiers are taught to obey the orders of their commanders. It is being planted into the minds of the young recruits that they must follow orders. Rogers points out in his book, that military efficiency "depends on the prompt and unquestioning obedience of orders to such an extent that soldiers are prepared to put their lives at risk in executing these orders"³. The author contends that "it is vital to the cohesion and control of a military force in dangerous and intolerable circumstances that commanders should be able to give orders and require their subordinates to carry them out"⁴ Rogers's statement is similar to one of Colonel Kennedy, the presiding military Judge in the famous U.S. v. Calley case, where Colonel stated: "Soldiers are taught to follow orders. And special attention is given to orders on the battlefield. Military effectiveness depends upon obedience to orders."⁵ In addition, what complicates the situation is that the soldiers are trained to presume that all the orders of their superiors are legal by default. Author Leslie Green quotes the

following statement from a proposal on superior orders: “There shall be a presumption that all orders issued by superiors to their subordinates are in fact legal”⁶ Unfortunately, it has been proven by quite a significant number of appalling instances throughout the history of mankind and warfare that superior orders may be unlawful. What are the criteria for the determination for each individual soldier to find such an order unlawful? International criminal law scholars developed a number of key definitions that could help in the making of such determination. “When the order is *grossly* illegal” is the suggestion by Justice Solomon from *R. v. Smith* case⁷. Another early example is the *McCall v. McDowell* case⁸, where the court offers the following criterion: “...where at first blush it is *apparent and palpable to the commonest understanding* that the order is illegal...”⁹ In *Llandovery Castle* case the court talks about the universally known illegality of some orders: “The firing on the boats was an offense against the law of nations...The rule of international law, which is here involved, is simple and universally known”¹⁰. Paust and other authors of this textbook suggest that it was Professor Yoram Dinstein who developed the method to determine whether the soldier knew that the order amounted in a criminal act.¹¹ This method is known as the auxiliary test of manifest illegality, or “the manifest illegality principle”; and according to Paust and other authors, this principle received extensive acceptance on the international level.¹² The underlying statement is that military orders must be obeyed unless they are manifestly unlawful. Such an order is the one that “offends the conscience of every reasonable, right thinking person; it must be an order which is obviously and flagrantly wrong.”¹³ In his book Dinstein quotes two other authors who expressed the gist of the principle, one being Maugham who stated that “A superior order should not be a defense if the act constituting the alleged crime was

clearly and obviously one of a criminal kind.”¹⁴ The other author, Cave, in reference to the principle said that it “limits the impunity of the soldier to cases where the orders are not so manifestly illegal that he must or ought to have known that they were unlawful.”¹⁵ The principle of the test is that a subordinate should incur responsibility for his act if he commits a crime pursuant to a manifestly illegal order, and should be released from guilt if he commits an offense in obedience with an order the illegality of which is not palpable.¹⁶ Dinstein points out that the illegality test is “objective in its character and is based on the intelligence of the reasonable man”¹⁷. To explore the test’s rationale Dinstein poses two hypotheticals: in the first one the soldier committed an international offense following the order not manifestly illegal from the point of view of a reasonable man. However, the offender himself knows that his act is criminal. Another issue is if a soldier committed a criminal act which is manifestly illegal for any reasonable man, but due to his personal inadequate intellectual abilities, he himself is not aware of the illegality of his act. Llandovery Castle case, according to the author, is the example of the practical application of this principle.¹⁸ He applies the rule set out by this case stating that even if the order does not reach the degree of the manifest illegality, the person committing the act will be held criminally responsible if he himself was aware of its illegality. In light of this determining factor, the hypothetical where the soldier commits an act not manifestly illegal to a reasonable man, but himself is aware of such illegality, he will be held criminally liable. Likewise, in the second hypothetical, if the subordinate commits an act in pursuance of a superior order, and such act is manifestly illegal, but for some reason the offender does not know about the act’s illegality, he will not be liable. Dinstein then suggests the formulation that “an accused should not be held responsible,

under international law, for a criminal act executed in obedience to a superior order if he committed the act without being aware of its illegality”.¹⁹ The author calls this substantive principle ‘the personal knowledge principle.’ However, as Dinstein points out, such principle contradicts the famous maxim ‘ignorantia juris non excusat’, the maxim, reaffirmed by Castren “ignorance of legal rules and failure to discover their content does not...relieve a person of responsibility”.²⁰ Some legal scholars respond to that by noting that it is the manifestly illegal orders that are prevalent in the context of international criminal law.²¹ Indeed the examples I will consider in further discussion represent situations that particularly deal with such manifestly illegal orders.

To conclude discussion regarding the definitions of the illegality of superior orders I would like to mention another prominent point of view. A remarkable, in my opinion, statement in this regard belongs to Judge Halevy in the decision for the *Kafr Qassem* case (Appeal, 279-283-58 Psakim, Judgments of the District Court of Israel, vol.44, at p.362)²² where he compares manifest unlawfulness of the order with the black flag which waves over the illegal order saying it is forbidden. He further talks about “certain and obvious unlawfulness that stems from the order itself, the criminal character,...unlawfulness that pierces and agitates the heart, if the eye is not blind nor the heart closed or corrupt.” (Id, p. 362)²³ This statement clearly indicates that subordinates are provided with a rather simple choice to make regarding the lawfulness of the order. The criteria are based on the rational human standards and qualities of any given reasonable individual. Thus even in the time of the most severe and destructive military conflict there are certain values that prevail and consideration of these basic human values should shelter some categories that sometimes can get drawn into military action.

In conclusion I would like to suggest that taking into consideration the discussion of the above points of view, we can clearly determine that in some circumstances the illegality of the superior orders is so manifest that, in my opinion, such cases should not make available the defense of superior orders to the criminals.

Now I will consider some particular examples where the perpetrators made attempts to resort to the superior orders defense and what the outcome was in each of these cases.

The first example is noteworthy in the history of the international criminal law trial of Adolf Eichmann²⁴. The counsel for the Appellant in the Supreme Court of Israel proposed the defense of obedience to superior orders claiming that Eichmann took the oath of allegiance when he joined the SS and thus Hitler's compulsion to destroy the Jews completely was the order he received by his superior.²⁵ This order was, according to the accused, passed to him through the organization's chain of command and in his action he was guided by his superior. The court rejects such contention declaring in particular that "the defense that the act was done in obedience to superior orders means...that the person who performed it had no alternative – either by law or virtue of the regulations of the disciplinary body (army, etc.) of which he was a member – but to carry out the order he received from his superior."²⁶ The Judge, however, does not accept such defense and says that such defense will render no result to the accused since it is clear from the facts of the case that the accused acted independently and even exceeded the tasks that were assigned to him through the official chain of command.²⁷ Furthermore, the court gives a thorough consideration of the superior orders and points out 3 problems associated with it. The first issue is that for the purpose of the good order

one should not disobey the commands of their superior. The second problem is that if the soldier obeys the unlawful order, this will create substantial damage to the public, thus the obedience should be only to the orders in which lawfulness the actor is convinced. The third issue is the dilemma to obey or disobey, where the soldier if he makes the wrong choice will either be brought to the court-martial (if he disobeys a lawful order) or become punishable under international criminal law (if obeys an unlawful order). Juxtaposing these issues the court in *Eichmann* case says these problems show that the question whether to allow superior order defense depends on the mental state of the accused at the time of the offense and in particular whether the offender knew about the unlawful nature of the order.²⁸ The court establishes in accordance with the tendency from the English law that “such defense is admissible where there was obedience to an order not manifestly unlawful.”²⁹ Following the suggested criteria the court then declares that the superior orders defense will be rejected for the accused for several reasons: 1). The order for physical extermination was manifestly unlawful, and all other orders to prosecute the Jews were contrary to the “basic ideas of law and justice”, and 2). The accused was well aware at the time of committing his crimes that he was a party to the perpetration of the most grave and horrible crimes.³⁰ To prove such knowledge the court cites Eichmann’s own statements where he himself declares that in the extermination of the Jews he sees “one of the gravest crimes in the history of the mankind” also admitting that he had such realization when he committed the crimes: “I already at that time realized that this... was something illegal, something terrible...”³¹ However, Eichmann also claims that he was under the oath of loyalty from which he was not released.³² This raises a question of a moral choice within the doctrine of superior orders. Did Eichmann,

being who he was in the SS ranking system, have a moral choice? Would a reasonable person being put to a similar test ever opt for the loyalty to the organization the purpose of which is not only manifestly unlawful, but such that on its face is against the basic ideas of justice?

For instances of horrible brutality and inhumane acts, says the court, the issue to dwell upon is not the knowledge (because such knowledge is obviously present), but rather the test of whether the moral choice was possible.³³ The negative answer to this question may serve in mitigation of the punishment. Such reference to moral choice was first suggested at the Trial of Major War Criminals in Nuremberg. This principle is known as one of the Nuremberg Principles affirmed by the UN Assembly Resolution of 11.12.46³⁴. The court in *Eichmann* recognizes that the Tribunal did not specify the meaning of the expression 'moral choice'³⁵ The suggested interpretation is that in the given circumstances there existed an element of coercion, or constraint, leading to the conclusion that unless the accused followed the order he would be subject to execution.³⁶ As the court points out, this invokes two other inquiries presented in the case *U.S. v. Olendorf*.³⁷ First, the threat to life must be imminent, real and inevitable. Second, the question is "whether the subordinate acted under the coercion or whether he himself approved of the principle involved in the order"³⁸ In case if the subordinate approved the underlying principle of the unlawful order, the defense of superior orders fails since the will of the doer merges with the will of the superior in the execution of the illegal act."³⁹ Here the court determining the possible mitigation of punishment for Eichmann comes to the conclusion that mitigation will not be available for the accused because "he performed the order of extermination at all times...with genuine zeal and devotion to that

objective.”⁴⁰ The *Eichmann* case presents an interesting, but failed attempt to invoke the doctrine of superior orders for the defense of the accused, or in mitigation of his punishment. Here the court correctly rejected availability of the superior orders defense to Eichmann who was clearly among the masterminds in the most shocking and outrageous murders of World War II.

Another example when the superior orders defense was used is the notorious trial of Lieutenant William Calley, “the man who ordered the massacre of My Lai civilians.”⁴¹

In order to picture Calley’s trial and his defense we should recount some circumstances surrounding the My Lai massacre. Charlie Company was the detachment where Calley served as one of the platoon leaders.⁴² The commanding officer of Charlie Company was Ernest Medina.⁴³ Calley’s subordinates described him as incompetent, “nervous, excitable type who yelled a lot”, “a glory-hungry person...the kind of person who would have sacrificed all of us for his own personal advancement”.⁴⁴ None of the men had any respect for him as a military leader. Even Captain Medina himself would often address Calley in a derogatory manner calling him “Lieutenant Shithead.”⁴⁵ One soldier said “if they wanted to do something wrong it was alright with Calley.”⁴⁶ The night before the My Lai tragedy, Captain Medina told the soldiers that the VC’s battalion is to become the target of a large-scale assault. In the morning before the assault, Medina allegedly added that “the women and children would be out of the village and all they could expect to encounter would be the enemy”⁴⁷ Medina later claimed that he did not give any instructions as to what to do with the women and children in the village. Some soldiers agreed with such recollection, but others clearly thought that Medina ordered them to kill every person in My Lai.⁴⁸ Thus, there are contradicting opinions on what

exactly were the commands from Medina regarding the civilian population of the village. The author Professor Linder suggests that Medina's orders were intentionally vague.⁴⁹ I agree with the author's point of view that Medina purposely gave the impression that everyone in My Lai would be their enemy.⁵⁰ Later in his testimony at Calley's trial Medina responding to the question about the instructions he had given the soldiers claimed: "One of the questions that was asked of me at the briefing was, "Do we kill women and children?" My reply to that question was: No, you do not kill women and children. You must use common sense. If they have a weapon and are trying to engage you, when you can shoot back, but you must use common sense"⁵¹ In my opinion, this suggests that Medina deliberately made such statements as if implying the high probability of women and children actually intending to use weapon against the American forces. As we now know, and as they should have known then, there were no such attempts from the unarmed civilian population of My Lai. I think, this idea to expect resistance at any time was intentionally planted in the minds of the soldiers so that they would be less hesitant about their actions. This is reflected in the following exchange between Paul Meadlo and Aubrey Daniel, the prosecutor at the Calley trial:

Q: The women, the children and babies were sitting down? A: Yes. Q: Did they attack you? A: I assumed at every minute that they would counterbalance. I thought they had some sort of chain or a little string they had to give a little pull and they blow us up, things like that.⁵²

From this testimony we can see that Meadlo claims he was constantly expecting a counter attack, even from the most unprotected peaceful civilians of My Lai, - women and infants. However, this contention is absolutely unfounded and ridiculous to any

reasonable person. If despite its controversy and amazing absurdity we consider the Meadlo statement as his true belief, it raises two issues. First, perhaps, this is the proof that Captain Medina did successfully convince soldiers to regard anyone in My Lai as an enemy who can strike back at any time. The other issue raised from this testimony is how is it possible that soldiers like Meadlo (and it seems that the majority of them *were* like Meadlo) followed such a flagrantly unlawful order. There was not a single sentence in the testimony where Meadlo indicated his disagreement or questioned in any way the horrible orders which he obediently followed. Nothing in the testimony suggests that he questioned the orders. The reasoning is “we suspected them of being Viet Cong... And as far as I am concerned they’re still Viet Cong”⁵³ Such statement hardly is a justification for committing one of the most aggravated massacres of the civilian population in the history of mankind. Naturally, villagers of My Lai were Vietnamese by origin, however this does not and should not automatically transfer them into the status of the enemy combatants or in any way disqualify the peaceful unarmed population from the necessity to be protected in the conflict. To accept Meadlo’s statement means to completely undermine all the doctrines in International Criminal law related to the humane treatment of civilian population or prisoners, because all such population and prisoners will definitely belong to the nation which is the opposing party to the military conflict. Then if you give them the same status as the active combatants of opposing army, (a wrong proposition even to begin with) it would undermine any need for protection of the peaceful civilians making such need undesired and unnecessary. So it looks like it was merely an artificial justification in the minds of the soldiers which would allow them to commit mass murder without questioning the flagrantly unlawful orders they received.

This is how Meadlo describes the orders and his reaction: “I shot the Viet Cong, he [Calley] ordered me to help kill people. I started shoving them off and shooting...”⁵⁴ On one occasion Meadlo said he was scared and frightened to carry out the orders, “because nobody really wants to take a human being’s life.”⁵⁵ Also at some point Meadlo said: “I didn't have my orders to kill them. It ain't my reason to figure what they was going to do with them. It was just natural procedure to hold them for questioning.”⁵⁶ This was his answer to the question why he did not kill the people earlier. From his statement we see that even in Meadlo’s mind there were certain things that are expected to happen when you capture a group of civilians. He at first assumed he was supposed to guard the captured and in his testimony referred to the “natural procedure”. The order to slaughter a helpless group of innocent civilians was not something that he expected to have been ordered. Why did he not disobey these horrible orders? Maybe the soldier did not know he could disobey, more likely is that he did not dare or simply acted as he was trained in the army. Perhaps he made his moral choice – to obey the orders, the manifestly illegal and as Judge Halevy defined it, the order unlawfulness of which “pierces and agitates the heart.”⁵⁷

Now I will consider the details of defense attempted in Calley’s trial by his counsel, George Latimer.⁵⁸ In the direct examination from the start Latimer asks Calley whether he learned anything about the Geneva Convention.⁵⁹ To this Calley responded that nothing from these classes stands in his mind. Then, Latimer inquired what Calley knew about obedience to orders. Here Calley attempted to portray himself as a diligent army trainee claiming that he was aware that he could be court-martialed for refusing the order and if the disobedience occurred in the face of the enemy he could be sent to death.

He also said he never was told he had a choice not to obey the orders. So from such exchange we can see how Latimer early in his defense strategy tries to depict an innocent and obedient soldier who is aware of his responsibility to follow orders without questioning. The following answer brings up another interesting point: “If I had—questioned the order, I was supposed to carry the order out and then come back and make my complaint. Later.”⁶⁰ So even if there was an order from Medina to kill all the civilians in the My Lai village, according to Calley himself instructions were given to him on multiple occasions: “the night before the company briefing, platoon leaders’ briefing, the following morning... and twice there in the village...” Calley had plenty of occasions to address his concerns if he had any well before the start of the brutal military actions in My Lai.

The testimony of some of Calley’s subordinates, however, revealed that no particular orders were given by Captain Medina to murder the innocent civilians and most of the brutal killings were actually initiated by Calley himself.⁶¹ Although the orders of Medina himself are not a particularly a clear issue due to the conflicting testimony and different points of view among the authors. For example, author Green states that “Captain Medina was alleged to have issued the order in compliance with which the massacre of My Lai was perpetrated, and who confessed that he subsequently knew of the outrage, but decided to hush it up instead of taking steps to punish those responsible therefore or report its perpetration.”⁶²

It is evident through the many descriptions of the events in My Lai that Lieutenant Calley, being a platoon leader, himself exercised his own authority during the murderous assault. Other soldiers, like Paul Meadlo, Dennis Conti, Robert Maples were actually

Calley's subordinates and were supposed to follow Calley's orders. They later testified at Calley's trial for the prosecution. Interestingly, both Conti and Maples revealed in their testimony that they refused to follow the orders of Calley.⁶³ In particular, Maples recalls that when he was told by Calley to use the machine gun on the women and children gathered in the ditch, the former refused.⁶⁴ In his testimony, Dennis Conti similarly refused to open direct fire at the helpless group of villagers gathered in the ditch. Conti recalled that Meadlo who followed Calley's orders "fired a little bit and broke down. He was crying. He said he couldn't do any more. He couldn't kill anymore people. He couldn't fire into the people any more. He gave me his weapon into my hands. I said I wouldn't. "If they're going to be killed, I'm not going to do it. Let Lieutenant Calley do it, I told him. So I gave Meadlo back his weapon. At that time there was only a few kids still alive Lieutenant Calley killed them one-by-one."⁶⁵

From this statement we can see that some soldiers in fact did exercise their right to moral choice and refused to kill the unarmed civilians in the ditch. On contrary, Calley himself committed the murders of women, children, infants and the elderly with zeal and vehemence. At his trial he was the one attempting to adhere to the defense of superior orders. If anyone, it could have been the soldiers under Calley's command who perhaps would have been fairly entitled to the defense of superior orders.

If we compare the two trials from the different historical periods, - the trial of Adolf Eichmann and the trial of William Calley, we can find certain similarities. Both of these criminals turned to the defense of superior orders whereas the accused themselves were in fact at a certain (higher in the case of Eichmann) level of authority in the military chain of command. The courts in both cases having correctly assessed the surrounding

circumstances did not allow such defense. The reasons given by the courts are similar. In the *Eichmann* case the court emphasized the fact that Eichmann knew about the illegality of his actions. Also the court noted this was "...a weighty reason to repudiate the above defence as one which relieves from responsibility in cases of this kind." ⁶⁶ The other reason the court gave in Eichmann for refusing superior orders defense to the defendant is "that the very commission of the crimes in question necessarily points to the existence of criminal intent in the perpetrator." ⁶⁷

The United States Court of Military Appeals addressed the superior orders defense issue in the similar manner. In the appeal process, the judge first stated that Captain Medina denied issuing any such order at any time, however, the court claims that the conflict between Calley's and Medina's testimonies is irrelevant in respect to the suggested defense. ⁶⁸ The judge reminds that the jury at trial had been instructed as follows: "Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, *a man of ordinary sense and understanding would have known the order was unlawful. Your deliberations on this question do not focus on Lieutenant Calley and the manner in which he perceived the legality of the order found to have been given him. The standard is that of a man of ordinary sense and understanding under the circumstances.*" ⁶⁹ Then the jurors were instructed to decide whether the allegedly given order was in fact unlawful as the suggested test requires. Further jurors were to apply this to each charged act which they found Calley to have committed. ⁷⁰ The appellate defense counsel suggested that such jury instructions are "prejudicially erroneous" and proposed to adopt a different test, "whether the order is so palpably or manifestly illegal that the

person of 'the commonest understanding' would be aware of its illegality.”⁷¹ However, as the court further noted even this proposed change in the test applied in the case will not provide remedy to the accused: “An order to kill infants and unarmed civilians who were so demonstrably incapable of resistance to the armed might of a military force as were those killed by Lieutenant Calley, is in my opinion, so palpably illegal that whatever conceptional difference there may be between a person of ‘commonest understanding’ and ...of ‘common understanding’ that the difference could not have had any impact on a court”⁷²

Indeed, the illegality of the military actions and the horrors that surround the tragic events in My Lai are evident to any individual, no matter what level or what degree of the test is applied. This is reflected in the reaction of many soldiers during the massacre, when one soldier deliberately shot himself in the leg in order to avoid carrying out Calley’s orders, others (like Conti) refused to shoot, and others (like Meadlo) followed the order at first, but could not overcome his emotions and did not continue. In addition, the appellate court noted: “Conceding for the purposes of this assignment of error that Calley believed the villagers were part of "the enemy," the uncontradicted evidence is that they were under the control of armed soldiers and were offering no resistance.⁷³ In his testimony, Calley admitted he was aware of the requirement that prisoners be treated with respect. He also admitted he knew that the normal practice was to interrogate villagers, release those who could satisfactorily account for themselves, and evacuate the suspect among them for further examination.⁷⁴ “Instead of proceeding in the usual way Calley executed all, without regard to age, condition, or possibility of

suspicion. On the evidence, the court-martial could reasonably find Calley guilty of the offenses before us.”⁷⁴

So, we can conclude that the court in consideration of availability of the superior orders defense for the perpetrator Lt. Calley, similarly to the court in the Eichmann’s case, dwelt upon illegality of the actions known to the accused. However, unlike in Eichmann, the court did not elaborate on the issue of intent in Calley’s case. The intent was mentioned by the prosecutor Aubrey Daniels in the summation where he in particular noted that first the accused presence of intention is proved by the fact that he was standing up over a group of people with his rifle and pulled the trigger aiming straight at them. Another factor that Daniels considers to prove intent is the fact that Calley specifically stated in regard to the group of civilians “I want them dead” and “waste them” to his soldiers.⁷⁵

In his discussion of the My Lai massacre Professor Linder says that two tragedies happened, - one is the massacre of the innocent civilians, and the other, - the cover up.⁷⁶ In my opinion, there was a third one. It is the fact that none of the perpetrators received the adequate punishment and that till nowadays the man who is responsible for the deaths of hundreds of innocent civilians, - including women and children, happily enjoys his life running a jewelry store. Professor Linder in his work describes the circumstances of the trials in connection with the My Lai massacre. According to the author, initially it was decided to prosecute a total of twenty five officers and enlisted men.⁷⁷ However, very few of them in fact were tried and only one of these people, Calley was convicted. As the author points out “most of the enlisted men who committed war crimes were no longer members of the military, and thus immune from prosecution by court-martial.”⁷⁸ It was

decided to prosecute some of the higher rank commanders as well. Among them were Captain Medina, General Koster, Colonel Henderson. The top officer, Koster was charged for failing to report known civilian casualties and conducting an obviously inadequate investigation which seems to have been aimed at covering up the murders. Charges against Koster were dropped; thus he only received a letter of censure and reduction in rank.⁷⁹ Colonel Henderson in his investigation of the massacre made no attempt to interview the surviving Vietnamese witnesses, but remained satisfied with the answers of a number of the soldiers. In his written report he announced that the number of victims accidentally killed at My Lai was twenty civilians. A trial by court martial found Colonel Henderson not guilty on all charges.⁸⁰ Other sources claim that “the battalion commander, a Lieutenant Colonel Henderson, had been killed in a helicopter crash after the events at My Lai occurred.”⁸¹

These trials of the top military commanders clearly indicate how difficult and almost impossible it is to hold the commanders responsible when they fail to act in situations when their intervention is needed the most. It should be those investigations in particular if conducted by the commanders promptly and adequately that can shed light on the war crimes and provide a future fair outcome when each perpetrator receives what they really deserve. Also, Medina’s own trial revealed that proving existence of the unlawful order is rather challenging.

From the testimonies of some soldiers it is clear that Captain Medina was present either during the horrific events or shortly thereafter. Meadlo in his testimony during Calley’s trial recalls responding to the question whether he saw Captain Medina: “Yes. And he didn't say anything and did not even try to put a stop to it. So I figured we was

doing the right thing.”⁸² If that is the case and Captain Medina *was* present during the massacre, even if he did not give direct orders to kill the innocent civilians, he is still responsible for the crime, since he did nothing to prevent the murders and stop the atrocities that were being committed by his subordinates. It was his duty under the doctrine of command responsibility in the international criminal law to stop the slaughter, punish the perpetrators and properly report the violations. Indeed, Medina was later charged with the “premeditated murder” of at least one hundred civilians. His other charges included the murder of a woman and a child and the assault of a prisoner.⁸³

However, the Jury considered that the evidence to establish his guilt was insufficient and Medina was acquitted on all charges. Subsequently, when a perjury prosecution was no longer possible, Medina did, in fact, admit that he had suppressed evidence and lied to the brigade commander about the number of civilians killed.⁸⁴ Thus, lying under oath allowed one of the perpetrators, responsible for mass murders, escaped punishment.

Calley himself who was initially convicted to life imprisonment, nevertheless, due to the pressure from public who viewed him as a ‘scapegoat’ had his sentence significantly reduced and consequently ended up spending only three years under home arrest and was subsequently pardoned by President Nixon.⁸⁵ It is hard to describe what I feel when I look at the pictures of the My Lai massacre and imagine that one of the key murderers who in cold blood slaughtered helpless children, infants, women and the elderly civilians on March 16, 1968; the criminal who kept insisting throughout the whole trial that he believes he was doing the right thing, still walks the earth, unpunished.

I think there should have been more trials, and the efforts to bring the guilty to justice should have been more systematic, so that public opinion would not protect Calley, the only one convicted in connection with the massacre, viewed as a scapegoat and whose status in the trial's aftermath elevated almost to one of a hero's. Even though the trial itself received public attention should have been exposed in a more detailed way in regards to the atrocities committed by the perpetrators with emphasis on the victims including the thorough recount of the events by the participants. Perhaps, the public should have been shown the testimonies of the soldiers with a description of all the details surrounding the massacre and particular acts of murder committed by each soldier. Thus society would be able to form its own opinion regarding the events and would feel strongly about the innocent victims, thus becoming concerned with the outcome of the trials. Also if the commanders from of the higher ranks such as Captain Medina were actually convicted, the overall outcome from Calley's trial perhaps would have been much different.

I realize, however, that the My Lai massacre occurred within the frames of a much debated and controversial war, and perhaps in the minds of a lot, any further complications and trials were not the most preferred way to handle the situation. In the circumstances surrounding Lt. Calley's trial, even though the defense of superior orders was not accepted by the court, the perpetrator, initially convicted to life imprisonment managed to escape the fair punishment as a result of the political and societal pressure.

The most recent trial I will consider in connection with the defense of superior orders is the trial of Lynndie England relating to the prisoner abuse scandal in the Abu Ghraib prison. According to many sources, Army Pfc. Lynndie England's smiling poses

in photos of detainee abuse at Baghdad's Abu Ghraib prison made her the face of the scandal.⁸⁶ She appeared in many notorious photographs of the abuse: in one holding a naked prisoner on the leash, in the others – pointing at the detainees who were put in humiliating positions. At the early stages of the trial England and her military defense attorney, Jonathan Crisp, in the public statement claimed she was ordered to abuse the detainees and take pictures of the mistreatment with the purpose to soften up prisoners for future interrogation by the intelligence personnel of the U.S.⁸⁷ England's defense attorney further explained that her actions were a part of a larger army plan to "set the conditions for interrogations."⁸⁸ Supposedly this strategy was developed by Major General Geoffrey Miller, who at first headed the prison at Guantanamo Bay and then took over Abu Ghraib.⁸⁹ Allegedly this strategy also involved prisoner sleep deprivation, strange meal patterns, stress positions and other psychological means to break down the detainees and make them talk.⁹⁰ The criminal army investigator mentioned there was some confusion among the soldiers on how far they are allowed to go to soften the detainees.⁹¹ However, it was clear since the early stage of the trial that the superior orders defense would turn problematic for England to follow.

There are several reasons that cause this difficulty. Rule 916 of the Manual for Court Martial says that the superior orders defense is acceptable unless the accused knew that the orders were unlawful, or a "person of ordinary sense and understanding would have known the orders to be unlawful."⁹² It is hard to imagine that England did not realize the unlawfulness of her actions. The abuse in which she participated is clearly a violation of the law and one does not need a legal background or sophistication to understand that. The illegal nature of her actions is palpable. Another reason is the

statements of her fellow soldiers. In fact none of the officers or soldiers in Abu Ghraib indicated that such orders existed.⁹³ Interestingly the defense team originally planned to request permission of fifty additional witnesses to testify at the pre-trial hearing, whose testimony would contribute to Lynndie England's defense of superior orders. Such potential witnesses included Vice President Dick Cheney, Defense Secretary Donald Rumsfeld, former top commander Lt. Gen. Ricardo Sanchez and Military Police Brigade commander Janis Karpinski.⁹⁴ However; the presiding officer at the hearing, Colonel Denise Arn rejected the request.⁹⁵ England's civilian attorney, Hernandez made the following statement in regard to the abuse scandal: "This is clearly something that went beyond this particular individual."⁹⁶ The military police sergeant testifying for the defense said he had seen two military intelligence agents abusing prisoners and ordering the abuse to Pvt. Graner who had been considered a ringleader of the abuse.⁹⁷ According to the requirements for the selected defense, England was also supposed to name the commander who gave this order, but instead she changed her tactic. Despite her initial contentions and resort to superior orders defense, England abandoned that defense saying that the pictures were taken with the purpose to amuse the prison guards and that she was trying to please her soldier boyfriend by participating in the detainee abuse.⁹⁸ Still, throughout England's trial the mass media reported statements from different sources, mainly from her defense team and family members that Lynndie was a scapegoat and in reality she is merely an obedient and trusting follower of the others' initiatives who gave in to the peer pressure. She depicted herself as being manipulated and used by her older peer Graner, with whom she was in love.⁹⁹

England was convicted of one count of conspiracy, four counts of maltreating detainees and one count of committing an indecent act and sentenced to three years in prison.¹⁰⁰ Several officers received administrative punishment, but none have gone to trial until recently. On April 28, 2006 the US military charged Lt.-Col. Steven Jordan, the former head of the Interrogation Center at Abu Ghraib with seven offenses including mistreatment of the detainees.¹⁰¹ Jordan is the highest ranking officer to face criminal charges in connection with the prisoner abuse in Abu Ghraib. According to a BBC correspondent there is still anger that no one in the administration took responsibility for the abuse.¹⁰² And while the outcome of Jordan's trial is hard to predict, if convicted, Jordan may become the first on the future list of military elite responsible for the abuse.

It seems that one serious problem arises in the context of England's case. In particular, even if there were certain orders from the top military commanders, it is highly unlikely that the current administration would be willing to charge any top commander with the abuse. It seems unlikely that the administration, which has been meticulously protective of its commanders throughout the war in Iraq, would suddenly turn to its top military officials and agents to indict any such individual, because the responsibility could be traced to someone at the top of the hierarchy reaching as high as the President or his ministers.

It is also possible that there were no direct orders to mistreat the prisoners, but the overall atmosphere of chaos, vagueness and ambiguity of instructions as well as frequent calls for "the softening up" of the detainees contributed to the abuse. Another possibility is that the prisoner abuses occurred due to the unhealthy moral atmosphere of permissiveness, where the soldiers knew they could do anything they wanted and perhaps

even proudly brag about their acts of detainee humiliation to their superiors without fearing punishment from the commanders but instead expecting encouragement.

Hopefully, Jordan's upcoming trial will shed some light on these issues.

The circumstances surrounding the three trials I discussed have some common features. First, the crimes committed by the perpetrators occurred in the context of the troubling military situations, - World War II in Eichmann's case, the Vietnam War in Calley's and the War in Iraq in Lynndie England's. There was an underlying government policy that formed and to a certain extent contributed to the acts of the accused. The influence and adherence to such policy is commensurate with the position of the accused, greater in the cases of a high rank officer, like Eichmann, and lesser for the foot soldier, like England. Interestingly in the last two cases, where the perpetrators, Lt. Calley and Pvt. England, were at the lower level of the military hierarchy, the public suggested the possibility of them serving as scapegoats especially since none of the higher ranking officers received an adequate punishment at the time.

Second, each one of the perpetrators could still exercise their moral choice, discussed by the court in Eichmann's case, however they failed to do so.¹⁰³ The defense of superior orders was rejected by the courts in the Eichmann's and Calley's case. Both these criminals were in a commanding position and in fact *they* were the ones who gave the orders to the soldiers to execute the innocent victims. Therefore their attempt to resort to the superior orders defense seems more outrageous. If any, it should have been the subordinates of Eichmann's and Calley's who could try to use such defense in mitigation of their punishment. Another reason why superior orders defense did not apply to these criminals is the fact that they had a moral choice. Instead, both perpetrators committed

their crimes eagerly and zealously. Meanwhile, especially in Calley's case others chose not to follow the illegal acts. One example is Hugh Thompson, the true hero of My Lai who landed his helicopter between the group of the wounded civilians and Calley's soldiers. Thompson ordered his people to protect the helpless group and even open fire if anyone from the US Army tried to kill the civilians.¹⁰⁴ He exercised his moral choice. It was a simple and humane decision, the only proper action in the given circumstances. Thompson, like everybody else fought in the Vietnam War, but, unlike many, he was able to remain true to himself and did not betray his consciousness. He saw the obvious illegality of the events and fulfilled his duty both as a soldier and a human being. Some other soldiers from Calley's group also refused to shoot at the civilians, one even intentionally shot himself in the leg. This is the moral choice exhibited in the midst of the atrocious war.

Did Lynndie England have a moral choice? The answer seems palpable. Despite her contentions that her participation in the photos was not completely voluntary but rather influenced by her boyfriend, it seems that England was engaged in the prisoner abuse with enthusiasm and eagerness. So if all the three perpetrators were allowed the superior orders defense and the moral choice were to serve as the threshold test, none of the perpetrators discussed above would be able to benefit from this defense, because none of them exercised their choice to prevent the outrageous crimes.

Also due to the difference in the army ranks of the perpetrators we find them at various levels of the military hierarchy; and their extent of participation in the existing overall scheme against the victims differs. The more favorable the situation is to Lynndie England, who simply was a foot soldier of the lower rank. In all three cases there seems

to have been either a pronounced or unspoken policy in regards to the perpetrator's victims. In Eichmann's case the killing of the Jews became a state policy promoted by Hitler. In Calley's case the massacre of the Vietnamese occurred in the context of the Vietnam War where oftentimes commanders encouraged to consider everyone, including women and children, an enemy. In England's trial the background atmosphere is more subtle and secretive. Several sources point at the existence of some secret order by top ranking authorities. In particular, according to Pvt. Graner's attorney, the treatment of detainees at Abu Ghraib "was being controlled and devised by the military intelligence community and other governmental agencies, including the CIA."¹⁰⁵ So if an order of such kind did exist, Pvt. England would still have difficulty fulfilling the requirement for the superior orders defense, to name the person who ordered the abuse. It seems that the atmosphere in Abu Ghraib in the midst of the war and general disposition of the public and soldiers towards the captured Iraqis was not favorable, where the attitude towards the Iraqi prisoners is far from sympathetic.

Interestingly, the three discussed perpetrators attempted to use the defense of superior orders in their trials, but at the end turned to other defenses. The court in *Eichmann* simply rejected such attempt, Calley was not able to provide proof of the existence of the order allegedly given by his superior since Medina was acquitted at his own trial; and the circumstances of England's trial involved the change in her defense team's strategy and a subsequent plea deal.

In my opinion, it is crucial that each soldier, especially those involved in the armed conflict, be properly explained and repeatedly instructed that if they receive an order which is clearly illegal, they are not only allowed, but in fact are required to

disobey such order. Each case that arises in connection with superior orders should be considered individually on its merits. The legal history has established requirements and provided us with a distinctive and precise mechanism for application of the superior orders defense. This will assist the courts in the future for consideration of such defense. Although it is hard to tell how many future perpetrators are going to turn to the defense of superior orders, each and every one of them should realize that this defense was not created to provide an easy escape for the malevolent military criminals from responsibility. I agree with Wilner who stated: "Having once recognized that the duty of obedience to superiors has some reasonable and prescribed limitations, that standard, in the name of all humanity, cannot logically or morally be abandoned."¹⁰⁶ This statement calls for the exercise of moral choice by each soldier. By this moment we have witnessed too many shocking incidents of war crimes. Adherence to the traditionally developed test of manifest illegality in combination with individual moral standards will hopefully prevent future tragedies and war crimes.

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