Vanderbilt Journal of Transnational Law

Volume 47
Issue 5 *November 2014*

Article 5

2014

Manifest Illegality and the ICC Superior Orders Defense: "Schuldtheorie" Mistake of Law Doctrine as an Article 33(1)(c)Panacea

Lydia Ansermet

NOTES

Manifest Illegality and the ICC Superior Orders Defense: *Schuldtheorie* Mistake of Law Doctrine as an Article 33(1)(c) Panacea

"I am aware now that at the time I was a tool in the hands of others, and this I deeply regret. I express regret and remorse for . . . my acts in situations when I could have done more and didn't."[1]

ABSTRACT

While the Anglo-American and international legal systems adhere to the rule that "a mistake of the law excuses no one," German Schuldtheorie *mistake of law doctrine provides for a mistake of law excuse if a defendant's mistaken belief in the lawfulness of his conduct was unavoidable. In a distinct but increasingly overlapping area of law, domestic and international legal systems provide defenses for subordinates acting in obedience to superior orders. At the international level, the Rome Statute of the International Criminal Court allows defendants charged with war crimes to invoke the defense of superior orders if the command obeyed was not "manifestly unlawful," a standard that has garnered substantial criticism. This Note argues that infusing the Rome Statute's superior orders defense with the* Schuldtheorie *mistake of law doctrine as codified by Section 17 of the German Criminal Code would*

---

1. Dragan Kolundžija, Statement of Guilt Before the International Tribunal for the Former Yugoslavia, Oct. 9, 2001, http://www.icty.org/sid/214 [http://perma.cc/M24X-B7XS] (archived Nov. 14, 2014). As a guard shift commander at the Bosnian Serb Keraterm camp in 1992, "Kolundžija was aware that detainees were kept in inhumane conditions, beaten, raped, sexually assaulted and killed, [but] the Trial Chamber heard ample evidence of his effort to ease the harsh conditions at the camp for many of the detainees." *Id.* Upon pleading guilty, Kolundžija was sentenced to three years' imprisonment. *See id.*

address criticisms of Article 33 by reconciling Article 33 with previously established customary international law and produce desirable results by encouraging reasonable, context-specific investigation into the legality of commands.

TABLE OF CONTENTS

I. INTRODUCTION

In November 2013, the Task Force on Preserving Medical Professionalism in National Security Centers (Task Force) published a report concluding that since 2001, physicians employed by the Department of Defense (DOD) and the Central Intelligence Agency (CIA) had participated in the abuse of terrorism suspects detained outside of the United States.[2] The abuse consisted of "the . . . use of

2. *See* THE TASK FORCE ON PRESERVING MED. PROFESSIONALISM IN NAT'L SEC. DET. CTRS., ETHICS ABANDONED: MEDICAL PROFESSIONALISM AND DETAINEE ABUSE IN

torture and cruel, inhuman or degrading treatment."[3] The Task Force report primarily blamed the DOD and CIA, which the Task Force found required healthcare staff members to act against their medical judgment in the interests of security practices and intelligence gathering.[4] These practices, the Task Force found, "caused severe harm to detainees" and included the participation of physicians in waterboarding, sleep deprivation, and force-feeding.[5]

As the Task Force reported, the ethical standards of the medical profession require that physicians "ensure their own clinical independence." [6] Ensuring clinical independence requires that physicians not "'allow third parties to influence their clinical medical judgment.'" [7] Ensuring clinical independence also requires that physicians not "'allow themselves to be pressured to breach ethical principles by intervening medically for non-clinical reasons'" or by "tak[ing] orders that preclude the exercise of or go against [their] medical judgment."[8]

Contrary to the ethical underpinnings of the medical profession, the Task Force found that, since 2001, the DOD and CIA had required healthcare professionals, including physicians and psychologists, "to act contrary to their professional obligations."[9] The Task Force found that compliance with the demands of the DOD and the CIA required physicians to contravene their professional and ethical obligations, including the responsibility to refrain from harming individuals, the duty to maintain confidences, the obligation to be transparent about their professional roles, and the required exercise of independent professional judgment.[10]

These violations of ethical standards occurred primarily in the context of interrogations.[11] The Task Force report found that medical

---

THE "WAR ON TERROR" xxxiii (2013) [hereinafter TASK FORCE], *available at* http://www.imapny.org/File%20Library/Documents/IMAP-EthicsTextFinal2.pdf [http://perma.cc/8SKE-XP8Y] (archived Oct. 3, 2014) ("The DOD and CIA required physicians, psychologists, and other health professionals to act contrary to their professional obligations.").

3. *Id.* at xxxi.

4. *See* Sarah Boseley, *CIA Made Doctors Torture Suspected Terrorists After 9/11, Taskforce Finds*, GUARDIAN (U.K.) (Nov. 3, 2013), http://www.theguardian.com/world/2013/nov/04/cia-doctors-torture-suspected-terrorists-9-11 [http://perma.cc/42C-QLMW] (archived Sept. 21, 2014) (reporting that the DOD and CIA "required their healthcare staff to put aside any scruples in the interests of intelligence gathering and security practices that caused severe harm to detainees").

5. *Id.*

6. TASK FORCE, *supra* note 2, at 93.

7. *Id.* (quoting World Med. Ass'n, *WMA Declaration of Malta on Hunger Strikers*, princ. 5 (2006)).

8. *Id.* (footnote omitted) (quoting World Med. Ass'n, *supra* note 7).

9. *Id.* at xxxiii.

10. *See id.* (discussing the ways in which DOD and CIA requirements caused "physicians, psychologists, and other health professionals to act contrary to their professional obligations").

11. *See id.* at 38 ("The role of clinical medical personnel in interrogation has typically been restricted to medical clearance for interrogation and attending to

care provided in the context of interrogations frequently went undocumented and that medical professionals were frequently uncertain as to whether they held the authority to order the end to an interrogation if they found that a detainee required medical attention.[12] In Iraq, medical professionals acceded that medical care was delayed or denied to detainees in order for interrogations to remain uninterrupted, and independent clinical evaluations of detainees held in Iraq have since reported grave deterioration in the physical and mental health of detainees resulting from their detention.[13]

Reports on the Task Force investigation explain that physicians misunderstood the applicability of their ethical and professional obligations in the interrogation and detention contexts.[14] Reports allege that medical professionals were told that their obligation to "first do no harm" was inapplicable because "they were not treating individuals who were ill."[15] Thus, according to the Task Force, medical professionals working under the DOD and CIA did not act in willing violation of medical ethics; rather, they suspended their medical judgment because they believed that the standards of medical ethics did not apply in the context of the detention and interrogation of detainees suspected of committing acts of terrorism.[16]

While the extent to which medical professionals employed by the DOD and CIA may have violated medical ethics, domestic law, or international criminal law is beyond the purview of this Note, the Task Force's findings introduce questions that evince the presently imprecise status of the superior orders defense in international criminal law. This Note suggests that a domestic mistake of law doctrine may provide a shield where the international defense of superior orders falls short.

This Note begins by providing background on the mistake of law excuse and superior orders defense through an examination of the approaches of the Anglo-American, German, and international legal systems. The international approach to both mistakes of law and the superior orders defense is discussed primarily in reference to the Rome Statute of the International Criminal Court. This Note argues

---

treatment for sickness and injuries," but "[i]n some locations, *their actions provided direct support for interrogation.*") (emphasis added).

12. *See id.* at 40 ("[M]edical personnel were not clear as to whether or not they had the authority to stop an interrogation if a detainee required medical care during it.").

13. *Id.*

14. *See, e.g.*, Boseley, *supra* note 4 (indicating that the DOD and the CIA told "[m]edical professionals . . . that their ethical mantra 'first do no harm' did not apply because [the medical professionals] were not treating people who were ill").

15. *Id.*

16. *See id.* ("The report lays blame primarily on the defense department (DOD) and the CIA, which required their healthcare staff to put aside any scruples in the interests of intelligence gathering and security practices that caused severe harm to detainees.").

that, while the international mistake of law approach should itself remain intact, criticisms of the Rome Statute's approach to superior orders can be remedied by applying its provisions under the framework of the *Schuldtheorie* approach to mistakes of law as codified in Section 17 of the German Criminal Code.

II. THE MISTAKE OF LAW EXCUSE

Domestic and international legal systems provide for the mistake of law excuse in various ways. Domestic approaches to mistakes of law can be grouped into four categories.[17] The first category imposes absolute liability and considers mistakes of law to be irrelevant to criminal culpability. [18] The second category grants courts discretionary authority to accept mistake of law excuses on an *ad hoc* basis. [19] The third category takes into consideration the reasonableness of the defendant's mistake; it allows for a mistake of law to excuse culpability unless "the mistake resulted from the [defendant's] intention or negligence."[20] The fourth category allows the mistake of law excuse to preclude punishment for any intentional crime, "even if the [mistake was] due to [the defendant's] negligence."[21] The international approach, as codified in Article 32(2) of the Rome Statute, essentially adheres to the first approach and restricts the availability of the mistake of law excuse to cases in which the mistake negates the mental element of a crime.[22] This Part begins by contrasting the Anglo-American and German approaches to the mistake of law excuse. Particular emphasis is placed on the German approach because of features that distinguish it from both the Anglo-American and international approaches. This Part then discusses the international approach to mistakes of law, as codified in Article 32(2) of the Rome Statute.

---

17. Scott Vogeley, *The Mistake of Law Defense in International Criminal Law*, *in* 1 INTERNATIONAL CRIME AND PUNISHMENT: SELECTED ISSUES 59, 65 (Sienho Yee ed., 2003); *see also infra* text accompanying notes 18–22.

18. *See* Vogeley, *supra* note 17 ("[I]gnorance of the law as a defense has no significance.").

19. *See id.* (explaining that courts may abstain from punishment according to the specific facts of a case).

20. *Id.*

21. *Id.*

22. *See* GEORGE P. FLETCHER, 1 THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL 108 (2007) [hereinafter FLETCHER, GRAMMAR] (explaining that the Rome Statute "follows the [MPC] approach in its Article 32" and noting that the MPC treats mistake as an exculpatory factor only if "it 'negates the mental element required by the crime'") (footnote omitted) (quoting Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, art. 31(2) [hereinafter Rome Statute]).

A. *The Anglo-American Approach*: Ignorantia Legis Neminem Excusat

The approach of Anglo-American common law systems is based upon the principle of *ignorantia legis neminem excusat*, that is, "ignorance of the law is no excuse."[23] However, by refusing to acknowledge honest and reasonable mistakes of law, strict enforcement of the absolute liability theory endorsed by the Anglo-American systems has carried the potential of objectionable results.[24] Thus, in practice, courts often permit application of the mistake of law excuse under their discretionary authority when denying the defense would result in "a clearly unjust outcome."[25] In so doing, common law courts have arguably created a doctrine that is "confusing . . . unpredictable, disjointed and often incoherent."[26]

The American Law Institute's Model Penal Code (MPC) provides for three narrow exceptions to the general rule of *ignorantia legis neminem excusat*.[27] While not binding, MPC provisions have proven influential on the statutes and case law of many American states.[28] The first exception, provided for in MPC § 2.04(1)(a), "allows . . . [a] mistake of law to [serve as] an excuse when [the mistake] . . . negates the requisite mental element of [an offense]."[29] However, under MPC

---

23. *See* WILLIAM J. STUNTZ & JOSEPH L. HOFFMANN, DEFINING CRIMES 124 (2011); *see also* George Lewis, AN ESSAY ON THE MAXIM "IGNORANTIA LEGIS NEMINEM EXCUSAT" (1867). For an early iteration of the *ignorantia legis* principle, see ARTISTOTLE, NICOMACHEAN ETHICS, bk. III, at 75 (F.H. Peters trans., 1893) (c. 384 B.C.E.) ("[I]gnorance of any of the ordinances of the law, which a man ought to know and easily can know, does not avert punishment. And so in other cases, where ignorance seems to be the result of negligence, the offender is punished, since it lay with him to remove this ignorance; for he might have taken the requisite trouble.").

24. In short, such a regime arguably fails to consider that criminal law has changed from regulating wrongful conduct to punishing "many [different] kinds of behavior," not all of which are wrongful. *See* ANNEMIEKE VAN VERSEVELD, MISTAKE OF LAW: EXCUSING PERPETRATORS OF INTERNATIONAL CRIMES 31 (2012); *see also infra* text accompanying note 26.

25. Vogeley, *supra* note 17, at 66.

26. *Id.*

27. *See id.* (listing the MPC's three exceptions to the rule against ignorance of the law excuses); *see also* discussion *infra* Part II.A.

28. *See, e.g.*, STUNTZ & HOFFMANN, *supra* note 23, at 176–77 (indicating that since its drafting, the MPC has served as the model for criminal code reform in twenty-two states). The MPC was drafted by the American Law Institute beginning in the 1950s and is intended to be used by state governments. *See id.* A final draft of the MPC was released in 1962, and following minor revisions by its authors, the most current version of the MPC was published in 1985. *See id.* at 176. The impact of the MPC on state criminal codes has varied: "Some 34 states revised their criminal codes during the 1960s, 1970s, and 1980s; in 22 of those states, legislators used the MPC as their model. But only loosely—legislatures in those 22 states adopted a few MPC provisions unchanged, adopted some others after amending them, and ignored many others." *Id.*

29. MODEL PENAL CODE § 2.04(1)(a) (1985); *see also* VAN VERSEVELD, *supra* note 24, at 11 (noting that, under MPC "§ 2.04(1)(a), the defendant is not liable when the mistake negates the mental element required to establish a material element of the

§ 2.02(9), knowledge of the criminal nature of an act is generally not an element of an offense.[30] The first MPC exception is therefore available only in the exceptional circumstance in which knowledge that the proscribed conduct was prohibited is expressly provided for as an element of an offense.[31]

The second exception, provided for in MPC § 2.04(3)(a), provides for the mistake of law excuse when the statute under which a defendant is charged has not been published or made available to the defendant prior to the defendant's alleged conduct.[32] The extent of the applicability of this exception has been debated.[33] The rationale for application of the excuse in such situations is that it is not fair to punish someone for an act that was not criminal at the time the act was committed, a rationale based upon the same principles undergirding the prohibition against vague or retroactive legislation.[34]

---

offence"). MPC § 2.04(1) provides that "[i]gnorance or mistake as to a matter of fact or law is a defense if: (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense." MODEL PENAL CODE § 2.04(1); *see also* Vogeley, *supra* note 17, at 66.

30. MODEL PENAL CODE § 2.02(9); *see also* VAN VERSEVELD, *supra note* 24, at 11. MPC § 2.02(9) provides that "[n]either knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides." MODEL PENAL CODE § 2.02(9); *see also* Vogeley, *supra* note 17, at 67 ("[N]o mental element at all is required for the conclusion that conduct is criminal . . . unless such elements are part of the definition of the offense.").

31. Vogeley, *supra* note 17, at 67 (explaining that the mistake of law defense under the first MPC exception is available only "for the rare circumstances where knowledge that the prohibited conduct constitutes an offense is itself an express element of a crime"); *see also* VAN VERSEVELD, *supra* note 24, at 11 ("[O]nly when the legislator has provided for consciousness of unlawfulness as an element of the required intent, will a mistake of law exculpate the defendant. . . . The defence of mistake of law is thus only available in the exceptional circumstance where knowledge of the prohibited nature of the conduct itself is an express element of an offence.").

32. MODEL PENAL CODE § 2.04(3) provides:

> (3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when: (a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with the responsibility for the interpretation, administration or enforcement of the law defining the offense.

Id.

33. *See, e.g.*, Vogeley, *supra* note 17, at 70–72 (analyzing possible implications of various United States Supreme Court cases).

34. *See* Andrew von Hirsch & Douglas Husak, *Culpability and Mistake of Law*, *in* ACTION AND VALUE IN CRIMINAL LAW 157, 166 (Stephen Shute, John Gardner & Jeremy Horder eds., 1993) ("If the law prohibits given conduct, but the prohibition can

Finally, MPC § 2.04(3)(b) provides for the mistake of law excuse when a defendant acts in reasonable reliance upon an official statement or interpretation of the law delivered by a person or agency charged with defining the offense.[35] The types of legal advice that a defendant may rely upon under this exception are limited.[36] MPC § 2.04(3)(b) excludes reliance upon unofficial advice from law enforcement personnel as well as advice from a defendant's lawyer.[37] The provision also exempts total ignorance of the law, under the reasoning that "ignorance cannot derive from reliance on a misleading official statement."[38]

B. *The German Approach*: Schuldtheorie

Prior to 1952, German criminal law adhered to the principle of *ignorantia legis neminem excusat.*[39] However, like their Anglo-American counterparts,[40] German legal practitioners and theorists struggled with strict application of the *ignorantia legis* principle.[41] In a 1952 case catalyzing a shift in German mistake of law doctrine, the *Bundesgerichtshof* (German Federal Court of Justice) addressed the problematic implications of a strict presumption of knowledge of the law by all defendants.[42] Since the subsequent codification of the court's 1952 holding, German criminal law excuses criminal conduct where a defendant lacked knowledge of the wrongfulness of his conduct if, and only if, the defendant's lack of such knowledge was unavoidable.[43]

Prerequisite to a discussion of the 1952 holding of the *Bundesgerichtshof* is an understanding of the two terms that German

---

be ascertained only with great difficulty, then the person has not been given fair notice of his potential for liability at the time of his conduct.").

35. MODEL PENAL CODE § 2.04(3)(b). For the full text of MPC § 2.04(3)(b), see *supra* text accompanying note 32.

36. *See* VAN VERSEVELD, *supra* note 24, at 13 (noting that the types of reliable legal advice are "circumscribed tightly").

37. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 755 (1978) [hereinafter FLETCHER, RETHINKING] (explaining that MPC § 2.04(3)(b) "excludes reliance on advice by counsel and unofficial advice from law enforcement personnel").

38. *See id.*

39. *See* VAN VERSEVELD, supra note 24, at 26. For a discussion of the *ignorantia legis* principle, see generally *supra* note 23 and accompanying text.

40. *See supra* notes 23–26 and accompanying text.

41. *See* VAN VERSEVELD, *supra* note 24, at 26 ("The German judges and legal theorists ran into the same problems of strict application of the *ignorantia legis* principle as their colleagues in Anglo-American systems.") (footnote omitted).

42. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 18, 1952, 2 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BCHSt] 194 (§ 17) (Ger.)). *See generally infra* notes 59–93.

43. *See* STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT [BGBL] I 3322, as amended, § 240(1) (Ger.), *available at* http://www.iuscomp.org/gla/statutes/StGB.htm#240 [http://perma.cc/F3AA-L6TR] (archived Nov. 14, 2014).

law uses for the English word "law."[44] The first, *Gesetz,* refers to statutory law.[45] The second, *Recht,* refers to "[l]aw as principle" or "[l]aw as a set of principles that appeal to us by their intrinsic merit."[46] While no English word for *Recht* exists, the concept carries great significance in German law, and the distinction between *Recht* and *Gesetz* is therefore of great relevance to a discussion of German mistake of law doctrine.[47]

In terms more familiar to the Anglo-American legal systems, the distinction between *Recht* and *Gesetz* has been described by comparison to the distinction in American law between the text of the United States Constitution and American constitutional law.[48] The Constitution is "a finite set of words" comprising authoritative rules and principles, "principles written down within the four corners of a specific document."[49] Constitutional law, by contrast, is the evolving interpretation of that written text. [50] Constitutional law produces principles extending beyond the finite words of both the Constitution and constitutional jurisprudence. [51] In this analogy, the *Gesetz* can be likened to the text of the American Constitution.[52] The *Recht,* on the other hand, is best likened to the evolving body of American constitutional law.[53]

Under German criminal law, only acts in violation of the *Recht* are punishable.[54] A criminal act is in violation of the *Recht* only if it is wrongful, or *"rechtswidrigkeit."*[55] Thus, even when the elements of a crime are fulfilled, an act is not necessarily unlawful if it is not also wrongful.[56] That is, an act in violation of the *Gesetz* as codified by the

---

44. *See* GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS 54–55 (2005) (introducing the concepts of *Recht* and *Gesetz*). Such an approach to the concept of law is typical of the continental legal systems. *See id.*

45. *Id.*

46. *Id.*

47. *See* VAN VERSEVELD, *supra* note 24, at 26.

48. *See* FLETCHER & SHEPPARD, *supra* note 44, at 55 (distinguishing the concepts of *Recht* and *Gesetz*).

49. *Id.*

50. *See id.* ("Constitutional law is the body of principles that has evolved and continues to evolve from the written text. It obviously includes principles that go beyond the finite words of the document and the cases that have interpreted it.").

51. *See id.*

52. *See id.* (analogizing the *Gesetz* to the Constitution because both constitute "a set of finite words").

53. *See id.* (likening the *Recht* to Constitutional law because both are "bod[ies] of principles that ha[ve] evolved and continue[] to evolve from the written text").

54. *See* VAN VERSEVELD, *supra* note 24, at 27.

55. *See* FLETCHER & SHEPPARD, *supra* note 44, at 55–56 (distinguishing illegality from wrongfulness). Given the etymology of *rechtswidrigkeit,* Fletcher and Shepherd argue, *rechtswidrigkeit* is properly translated to "wrongful" in English. *See id.* For a full discussion of the translation, see *id.*

56. *See* VAN VERSEVELD, *supra* note 24, at 27 ("Fulfillment of all the elements of a crime as defined does not necessarily mean that the act was *unlawful.*").

legislature is not punishable unless it also violates the *Recht,* or the "[l]aw as principle."[57] This distinction was affirmed in the 1952 holding of the German Federal Court of Justice, in which the *Bundesgerichtshof* upheld the superiority of the *Recht* over the *Gesetz.*[58]

The case before the *Bundesgerichtshof* in 1952 involved an assessment of the criminal liability of an attorney, Lawyer B.[59] According to the facts before the court, Lawyer B. had agreed to represent a client, Mrs. W., in a criminal case without making fee arrangements beforehand.[60] Once Mrs. W.'s trial had commenced, Lawyer B. demanded various sums of money from Mrs. W., threatening to withhold representation if she did not pay him each sum.[61] Lawyer B. was charged with coercion,[62] defined by Section 240 of the German Criminal Code:

> (1) Whoever unlawfully with force or threat of an appreciable harm compels a human being to commit, acquiesce in or omit an act, shall be punished with imprisonment for not more than three years or a fine.[63]
>
> (2) The act shall be unlawful if the use of force or the threat of harm is deemed reprehensible in relation to the desired objective.[64]

The *Landgericht,* or court of first instance, convicted Lawyer B. of coercion, holding that "if the defendant believed that he was

---

57. *See id.* ("The act is against the law, but it is not wrongful."); *see also* FLETCHER & SHEPPARD, *supra* note 44, at 55.

58. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 18, 1952, 2 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BCHST] 194 (§ 6) (Ger.)); *see also* VAN VERSEVELD, *supra* note 24, at 26–28.

59. *See* 2 BGHST 194 (§6) (Ger.).

60. *See id.* ("[T]he defendant, an attorney, took on the defense of Ms. W. during several days of hearings in a criminal proceeding, without first agreeing on a specific fee.") (translated by Alexandra Spartz).

61. *See id.* ("At the first hearing, the defendant demanded that Mrs. W. pay him 50 DM upfront by 8:30 a.m. the next morning, threatening that otherwise he would not continue with her defense. Under the pressure of this threat, Mrs. W. paid him the money. As she was paying the fee to the defendant in his office that next morning, he forced her, using the same threat, to sign a fee note for 400 DM.") (translated by Alexandra Spartz).

62. *See* STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT [BGBL] I 3322, as amended, § 240 (Ger.), *available at* http://www.iuscomp.org/gla/statutes/StGB.htm#240 [http://perma.cc/F3AA-L6TR] (archived Nov. 14, 2014); *see also* 2 BGHST 194 (§ 6) (Ger.). The conduct prohibited by § 240 can also be described as the crime of extortion. *See* VAN VERSEVELD, *supra* note 24, at 27.

63. STGB § 240(1) (Ger.). The original German provides: "Wer einen Menschen rechtswidrig mit Gewalt oder durch Drohung mit einem empfindlichen Übel zu einer Handlung, Duldung oder Unterlassung nötigt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft." *Id.*

64. *Id.* § 240(2). The original German provides: "Rechtswidrig ist die Tat, wenn die Anwendung der Gewalt oder die Androhung des Übels zu dem angestrebten Zweck als verwerflich anzusehen ist." *Id.*

authorized to take this action against Mrs. W., that would be an unremarkable mistake of law."[65]

When the case came before the *Bundesgerichtshof,* the court was faced with two questions.[66] First, the court was tasked with determining whether, in addition to proving knowledge as required by the factual elements of the crime, a defendant must be shown to have been aware of the wrongfulness of his conduct to be found culpable under Section 240 of the German Criminal Code.[67] Second, were this first question answered in the affirmative, the *Bundesgerichtshof* was tasked with determining whether a defendant could be found culpable under Section 240 when "he lacked consciousness of the wrongfulness" of his conduct, where his own negligence caused his ignorance of the law.[68]

Addressing the first question, the *Bundesgerichtshof* considered whether use of the term *rechtswidrig* in Section 240 of the German Criminal Code implies that consciousness of wrongdoing (*Unrechtsbewußtsein*) is a mental element of the crime of coercion.[69] The court answered this question in the negative,[70] holding that *Unrechtsbewußtsein* is not an intent element of any crime but rather a requirement for criminal culpability under any crime definition.[71] The *Bundesgerichtshof* explained that the inclusion of *rechtswidrig* as part of a crime definition merely indicates that fulfilling the elements of a crime is not necessarily wrongful.[72] The court thus distinguished *Unrechtsbewußtsein* from intent, holding that a defendant who lacks knowledge of the wrongfulness of his conduct can still act with the

---

65. 2 BGHST 194 (§ 6) (Ger.) (translated by Alexandra Spartz).

66. *See id.* §§ 2–4.

67. *See id.* § 2. The Court stated the first question before it as follows: "Does culpability under § 240 of the Criminal Code require not only the knowledge of the facts of § 240, paragraph 2, but also the awareness that the act is illegal?" *Id.* (translated by Alexandra Spartz). The original German provides: "Gehört bei § 240 StGB zur Schuld nicht nur die Kenntnis der Tatsachen des § 240 Abs 2, sondern auch das Bewusstsein, dass die Tat rechtswidrig ist?" *Id.*

68. *See id.* §§ 3–4. The Court stated the second question before it as follows: "Is an offender still culpable under § 240 (in the sense referred to in Question 1) if he lacked the awareness that the act was unlawful due to negligence?" *Id.* (translated by Alexandra Spartz). The original German provides: "Für den Fall der Bejahung der Frage zu 1: Handelt der Täter bei § 240 auch dann schuldhaft, wenn ihm das Bewusstein der Rechtswidrigkeit (in dem zu 1 bezeichneten Sinne) fehlte, wenn dies aber auf Fahrlässigkeit beruht?" *Id.*

69. *See* VAN VERSEVELD, *supra* note 24, at 28 (citing 2 BGHST 194 (§ 7) (Ger.)).

70. *Id.* at 28 & n.131 (citing 2 BGHST 194 (§ 7) (Ger.)).

71. *See id.* (citing 2 BGHST 194 (§ 7) (Ger.)) ("*Unrechtsbewußtsein* is not an element of this specific crime definition, and thus of the required mental element, like factual elements are. Rather, it is an element which is common to all criminal offences.").

72. *See id.* at 28 & n.131 (citing 2 BGHST 194 (§ 7) (Ger.)) (translating the court's holding as stating that inclusion of the term *rechtswidrig* in the crime definition "has no other meaning than to refer to the general rule which applies to all offences, namely that fulfil[l]ment of the elements of the crime definition . . . is not always wrongful").

requisite intent for a criminal offense.[73] In so holding, the *Bundesgerichtshof* affirmed the superiority of the *Recht* over the *Gesetz*.[74]

The *Bundesgerichtshof* emphasized that, although *Unrechtsbewußtsein* is not an intent element of any crime, such knowledge is still required for a defendant to be found guilty of a criminal offense.[75] The court explained that the basis for criminal culpability is the capability of individuals to distinguish between what is right and what is wrong and to avoid conduct prohibited by the law.[76] A precondition for the capacity to act in accordance with that which is right, rather than that which is wrong, the court held, is knowledge of that which is right, and knowledge of that which is wrong.[77] The *Bundesgerichtshof* thus answered the first question before it in the affirmative, holding that the capacity to choose in favor of the *Recht* exists only if a person is conscious of that which is right and that which is wrong.[78]

Turning to the second question, the *Bundesgerichtshof* was careful to note that a defendant lacking *Unrechtsbewußtsein* will not necessarily be excused from criminal culpability.[79] Rather, the court

---

73. *See id.* at 28 (citing 2 BGHST 194 (§ 7) (Ger.)) ("*Rechtswidrigkeit* is not an element of the required intent. When the perpetrator fails to recognise the wrongfulness of his behaviour, this does not mean that he acts without the required intent.").

74. *See id.* at 26–28.

75. *See id.* at 28 & n.131 (citing 2 BGHST 194 (§ 7) (Ger.)) (explaining that "*Unrechtsbewußtsein* . . . is an element which is common to all criminal cases").

76. *See* 2 BGHST 194 (§ 15) (Ger.). As the *Bundesgerichtshof* explained:

> The fundamental basis of condemnation is that Man is created free, responsible, morally self-determined, and is therefore able to choose right and turn away from wrong, establish his behavior in accordance with legal standards and to avoid what is forbidden by the law, from the time he reaches moral maturity until his free, moral self-determination is temporarily crippled by the pathological processes specified in § 51 of the Criminal Code or is destroyed over time. The knowledge of right and wrong requires that a person freely chooses right and turns away from wrong in moral self-determination. He who knows that what he chooses to do in his freedom is wrong is culpable if he does it anyway.

Id. (translated by Alexandra Spartz).

77. *See id.* ("Consciousness of wrongdoing may be absent in individual cases even from a sane person, because he does not know or ignores a social prohibition. Also in this case of mistake of law, the offender is not in a position to turn away from wrong.") (translated by Alexandra Spartz).

78. *See id.* § 3 (noting the question of criminal culpability presented to the court); *id.* § 15 ("Punishment requires guilt. Guilt is blameworthiness. The offender is accused with the condemnation of guilt: that he has not behaved lawfully, that he has *chosen* wrong; although he could have acted lawfully, he could have chosen right.") (emphasis added) (translated by Alexandra Spartz).

79. *See id.* § 15.

held, only an unavoidable lack of *Unrechtsbewußtsein* may excuse a defendant's conduct.[80]

In arriving at this conclusion, the *Bundesgerichtshof* weighed the merits of two competing theories: the *Vorsatztheorie* and the *Schuldtheorie*. [81] Under the *Vorsatztheorie,* consciousness of wrongfulness is an intent element of a crime definition.[82] A defendant only acts intentionally under the *Vorsatztheorie* if he realized at the time of his conduct that he was acting wrongfully.[83] Avoidability or unavoidability of the mistake of law is irrelevant under the *Vorsatztheorie.*[84]

The *Schuldtheorie*, by contrast, considers the avoidability of a mistake of law to be the crux of a guilt analysis. [85] Under the *Schuldtheorie,* only unavoidable and non-negligent mistakes of law excuse criminal conduct.[86] An avoidable or negligent mistake of law (*i.e.*, an avoidable or negligent lack of *Unrechtsbewußtsein)* is irrelevant to a finding of intent and "does not negate the culpability of the defendant."[87] Under the *Schuldtheorie,* an avoidable or negligent

---

80. *See id.* As explained by the *Bundesgerichtshof*:

> Because he is created with free, moral self-determination, Man is called at all times to make responsible decisions, to behave lawfully as a partner in the legal community, and to avoid wrongdoing. It is not enough to fulfill this duty if he simply does not do what clearly stands out before his eyes as wrongdoing. Rather, he must make himself aware of whether anything he is about to do is consistent with the principles of the law.

Id. (translated by Alexandra Spartz); *see also id.* § 39 (holding that, under § 240 of the Criminal Code, "the offender must have knowledge of the circumstances surrounding the offenses in § 240, Paragraph 1, which do not include illegality, or have properly applied his conscience.") (translated by Alexandra Spartz).

81. *See id.* §§ 26–27, 29–30, 32–34 (assessing both theories and ultimately adopting the *Schuldtheorie*).

82. *See id.* § 29 (explaining that the *Vorsatztheorie* "proposes awareness of illegality as a component of intent") (translated by Alexandra Spartz). The *Vorsatztheorie* "punishes a 'negligent' mistake of law only if a negligent offense is actually committed, and only to the same extent as a negligent disregard of factual circumstances." *Id.* (translated by Alexandra Spartz).

83. *See id.* ("One can only arrive at an intentional penalty if the offender himself was aware of his wrongdoing at the moment he was carrying out the action.") (translated by Alexandra Spartz).

84. *See id.* § 30. For a discussion of the disadvantages of the *Vorsatztheorie*, see *id.* §§ 29–30.

85. *See id.* § 32. In contrast to the *Vorsatztheorie*, the court explained, the *Schuldtheorie* "makes it possible to punish intentional acts for what they are . . . the guilty verdict remains in line with the original accusation of blame. For the object of reproach lies in the intentional crimes committed in mistake of law, and also the initial realization of the offense and the conscious decision to act wrongfully." *Id.* (translated by Alexandra Spartz).

86. *See id.* (observing that the *Schuldtheorie* approach excuses unavoidable mistakes of law but not avoidable or negligent mistakes of law).

87. *Id.*

mistake of law can, however, mitigate punishment for an intentional crime.[88]

The *Bundesgerichtshof* embraced the *Schuldtheorie* approach, holding that an avoidable or negligent mistake of law does not excuse criminal culpability.[89] Thus, only a defendant who could not avoid lacking *Unrechtsbewußtsein* may be excused from criminal culpability.[90] As the *Bundesgerichtshof* emphasized, determining the avoidability of a defendant's mistake of law requires a determination of whether a defendant searched his conscience prior to acting.[91] A defendant must search his conscience, the *Bundesgerichtshof* held, to the extent feasible given "the circumstances of the case and the lifestyle and customs of his particular community." [92] If, after searching his conscience, the defendant still does not understand the wrongfulness of his behavior, then he is not culpable.[93]

Following this decision, the German legislature codified the *Schuldtheorie* mistake of law excuse.[94] As codified, intent is a *mens rea* requirement in German criminal law; *Unrechtsbewußtsein* is a requirement for criminal culpability but not a *mens rea* requirement.[95] Consistent with the *Schuldtheorie* analysis embraced

---

88. *See id.* § 33 (explaining that under the *Schuldtheorie*, "a mistake of law, if excusable, precludes blame, but if inexcusable, mitigates, but does not eliminate, an intentional crime") (translated by Alexandra Spartz).

89. *See id.* §§ 33, 34, 39.

90. *See id.* § 33.

91. *See id.* § 15 ("He has to eliminate any doubt through reflection or inquiry. This requires an exertion of his conscience . . . .") (translated by Alexandra Spartz).

92. *Id.*

93. *See id.* ("If . . . despite a significant exertion of his conscience, he is not able to gain insight into the unlawfulness of his actions, that mistake was insurmountable; the action was unavoidable for him. In this case, an accusation of guilt will not be applicable against him.") (translated by Alexandra Spartz).

94. *See* STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT [BGBL] I 3322, as amended, § 17 (Ger.), *available at* http://www.iuscomp.org/gla/statutes/StGB.htm#17 [http://perma.cc/7DBU-PYAT] (archived Nov. 15, 2014). Section 17 of the German Criminal Code provides:

> If upon commission of the act the perpetrator lacks the appreciation that he is doing something wrong, he acts without guilt if he was unable to avoid this mistake. If the perpetrator could have avoided the mistake, the punishment may be mitigated pursuant to Section 49 subsection (1).

Id. The original German provides:

> Fehlt dem Täter bei Begehung der Tat die Einsicht, Unrecht zu tun, so handelt er ohne Schuld, wenn er diesen Irrtum nicht vermeiden konnte. Konnte der Täter den Irrtum vermeiden, so kann die Strafe nach § 49 Abs. 1 gemildert warden.

Id.

95. *See* VAN VERSEVELD, *supra* note 24, at 33 ("[I]ntent is the normal *mens rea* requirement. Consciousness of wrongdoing is an element of criminal liability but not an element of this *mens rea*.").

by the *Bundesgerichtshof* in 1952,[96] Section 17 of the German Criminal Code provides for a mistake of law excuse only when the mistake was unavoidable.[97] Thus, if a defendant does not know that he is acting wrongfully when he commits an offense, he is not culpable if his mistake was unavoidable.[98] If his mistake was avoidable, he is culpable, but the court may mitigate his punishment.[99] As the *Bundesgerichtshof* held, and as commentators have emphasized, culpability for avoidable mistakes of law is premised on the concept of a social duty to ascertain and conform one's conduct to legal standards.[100] Accordingly, under Section 17, if a mistake of law was unavoidable, then the defendant cannot be blamed for his conduct and should not be punished.[101] If, however, the mistake was avoidable, then the defendant is blameworthy and should be punished.[102]

As codified, two issues arise in applying the mistake of law excuse under Section 17 of the German Criminal Code.[103] First, a court must determine whether a defendant lacked *Unrechtsbewußtsein* at the time of his alleged conduct.[104] If a defendant was conscious of the wrongfulness of his conduct at that

---

96. *See* 2 BGHST 194 (§§ 32–33) (Ger.) (summarizing and adopting the *Schuldtheorie* doctrine).

97. *See* STGB § 17 (Ger.). For the full text of Section 17, see *supra* note 94.

98. *See id.*

99. *See id.*

100. *See* 2 BGHST 194 (§ 32) (Ger.) ("The blameworthiness of the offender's conviction is in the fact that he consciously replaces the community value system with his own and analyzes it incorrectly in individual cases.") (translated by Alexandra Spartz); *see also* VAN VERSEVELD, supra note 24, at 37–38 (describing the position of Hans-Heinrich Jescheck and Thomas Weigend, who argue that the basis for culpability in the case of an avoidable mistake lies in a defendant's duties as a citizen in a free and democratic society). As Jescheck and Weigend argue,

> a citizen must be led by the desire to act according to the law, the legal order requires him every time to make an effort to ascertain whether he acts accordingly. This is why, even in cases where the defendant in good faith (subjectively) believes in the lawfulness of his behavior, he is still blameworthy, when he did not make a reasonable effort to determine the legal implications of his behavior.

HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 457 (1996), *translated in* VAN VERSEVELD, *supra* note 24, at 37–38.

101. *See* VAN VERSEVELD, *supra* note 24, at 37.

102. *See id.*

103. *See generally id.* at 33–40 (discussing *Unrechtsbewußtsein* and avoidability aspects of the *Schuldtheorie* analysis).

104. *See* StGB § 17 (providing for the mistake of law excuse in limited circumstances in which "the perpetrator lacks the appreciation that he is doing something wrong"); *see also* VAN VERSEVELD, *supra* note 24, at 34–36 (explaining that the crux of the inquiry turns on defining the required knowledge: "Is this knowledge of the legal prohibition, including all its technicalities? Or is knowledge of moral wrongdoing sufficient to establish the perpetrator acted with *Unrechtsbewußtsein*?").

time, then no mistake of law has occurred.[105] Second, if defendant is found to have lacked *Unrechtsbewußtsein* at the time of his alleged conduct, then the legal effect of his mistake of law, either excuse or mitigation, must be assessed according to the avoidability of his mistake.[106]

An assessment of the presence of *Unrechtsbewußtsein* requires defining the type and amount of knowledge required for a defendant to be found to be conscious of his wrongdoing.[107] With respect to the type of knowledge required, there is wide agreement that knowing violation of a civil, criminal, or administrative law will constitute *Unrechtsbewußtsein*, but a mere awareness of moral wrongfulness will not suffice.[108] However, a defendant's knowledge of the moral reprehensibility of his behavior will generally lead to the conclusion that his ignorance as to the wrongfulness of his behavior was avoidable.[109] With regard to the amount of knowledge required, the *Bundesgerichtshof* has held that to invoke the mistake of law defense, a defendant cannot have doubts.[110] In other words, according to the *Bundesgerichtshof*, a defendant who has doubts as to the lawfulness of his behavior has *Unrechtsbewußtsein*.[111]

It is worthwhile to note that in using the term "unavoidability," Section 17 suggests that perhaps only an absolute inability to ascertain the illegality of one's behavior renders such behavior an unavoidable mistake of law.[112] However, it is unlikely that the drafters of Section 17 intended to require absolute inability to learn of the wrongfulness of one's conduct; if this were the case, then the mistake of law excuse would never be available, given that, in principle, Article 103 of the German constitution guarantees that the law will be accessible to everyone.[113]

---

105. *See* StGB § 17; *see also* VAN VERSEVELD, *supra* note 24, at 34 ("Obviously, if the defendant had *Unrechtsbewußtsein*, that is, was aware of the wrongfulness of his behaviour, he made no mistake of law.").

106. *See* StGB § 17. *See generally* VAN VERSEVELD, *supra* note 24, at 37–40 (explaining the avoidability test).

107. *See* VAN VERSEVELD, *supra* note 24, at 34 (summarizing the inquiry as "[w]hat is the required knowledge?").

108. *See id.* (setting forth the positions of several legal scholars demonstrating that knowledge of violation of a rule of law is widely viewed as sufficient, while knowledge of immorality is widely viewed as insufficient).

109. *See id.* (citing JESCHECK & WEIGEND, *supra* note 100, at 454).

110. *See id.* at 35.

111. *See id.* ("A defendant in doubt has *Unrechtsbewußtsein*.").

112. *See id.* at 38 (noting Claus Roxin's criticism of the use of the term "unavoidability" based on the view that it imposes too high a burden on a defendant to show that he absolutely lacked the ability to learn about the wrongfulness of his behavior).

113. *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BCBl. 1, art. 103 (Ger.); *see also* VAN VERSEVELD, *supra* note 24, at 38.

Some commentators have suggested that avoidability should be measured under a negligence standard.[114] Under this approach, the avoidability of a mistake of law may depend upon three interrelated factors.[115] Before concluding that an actor's mistake was avoidable, a court would first consider whether the actor had reason to investigate the lawfulness of his conduct based upon some indication of its illegality.[116] An actor has reason to investigate "(1) if he has doubts; (2) if he does not have doubts, but realises" that his conduct is governed by a certain set of rules; or (3) if "the actor knows his conduct causes damage to another [person] or the community."[117] Second, a court would consider whether the actor had insufficiently or had not at all investigated the wrongfulness of his conduct.[118] If the conduct was expressly condoned or even tolerated by a proper authority, such as a reliable lawyer, reliance upon such authority by an actor would constitute sufficient investigation.[119] Finally, a court would consider whether sufficient effort would have provided the actor with knowledge of the wrongfulness of his conduct.[120] It has been argued that with regards to this final factor, "'what is decisive is not what a certain lawyer actually said, but what the outcome would have been, on which the actor would have been allowed to rely.'"[121]

This proposed three-part analysis attempts to illuminate possible relevant factors that a court might consider in determining whether a mistake of law was avoidable. The outcome, however, has been clearly provided for by the German legislature: an unavoidable mistake of law can excuse a defendant from criminal punishment, but an avoidable mistake of law can at most mitigate the punishment received.[122]

---

114. *See* VAN VERSEVELD, *supra* note 24, at 37–38 (citing JESCHECK & WEIGEND, *supra* note 100) ("This is why, even in cases where the defendant in good faith (subjectively) believes in the lawfulness of his behavior, he is still blameworthy, when he did not make a reasonable effort to determine the legal implications of his behavior.").

115. *See id.* at 39 (citing CLAUS ROXIN, STRAFRECHT ALLGEMEINER TEIL BAND I: GRUNDLAGEN. DER AUFBAU DER VERBRECHENSLEHRE 950 (2006)) ("(a) [T]he actor had an indication of the wrongfulness, he had a reason investigate; (b) the actor has not undertaken any effort in this regard, he has not or insufficiently conducted further inquiries; and (c) the mistake is nevertheless only then avoidable when sufficient effort would have provided him with the required knowledge of wrongfulness.").

116. *See id.*

117. *See id.* (citing ROXIN, *supra* note 115, at 951) (listing the three situations in which a defendant would have a reason to conduct further inquiries).

118. *See id.* (citing ROXIN, *supra* note 115).

119. *See id.* (citing ROXIN, *supra* note 115, at 954) (presenting Roxin's argument that reliance upon the advice of a lawyer is sufficient).

120. *See id.* (citing JESCHECK & WEIGEND, *supra* note 100, at 459).

121. *See id.* (quoting ROXIN, *supra* note 115, at 959) (footnote omitted).

122. *See* STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT [BGBL] I 3322, as amended, § 17 (Ger.), *available at* http://www.iuscomp.org/gla/statutes/StGB.htm#17 [http://perma.cc/7DBU-PYAT] (archived Nov. 15, 2014). For the full text of Section 17, see supra note 94.

C. *The International Approach: Article 32(2) of the Rome Statute*

Article 32(2) of the Rome Statute provides that a mistake of law excuses criminal responsibility only if it negates the mental element of a crime.[123] Article 32(2) thus follows the same approach as the MPC.[124] A mistake of law only exculpates the accused if it "negates the mental element required by the crime."[125] Article 32(2) does not take into account the negligence or unreasonableness of a mistake.[126]

III. THE SUPERIOR ORDERS DEFENSE

The superior orders defense in its modern iteration generally provides that "a soldier may presume the lawfulness of superior orders, and will be excused from punishment if they prove unlawful, unless they require acts so transparently wicked as to foreclose any reasonable mistake concerning their legality."[127] Early rationales for the defense of superior orders relied upon the primacy of national over international law.[128] Today, the defense is primarily explained under the rationales of *respondeat superior* and the exigencies of combat. [129] Its modern iteration can be said to represent "a compromise between the interests of military discipline and the supremacy of the law."[130]

This Part begins by discussing the defense of superior orders in the Anglo-American tradition and then turns to the defense of

---

123. Rome Statute, *supra* note 22, art. 32(2). Article 32(2) provides:

> A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Id.

124. *Cf.* FLETCHER, GRAMMAR, *supra* note 22 ("The imprint of the MPC in the Rome Statute is evident in the treatment of mistake.") (footnote omitted).

125. *Id.* (quoting Rome Statute, *supra* note 22).

126. *See* Rome Statute, *supra* note 22, art. 32(2) (illustrating the limited circumstances in which mistake of law may be used as an excuse).

127. Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939, 962–63 (1998).

128. *See* Robert Cryer, *Superior Orders and the International Criminal Court*, *in* INTERNATIONAL CONFLICT AND SECURITY LAW: ESSAYS IN MEMORY OF HILAIRE MCCOUBREY 49, 53 (Richard Burchill, Nigel D. White & Justin Morris eds., 2005) (discussing dispensation with this rationale at the IMT Nuremberg trials). While a complete history of the defense is beyond the scope of this Note, it is instructive to bear in mind that the purposes underlying the defense of superior orders have changed throughout the defense's history.

129. *See id.* at 53–55 (offering *respondeat superior* and exigencies of combat as potential explanations for the superior orders defense).

130. Osiel, *supra* note 127, at 961.

superior orders in the German tradition. This Part concludes by discussing the defense of superior orders as defined by Article 33 of the Rome Statute.

A. *The Anglo-American Approach*

The Anglo-American approach restricts the availability of the superior orders defense to cases meeting dual criteria.[131] First, the individual acting in obedience to an order must have been actually unaware of the unlawfulness of the order.[132] Second, the order must have been such that a reasonable person in the position of the individual acting in obedience to the order would not have known that the order was unlawful.[133]

Doctrinal underpinnings of the approaches of the United States and the United Kingdom are similar with regards to the defense of superior orders.[134] In 1944, American and British provisions were both revised to accord with the sixth edition of Professor Lassa Oppenheim's treatise on international law,[135] which provided that obedience to a superior order does not "confer upon the perpetrator immunity from punishment" or "deprive the act in question of its character as a war crime."[136] Since then, under American law, obedience to superior orders that are not permitted by the rules of war or that are "clearly illegal" provides no excuse to an individual acting under those commands.[137] "Clearly illegal" orders have been defined as orders that "a man of *ordinary* sense and understanding" would recognize as illegal.[138] The United Kingdom's approach

---

131. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 509 (1956) [hereinafter U.S. ARMY FIELD MANUAL] ("[T]he fact that the law of war has been violated pursuant to an order of a superior authority . . . does [not] constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.").

132. *See id.*

133. *See id.*

134. *See* Leslie C. Green, *Fifteenth Waldemar A. Solf Lecture in International Law: Superior Orders and Command Responsibility*, 175 MIL. L. REV. 309, 314 (2003) (discussing early American and English writings).

135. *See* Matthew R. Lippman, *Humanitarian Law: The Development and Scope of the Superior Orders Defense*, 20 PENN ST. INT'L L. REV. 153, 174–75 (2001).

136. LASSA OPPENHEIM, INTERNATIONAL LAW, A TREATISE: DISPUTES, WAR AND NEUTRALITY 453 (6th ed., vol. 2, 1940).

137. *See* RONALD A. ANDERSON, 1 WHARTON'S CRIMINAL LAW AND PROCEDURE 258 (1957).

138. *Id.* (emphasis added). For an application of this approach, see, for example, *United States v. Calley*, 22 U.S.M.C.A. 534 (C.M.A. 1973), a case arising from the My Lai massacre of the Vietnam War. *Id.* at 542. Upholding the following instruction provided by the trial court on the defense of superior orders, the United States Court of Military Appeals affirmed that

> [t]he acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him

similarly provides for the superior orders defense only where a soldier *reasonably* acts in obedience to a superior order.[139] Thus, under the Anglo-American approach, obedience to a superior order is only a defense if the order was not illegal on its face—that is, if a reasonable person would not view the order as unlawful.[140]

In addition to requiring that obedience to a superior order be objectively reasonable for the defense to be rendered applicable, the American approach requires that an individual acting in obedience to a superior order must also have been *actually* unaware of the unlawfulness of the order for his conduct to be excused.[141] As the Department of the Army Field Manual, *The Law of Land and Warfare,* provides, the defense of superior orders "does [not] constitute a defense . . . unless [an individual] did not know *and* could not reasonably have been expected to know that the act ordered was unlawful."[142] A manifestly unlawful order, such as an order to commit a war crime, can at most serve as mitigation for punishment.[143]

B. *The German Approach*

Under German law, a soldier is criminally liable for the commission of a crime in obedience to a superior order either if he has actual knowledge that the order was unlawful or if the order was unlawful on its face.[144] The German approach thus considers both subjective and objective criteria by considering both manifest illegality and the actual knowledge of a soldier in determining whether the superior orders defense applies.[145] However, unlike the Anglo-American approach, the German approach does not require an individual to show both actual lack of knowledge and objective

---

> unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

Id. (emphasis omitted). *But see id.* at 31 (Darden, J., dissenting) (arguing that the standard should not hinge on "what some hypothetical reasonable soldier would have known, but also by 'those persons at the lowest end of the scale of intelligence and experience in the services.'") (footnote omitted).

139. *See* 10 HALSBURY'S LAWS OF ENGLAND ¶¶ 541, 1169 (Simmonds ed., 1952) (noting that obedience to a superior order does not excuse the perpetrator, but that such obedience to a superior "whom he is bound to obey may exclude the inference of malice or wrongful intent.").

140. *See supra* notes 135–39 and accompanying text.

141. *See* U.S. ARMY FIELD MANUAL, *supra* note 131.

142. *Id.* (emphasis added).

143. *See id.* ("In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders maybe considered in mitigation of punishment.").

144. *See* VAN VERSEVELD, *supra* note 24, at 56 (summarizing § 5, Handeln auf Befehl, of the German Military Criminal Law Act).

145. *Id.*

reasonableness of the lack of knowledge.[146] Rather, an individual need only show *either* that he did not actually understand the unlawfulness of the order *or* that a reasonable person would not have understood the unlawfulness of the order.[147]

It is unclear whether the avoidability of a subordinate's mistaken reliance on a superior order is relevant to determining culpability in the context of superior orders under the German approach.[148] The avoidability principle contained in Section 17 of the Criminal Code may be inapplicable to Article 5 of the *Wehrstrafgesetz* (Military Criminal Law Act), the statute governing superior orders.[149] Some argue that Article 5 of the Military Criminal Law Act rejects the concept of avoidability and the duty to investigate as defined in Section 17 of the Criminal Code.[150] Such commentators argue that Article 5 of the Military Criminal Law Act gives priority to the duty to obey.[151] Under this view, where Section 17 of the Criminal Code provides that a defendant with doubts must resolve his doubts before acting, under Article 5 of the Military Criminal Law Act, a soldier with doubts should obey because his having doubts about the legality of the command means that the order is not unlawful on its face.[152]

A slight modification to Article 5 of the Military Criminal Law Act occurred when the 2002 *Völkerstrafgesetzbuch* (International Criminal Code) was passed. The International Criminal Code regulates crimes against public international law and was passed in order to bring German criminal law into compliance with the Rome Statute. The International Criminal Code provides for a rule similar to that of Article 5 of the Military Criminal Law Act except that under Section 3 of the International Criminal Code, the superior orders defense is not available in cases of genocide and crimes against humanity.[153]

---

146. *See id.* ("[A] soldier is criminally liable for committing a(n international) crime in obedience to superior orders if he has actual knowledge of the unlawfulness of the order or if the order was manifestly unlawful.").

147. *See id.*

148. *See id.* at 56–57 (summarizing conflicting scholarly viewpoints on whether avoidability plays into subordinate culpability in the German system).

149. *See id.* (remarking that it may be the case that Section 17 applies to Article 5, but some scholars oppose this notion).

150. *See, e.g., id.* (citing CHRISTIANE NILL-THEOBALD, DEFENCES BEI KRIEGSVERBRECHEN AM BEISPIEL DEUTSCHLAND 116–121 (1998)) ("[Nill-Theobald] holds that Article 5(I) WStG explicitly rejects the principle of avoidability, and thus a duty to investigate, as laid down in the general part of the Criminal Code.").

151. *See, e.g., id.*

152. *See id.*

153. *See id.*

C. *The International Approach: Article 33 of the Rome Statute*

In the early twentieth century, international law immunized combatants acting pursuant to superior orders from liability, imposing liability instead upon the officer or commander issuing the order obeyed.[154] As Professor Lassa Oppenheim's leading treatise at the time provided, "[i]f members of the armed forces commit violations *by order* of their Government, they are not war criminals and cannot be punished by the enemy . . . ."[155] After 1945, however, "the scope of the superior orders defense shifted dramatically,"[156] beginning with the absolute rejection of the defense of superior orders in the Nuremberg Charter.[157]

Article 8 of the Nuremberg Charter provided that a defendant acting in obedience to a superior order could not by virtue of that fact be freed from responsibility for his conduct.[158] Rather, under Article 8, that a defendant acted pursuant to the order of a superior could be considered only for the purposes of mitigating punishment. [159] Consideration of superior orders for the purposes of mitigation of punishment was further restricted to situations in which "the Tribunal determine[d] that justice so require[d]."[160] Article 8 can

---

154. *See generally* Lippman, *supra* note 135, at 153. This Part discusses the historical background of the superior orders defense as provided for in Article 33 of the Rome Statute from the early twentieth century onwards, and does so only briefly. For a discussion of the early history of the superior orders defense, see Hilaire McCoubrey, *The Concept and Treatment of War Crimes*, 1 J. ARMED CONFLICT L. 121, 123 (1996) (recounting, *inter alia*, the *Hagenbach* case of 1474). For a comprehensive history of the superior orders defense in the twentieth century, see, for example, Lippman, *supra*.

155. 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 264 (1906) [hereinafter OPPENHEIM 1906].

156. Mark W.S. Hobel, Note, *"So Vast An Area of Legal Irresponsibility"? The Superior Orders Defense and Good Faith Reliance on Advice of Counsel*, 111 COLUM. L. REV. 574, 584 (2011).

157. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal ("London Agreement"), art. 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter]. While standing in sharp contrast to the pre-World War I absolute immunity rule, the absolute liability rule advanced by the Nuremberg Charter was not without early support. *See, e.g.*, James B. Insco, *Defense of Superior Orders Before Military Commissions*, 13 DUKE J. COMP. & INT'L L. 389, 390 (2003) (quoting Hugo Grotius, 2 De Jure Belli Ac Paris Libri Tres [The Law of War and Peace] 138 (Francis W. Kesley trans., 1925)) ("Hugo Grotius, widely considered the father of international law, wrote in the seventeenth century that, '[i]f the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out.'").

158. *See* Nuremberg Charter, *supra* note 157. Article 8 of the Nuremberg Charter provided that "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." *Id.*

159. *See id.*

160. *Id.*

therefore be read to have applied absolute liability to defendants acting pursuant to superior orders,[161] in sharp contrast to the early-twentieth century absolute immunity rule memorialized in Oppenheim's 1906 treatise.[162]

In writing the Nuremburg Principles in 1950, the International Law Commission apparently took a different approach. [163] The Nuremberg Principles provided that a defendant acting in obedience to superior orders could not be relieved from responsibility, "provided a moral choice was in fact possible to him."[164] In formulating the Nuremberg Principles' ban on superior orders in distinctly qualified language, the Commission thus apparently allowed for superior orders to form part of a substantive defense. [165] This qualified approach stands in sharp contrast to the treatment of superior orders in the Nuremberg Charter, which allowed for consideration of superior orders only as mitigation for punishment but not as a defense for liability. [166] As one commentator has noted, the Nuremberg experience thus arguably reflects "an example of the complex and, at times, confused treatment of the [superior orders defense]." [167] Given the conflicting approaches of the Nuremberg Charter and the Nuremberg Principles, it is unclear from the Nuremberg experience whether superior orders might constitute a substantive defense, as the Nuremberg Principles indicated, or merely serve as a mitigating factor, as the Charter provided.[168]

---

161. *See id.*; *see also* Sunita Patel, *Superior Orders and Detainee Abuse in Iraq*, 5 N.Z.Y.B. INT'L L. 91, 97 (2008).

162. *See* OPPENHEIM 1906, *supra* note 155.

163. *See* Patel, *supra* note 161 (suggesting that rather than applying absolute liability, "[t]he principle laid down by the Commission . . . qualifies the rule in such a way as to allow superior orders to form part of a substantive defence").

164. *See* Rep. of the Int'l Law Comm'n, 2d Sess., June 5–July 29, 1950, U.N. Doc. A/1316; GAOR, 5th Sess., Supp. No. 12 (1950), *reprinted in* [1950] Y.B. Int'l L. Comm'n 364, 375, U.N. Doc. A/CN.4/34. The Report provides that "[t]he fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him." *Id.*

165. *See* Patel, *supra* note 161 (arguing that the Commission's qualification of the rule permits the use of superior orders as "part of a substantive defence"). The tribunal's *Einsatzgruppen* judgment lends support to this view, insofar as the tribunal announced therein that "[t]o plead superior orders one must show an excusable ignorance of their illegality." United States v. Otto Ohlendorf (*Einsatzgruppen*), 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 473 (1948).

166. *See* Nuremberg Charter, *supra* note 157; *see also* Patel, *supra* note 161 ("The Charter seems to provide for the absolute liability approach, allowing for a plea in mitigation. The principle laid down by the Commission, however, qualifies the rule in such a way as to allow superior orders to form part of a substantive defence (albeit contributing more directly to a defence of duress).").

167. Patel, *supra* note 161.

168. *See id.*

Signaling the "rediscovery of international criminal tribunals in the 1990s,"[169] the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) both deny defendants the defense of superior orders but allow for obedience to superior orders to be considered for the purposes of mitigating punishment.[170] Specifically, Article 7(4) of the ICTY Statute and Article 6(4) of the ICTR Statute provide that the fact that a defendant acted pursuant to a government or superior order will not relieve him of criminal responsibility.[171] However, both statutes provide that obedience to superior or government orders "may be considered in mitigation of punishment" if it is determined that justice so requires.[172] Thus, both the statute of the ICTY and the statute of the ICTR follow the rule set forth in the Nuremberg Charter: obedience to superior orders may not constitute a substantive defense but may be considered in mitigation of punishment.[173] At the same time, the statutes of the ICTY and ICTR contravene the rule set forth in the Nuremberg Principles drafted in 1950,[174] evincing the confused state of affairs faced prefacing the drafting of the Rome Statute.[175]

In the midst of this imprecise doctrinal backdrop,[176] Article 33 of the Rome Statute was drafted to provide as follows:

> (1) The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

---

169. Hobel, *supra* note 156, at 587.

170. *See* S.C. Res. 955, annex art. 6(4), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; S.C. Res. 827, annex art. 7(4), U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; *see also* Cryer, *supra* note 128, at 51 (noting that the statutes of both the ICTY and ICTR preclude pleading the superior orders defense).

171. *See* ICTR Statute, *supra* note 170; ICTY Statute, *supra* note 170. Article 7(4) of the ICTY statute provides that "[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires." ICTY Statute, *supra* note 170. Article 6(4) of the ICTR contains almost identical language. *See* ICTR Statute, *supra* note 170.

172. *See* ICTR Statute, *supra* note 170; ICTY Statute, *supra* note 170.

173. ICTR Statute, *supra* note 170; ICTY Statute, *supra* note 170; Nuremberg Charter, *supra* note 157.

174. *See* Rep. of the Int'l Law Comm'n, *supra* note 164 (noting "that superior orders are not a defence provided a moral choice was possible to the accused" and that the Commission dropped the clause allowing evidence of superior orders to be considered in mitigation of punishment because "[t]he Commission considers that the question of mitigating punishment is a matter for the competent Court to decide").

175. *See* Patel, *supra* note 161 (explaining that the Nuremberg Charter and the Nuremberg Principles represent conflicting approaches to the use of superior orders as a defense).

176. *See, e.g.*, Hobel, *supra* note 156, at 587 (discussing "[p]ersisting [u]ncertainties in the [s]uperior [o]rders [d]efense").

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

(2) For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.[177]

First, Article 33(1)(a) requires that "[t]he person was under a legal obligation to obey orders of the Government or the superior in question."[178] Article 33(1)(a) refers back to the domestic legal order within which the defendant and his superior were acting to determine whether the defense of superior orders is available.[179] Article 33(1)(a) does not, however, require that a defendant be required by domestic law to obey the specific order issued, but rather requires only that his domestic legal system require obedience to superior orders in general.[180]

Article 33(2) excludes availability of the defense of superior orders to cases involving an order to commit genocide or crimes against humanity.[181] However, it is unclear whether "orders to commit genocide or crimes against humanity" are defined by the knowledge and intent of the commander or that of the individual receiving the order.[182] Professor Robert Cryer points out that unlike war crimes, under the Rome Statute, crimes against humanity "necessarily form part of either a systematic or widespread commission of similar acts and are therefore committed as part of a plan or policy."[183] Genocide, Cryer adds, may be said to also require specific intent.[184] As Cryer concludes, Article 33(2) arguably remains unclear as to whether the relevant inquiry for crimes against humanity and genocide is determining the awareness and specific

---

177. Rome Statute, *supra* note 22, art. 33.

178. *Id.* art. 33(1)(a).

179. *See* Cryer, *supra* note 128, at 60 (explaining that the statute "'refers back to the legal order within which both the superior . . . and the offender were acting'") (footnote omitted) (quoting Andreas Zimmerman, *Superior Orders*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 957, 969 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002)) (citing Otto Triffterer, *Article* 33, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 585 n.2 (Otto Triffterer ed., 1999)).

180. As Cryer explains, the drafters were likely conscious of the fact that requiring a domestic legal system to demand obedience to the specific order at issue would essentially strip the availability of the defense altogether, as most domestic legal systems requiring obedience to superior orders do not require obedience to *illegal* superior orders. Cryer, *supra* note 128, at 60–61.

181. *See* Rome Statute, *supra* note 22, art. 33(2).

182. *See* Cryer, *supra* note 128, at 63–64 ("[T]he idea that the defence is per se inapplicable on a charge of genocide or crimes against humanity is difficult to reconcile with the wording of Article 33(2), which refers to 'orders to commit crimes against humanity or genocide.'").

183. *Id.* at 64 (footnote omitted) (quoting Zimmerman, *supra* note 179, at 971).

184. *Id.*

intent of the superior or that of the subordinate acting in obedience to the superior's commands.[185]

Raising similar clarity concerns, Article 33(1)(b) and (c) provide that the superior orders defense is only available when an order was not manifestly unlawful and a subordinate did not have actual knowledge of the unlawfulness of the order.[186] In relation to mistake of law as provided for in Article 32, Article 33 can thus be said to be both narrower and broader in its application.[187] On the one hand, the defense of superior orders is narrower because it is categorically excluded in cases of genocide or crimes against humanity—that is, it is available only to defendants charged with war crimes.[188] On the other hand, it is broader because in cases in which a subordinate acted pursuant to an unlawful command that was not manifestly unlawful, that subordinate's conduct is excused if he did not have actual knowledge of the command's illegality, even if he *should have* known that the command was unlawful.[189]

IV. CRITICISMS OF ARTICLE 33 OF THE ROME STATUTE

This Part addresses the two foremost criticisms of Article 33. It begins by discussing arguments that Article 33 signals a problematic departure from previously established customary international law.[190] It then addresses the argument that Article 33(1)(c)'s manifest

185. *See id.*

186. *See infra* Part IV.B (exploring criticisms and varying interpretations of the required "manifest illegality" standard in greater depth).

187. *Cf.* VAN VERSEVELD, *supra* note 24, at 95 ("With Article 33 the ICC Statute provides for superior orders as a separate defence. The excuse here provided for is, on the one hand, narrower and, on the other, wider than the defence of mistake of law per se.").

188. *Id.*

189. *Id.*

190. *See* YORAM DINSTEIN, THE DEFENCE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW (1965) [hereinafter DINSTEIN, OBEDIENCE] (examining different approaches to liability under international law in an attempt to determine when the defense of superior orders ought to be a permissible defense); VAN VERSEVELD, *supra* note 24, at 95 (pointing out that the ICC statute is simultaneously narrower and wider than "the defence of mistake of law per se"); Yoram Dinstein, *Defences*, *in* 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 371, 377–78 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) [hereinafter Dinstein, *Defences*] (noting that international criminal law has not adopted "the rule of *ignorantia juris non excusat* [which is] widely accepted within national legal systems"); Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L.F. 1, 31 (1999) (suggesting that "[t]he provision follows the 'manifest illegality principle,' while current international law rather tends to the 'mens rea principle,' rejecting superior orders as a defence *per se*") (footnotes omitted); Paola Gaeta, *The Defence of Superior Orders: The Statute of the International Criminal Court* versus *Customary International Law*, 10 EUR. J. INT'L L. 172, 190–91 (1999) (positing that, in addition to "depart[ing] from customary international law without any well-grounded motivation, . . . Article 33 is

illegality requirement is an inadequate standard for determining subordinate culpability.[191]

A. *Article 33's Departure from Previously Established Customary International Law*

Critics of Article 33 who base their criticism on Article 33's departure from previously established customary international law rely primarily on the Nuremberg International Military Tribunal (Nuremberg IMT) judgment and subsequent proceedings under Control Council Law No. 10 (CCL No. 10).[192] Under the statutes applicable at the Nuremberg IMT and subsequent proceedings, the superior orders defense was uniformly banned.[193] Consideration of a subordinate's obedience to superior orders was permitted only as grounds for mitigation of punishment.[194] Some thus suggest that by permitting superior orders as a substantive defense, Article 33 departs from previously established customary international law as established at Nuremberg.[195]

Others argue that Article 33 departs from previously established customary international law by permitting defendants charged with war crimes to invoke the defense.[196] These critics argue that in permitting the defense in the context of war crimes, Article 33 conflicts with customary international law and renders the Rome Statute internally inconsistent.[197] While Article 33 does not expressly prohibit application of the superior orders defense to defendants charged with war crimes, Article 8 does, in very specific terms, codify

---

basically inconsistent with the codification of war crimes effected through Article 8 of the Rome Statute").

191. *See* VAN VERSEVELD, *supra* note 24, at 94–95; Cryer, *supra* note 128, at 61–67 (addressing the shortcomings of the "manifest illegality" approach to determining subordinates' liability).

192. *See generally* VAN VERSEVELD, *supra* note 24, at 104–18 (providing background information on the IMT Nuremburg judgment and subsequent proceedings).

193. *See supra* Part III.C.

194. *See id.*

195. *See* Dinstein, *Defences*, *supra* note 190, at 379–82 (describing the Nuremberg Charter's policy, which held that an order to kill cannot later serve as a defense should that subordinate soldier find himself on trial but may be raised to mitigate punishment); DINSTEIN, OBEDIENCE, *supra* note 190, at 88 (advocating for a rule that states, "the fact of obedience to orders constitutes not a defence *per se* but only a factual element that may be taken into account in conjunction with the other circumstances of the given case within the compass of a defence based on lack of *mens rea*, that is, mistake of law or fact or compulsion").

196. *See* Gaeta, *supra* note 190, at 190.

197. *See id.* (illustrating the internal conflict by pointing out that Article 33 "provides for the validity of the defence in cases of war crimes, on the assumption that orders to commit war crimes may be issued that are *not* manifestly unlawful" while Article 8 "sets out an exhaustive list of war crimes, which covers acts that are unquestionably and blatantly criminal").

war crimes.[198] It is impossible, some have argued, to imagine a war crime meeting Article 8's definition that would not be manifestly unlawful under Article 33.[199] Perhaps, then, Article 33's exceptions to the applicability of the superior orders defense—that is, exclusion of applicability of the superior orders defense in cases of crimes against humanity and genocide—should have been drafted to include an exceptional provision for cases involving war crimes.[200]

However, Article 33 may be consistent with customary international law insofar as it grounds exculpation on a broader lack of culpability than that associated strictly with obedience to superior orders.[201] Exculpation under Article 33 may be justified because a defendant cannot, theoretically, be considered culpable if he could not reasonably be expected to have disobeyed an order or if he could not reasonably be expected to know that his conduct was illegal.[202] If the basis of a defendant's exculpation is that his obedience to a superior's orders constituted an unavoidable mistake of law, then he is not blameworthy and should not be punished.[203] In such situations, mitigating punishment may not do justice for an unavoidably mistaken defendant.[204] Article 33 may thus provide an appropriate grounds for the exclusion of criminal culpability.[205] However, Article 33 does not refer to the unavoidability of a subordinate's mistaken obedience to his superior's orders, and, in the case of genocide and crimes against humanity, Article 33 excludes the defense entirely.[206] Whether Article 33 "allows for a true culpability test" might therefore be disputed.[207]

---

198. *See id.*

199. *See, e.g., id.* ("How would it be possible to claim that the order to commit one of those crimes is *not* manifestly unlawful or that subordinates cannot recognize its illegality?").

200. *See* Ambos, *supra* note 190 (analyzing the two principle approaches to the superior orders defense and that the Rome Statute's provision "attempts to affirm the principle that superior orders is not a defence, although it can, exceptionally, be invoked in cases of war crimes under strictly limited conditions").

201. *See* Edward M. Wise, *Commentary on Parts 2 and 3 of the Zutphen Intersessional Draft: General Principles of Criminal Law, in* OBSERVATIONS ON THE CONSOLIDATED ICC TEXT BEFORE THE FINAL SESSION OF THE PREPARATORY COMMITTEE 43, 52–53 (M. Cherif Bassiouni ed., 1998) (acknowledging the controversial issue of "whether there should be a special defense along the lines of mistake of law in circumstances where the accused has no knowledge of its illegality and the order was not manifestly illegal").

202. *See id.*

203. *See* VAN VERSEVELD, *supra* note 24, at 93–94.

204. *See id.* at 94.

205. *See id.*

206. *See id.* ("It might be disputed, though, whether Article 33 allows for a true culpability test, especially since Article 33 does not refer to the unavoidability of the mistake and since the provision excludes the defence in case of certain crimes entirely.").

207. *Id.*

Foreshadowing this Note's recommendation in Part IV, *infra,* Article 33's apparent departure from customary international law may thus be salvageable based upon precisely this unavoidability of mistake of law approach.[208] Unavoidability of mistake of law might be seen as inherent to the obedience to superior orders that qualify for the superior orders defense under Article 33 but run afoul of customary international law principles. This may thus explain the apparent departure from customary international law on an independent basis. The impact that this approach might have on Article 33's departure from customary international law will be discussed in greater depth in Part IV, *infra.*

B. *Inadequacy of the Article 33 Manifest Illegality Standard*

Under Article 33(1)(c), a defendant cannot invoke the defense of superior orders when the order followed was manifestly unlawful.[209] As critics have pointed out, however, "manifest illegality" is a vague and undefined concept in the statute.[210] In its judgment against Adolf Eichmann, the District Court of Jerusalem offered a vivid explanation of the standard.[211] There, the court held that manifest illegality requires "unlawfulness piercing the eye and revolting to the heart, be the eye not blind nor the heart stony and corrupt."[212] A manifestly unlawful order, the court held, "should fly like a black flag above the order given, as a warning saying 'Prohibited!'."[213] The court emphasized that "formal unlawfulness" and "unlawfulness discernible only by the eyes of legal experts" would not suffice.[214] Without a "flagrant and manifest breach of the law," the court concluded, a soldier cannot be released from the duty of obedience and held criminally responsible for his conduct.[215]

Critics of the "manifest illegality" standard argue that Article 33 objectionably provides for the superior orders defense in cases in which the command was not *manifestly* unlawful, but a *reasonable*

---

208. *See id.* at 94–96 (discussing criticisms and benefits of Article 33's alleged departure from customary international law and unavoidable mistake of law approach).

209. Rome Statute, *supra* note 22, art. 33(1)(c).

210. *See* Osiel, *supra* note 127, at 969–70 (enumerating factors contributing to the vagueness of the term "manifest illegality," including "[t]he paucity of litigation in this area," the "changing content of international criminal law itself," "the proliferation of new international crimes," and the inclination to prosecute only the most severe war crimes rather than those falling within a gray area).

211. *See* Att'y Gen. of Isr. v. Eichmann, 36 INT'L L. REP. 5, 256 (1968) (Dist. Ct. Jerusalem 1961), *aff'd,* 36 INT'L L. REP. 277 (Sup. Ct. of Isr. 1962).

212. *Id.* (quoting Chief Military Prosecutor v. Melinki, 13 PM 90 (Dist. Ct. Rep.) (1959) (Isr.)).

213. *Id.*

214. *Id.*

215. *Id.*

subordinate should have known that the command was unlawful.[216] Defendants making judgment calls, these critics argue, are granted unfettered access to the defense of superior orders, regardless of how unreasonable their decisions prove to be.[217] As Professor Mark Osiel explains, "[w]here a soldier must exercise situational judgment in order to ascertain the unlawfulness of a superior's order, that order is not manifestly illegal."[218] Osiel uses the example of a field officer tasked with making a situational judgment call in choosing among weapons systems likely to produce different degrees of destruction.[219] A field officer's decision when faced with this "question might prove mistaken, [perhaps] even unreasonably [mistaken], given what [the field officer] kn[ew] or should have . . . known" at the time.[220] However, such a mistake in situational judgment, even one producing unlawful results, will by its very nature rarely "rise to the level of manifest illegality."[221] Any case involving a close judgment call will thus not rise to the level of manifest illegality, which makes the defense of superior orders available even to defendants making unreasonable situational judgment calls.[222] As Osiel notes, far from encouraging meticulous and reasonable judgment, the manifest illegality standard "deliberately discourages" subordinates from "evaluat[ing] an order in light of the particular circumstances, including the likely consequences of the commanded action."[223]

Thus, by setting the threshold for unavailability of the superior orders defense exceedingly high, the manifest illegality standard may objectionably allow subordinates who make unreasonable mistakes in situational judgment to rely upon the superior orders defense.[224] In

---

216. *See* Osiel, *supra* note 127, at 971 (arguing that "[w]here a soldier must exercise situational judgment in order to ascertain the unlawfulness of a superior's order, that order is not manifestly illegal" and "the law strongly presumes that any mistake a soldier makes in obeying a criminal order is a reasonable one."); *see also* Cryer, *supra* note 128, at 62 (comparing two interpretations of the "manifest illegality" standard—a subjective standard considering the reasonable interpretations of subordinates and an objective standard open to criticism for being over-indulgent and, perhaps, too harsh).

217. *See* Osiel, *supra* note 127, at 971 ("A decision on such a [judgment] question might prove mistaken, even unreasonably so, given what was known or should have been known about the situation. Though such a mistake could easily produce unlawful consequences, this type of mistake would rarely be classified as *manifestly* illegal.").

218. *Id.*

219. *See id.*

220. *Id.*

221. Osiel notes that such a mistake might be found to rise to the level of manifest illegality if "the degree of unnecessary overkill was both very great and readily foreseeable in advance." *See id.*

222. *See id.* (pointing out that disallowing the defense only in cases where subordinates carry out their superior's *manifestly* illegal orders makes the defense applicable to all situations requiring subordinates to make a judgment call, for an order to undertake a *manifestly* illegal act does not require such a judgment).

223. *Id.*

224. *See id.* (discussing the strong presumption of reasonableness).

other words, so long as situational judgment was required on the part of the subordinate, the unlawfulness of his obedience will not be characterized as "manifest."[225] Some have suggested that Article 33(1)(c)'s manifest illegality standard should therefore be replaced with a reasonableness standard.[226] Requiring that an order be "illegal to a reasonable soldier" rather than "manifestly illegal" would arguably address the problematic granting of the superior orders defense to subordinates who make unreasonable mistakes in situational judgment.[227]

Others attempting to define "manifest illegality" argue that Article 33(1)(c) *is* a reasonableness standard.[228] According to this view, an order is manifestly unlawful when its illegality is "obvious to a person of ordinary understanding."[229] This view holds that the unlawfulness inquiry does not consider whether a command was manifestly unlawful under any specific domestic legal order.[230] Rather, the unlawfulness inquiry considers whether the command was manifestly unlawful under international law.[231] Under this view, an order is manifestly lawful if "a layman with only basic knowledge of international humanitarian law should have considered the action to be unlawful and to constitute a punishable crime."[232]

As these divergent interpretations of Article 33 demonstrate, it is unclear whether Article 33(1)(c) demands a reasonableness test or a more exacting standard than that of reasonableness.[233] Under both interpretations, the level of exaction of Article 33(1)(c) may depend upon whether the term "manifest" is interpreted subjectively or

---

225. *See id.*

226. *See id.* at 1096–98, 1128 (arguing that a reasonableness standard would foster more practical judgment on the part of soldiers).

227. *See id.* at 1127–28 (emphasizing that under a general standard of reasonableness, soldiers will have to stop and think about their actions rather than blindly following orders).

228. *See* Zimmerman, *supra* note 179, at 970 (arguing that because "one has to apply the perception of an ordinary person, one has to find that even a layman with only a basic knowledge of international humanitarian law should have considered the action to be unlawful and to constitute a punishable crime").

229. *Id.* (footnote omitted) (quoting Unpublished memorandum 'Punishment of War Crimes' of 1942 submitted to the Committee on Crimes against International Public Order, at 73, quoted by Dinstein, *The Defense of 'Obedience to Superior Orders' in International Law* (1965) 123–24).

230. *See id.* (claiming that the "true test is whether the order was manifestly unlawful under international law").

231. *Id.*

232. *See id.*

233. *Compare* Osiel, *supra* note 127, at 1096–98, 1128–29 (arguing for a "reasonable error rule [that] would excuse disobedience to orders which, though lawful, are radically misconceived and hence highly imprudent"), *with* Zimmerman, *supra* note 179, at 970 (treating the manifestly unlawful standard as an "ordinary person in the situation of the accused" test).

objectively.[234] Under a subjective approach, the manifest illegality of a command would depend not solely upon the content of the command.[235] Rather, a subjective approach would consider a broader array of factors, including the amount of time a subordinate had to evaluate the command, the subordinate's level of training, and the subordinate's familiarity with the assessment of orders.[236] Under an objective approach, these enumerated factors would be irrelevant.[237] As Professor Robert Cryer points out, an objective standard might be too harsh on subordinates who, either due to insufficient training or low mental capacity, are simply incapable of correctly evaluating the order's legality.[238]

In practice, the distinction between the subjective and objective approaches to manifest illegality has been fluid. A belief that is reasonable tends to be presumed to be held honestly.[239] Nevertheless, conflicting interpretations of how exacting of a standard Article 33(1)(c) demands, entwined with the tension between a subjective and objective interpretation, evince the problematic vagueness of the term "manifest illegality."[240]

V. RECOMMENDATION: ARTICLE 33(1)(C)'S MANIFEST ILLEGALITY REQUIREMENT SHOULD BE APPLIED UNDER THE FRAMEWORK OF THE *SCHULDTHEORIE* MISTAKE OF LAW DOCTRINE

This Note suggests that Article 33 could be reconciled with previously established customary international law and its manifestly illegality requirement rendered more practicable if Article 33(1)(c) were applied under the framework of the *Schuldtheorie* mistake of law doctrine. In suggesting application of the *Schuldtheorie* framework to Article 33(1)(c), this Note advocates preservation of the language of manifest illegality and the international mistake of law excuse. While suggesting retention of the rule that a mistake of law is generally no excuse under Article 32(2), this Note suggests that, given the exigencies inherent to the duty to obey and the presently

---

234. *See* Cryer, *supra* note 128, at 61–63 (comparing the objective and subjective approaches to manifest illegality).

235. *See id.* at 62 (arguing that the evaluation depends on a variety of factors and that "[w]hat is manifest to one person may not be to another").

236. *See id.*

237. *See id.* (asserting that a subjective standard for "manifest" requires consideration of these factors, while an objective standard contains a hard line without subjectivity).

238. *See id.* at 62–63 (acknowledging that a "purely objective standard may . . . be too harsh on those who, through lack of training or mental capacity, simply could not have correctly evaluated the order as unlawful").

239. *See* Osiel, *supra* note 127, at 950–51 ("This presumption is rebutted only when the acts ordered were so egregious as to carry their wrongfulness on their face.").

240. *See generally id.* at 969–75.

overbroad scope of the defense of superior orders, Article 33(1)(c)'s manifest illegality provision should be applied under a more flexible *Schuldtheorie* mistake of law framework.[241]

This Part will begin by explaining the possible functional implications of applying Article 33(1)(c) under the *Schuldtheorie* framework. It will then discuss the ways in which an Article 33(1)(c) *Schuldtheorie* analysis would remedy the criticisms of Article 33 discussed in Part IV, *supra*. It will first argue that if Article 33(1)(c) were applied under the *Schuldtheorie* framework, Article 33 would no longer conflict with previously established customary international law. Finally, this Part will address the ways in which application of the *Schuldtheorie* framework to Article 33(1)(c) would present a more workable standard than that of Article 33(1)(c)'s manifest illegality requirement as presently understood today.

A. *Functional Implications*

Infusing Article 33(1)(c) with the *Schuldtheorie* doctrine's analytical process would entail applying the manifest illegality standard under the two-part inquiry applied to mistakes of law under Section 17 of the German Criminal Code.[242] Under this approach, first, the court would be required to establish whether a defendant was conscious of the wrongfulness of his conduct at the time of his actions.[243] Showing knowledge of the moral reprehensibility of a defendant's behavior would be insufficient to show awareness of

---

241. *Cf.* VAN VERSEVELD, *supra* note 24, at 97–98. Van Verseveld suggests adding a new provision to Article 32 to recognize "mistakes about facts 'extrinsic to the required mental elements,' such as, for example, mistakes about justifications which do not negate the required mental element." *Id.* at 97. Her proposed addition would provide as follows:

> Article 32a
> Mistake of law or mistake of fact
> If it is concluded that that the defendant acted in the mistaken belief that his conduct was lawful, or that he was mistaken about a fact extrinsic to the required mental element, and if this mistake was unavoidable, the defendant shall not be convicted in respect of such a wrongful act.

Id. Van Verseveld suggests that such an addition to Article 32 would "allow abandoning the separate defence of superior orders." *Id.* This Note suggests an alternative approach and proposes that the current *ignorantia legis neminem excusat* rule of Article 32(2) should be upheld, while a flexible mistake of law framework should be imputed to Article 33(1)(c) to acknowledge the unique exigencies of combat and the duty to obey.

242. This Part applies the German mistake of law framework discussed in earlier Parts. For a more in-depth explanation of the rules and rationales applied in this Part, *see supra* Part II.B (discussing the evolution of the mistake of law excuse in German criminal law).

243. *Cf. supra* note 104 and accompanying text.

wrongfulness.[244] If a defendant were found to have been conscious of the wrongfulness of his conduct, then the superior orders defense would be unavailable to that defendant.[245]

Were a defendant found not to have been aware of the wrongfulness of his conduct, then the legal effect of his conduct would be assessed according to the avoidability of his lack of awareness of wrongfulness.[246] If his mistaken belief in the lawfulness of his conduct were avoidable, then the fact that he acted pursuant to a superior order could, at most, mitigate his punishment.[247] If, on the other hand, his mistake were unavoidable, then the superior orders defense might provide a substantive defense for his conduct.[248]

This Note proposes that the avoidability of a mistaken belief in the lawfulness of a subordinate's conduct would be best assessed based upon the three factors delineated by Claus Roxin, as previously discussed in Part II.A, *supra*.[249] First, for the mistake to have been avoidable, the court would be required to find that the subordinate had reason to investigate the lawfulness of the command based upon some indication of its illegality.[250] A subordinate would have reason to investigate if he had doubts, if he did not have doubts but realized that his conduct was governed by a certain set of rules, or if he knew that his conduct would cause damage to another person or community.[251] Second, a court would be required to find that the subordinate had not or had insufficiently investigated the wrongfulness of his conduct.[252] Finally, a court would be required to find that sufficient effort would have provided the subordinate with

---

244. *Cf. supra* note 108 and accompanying text. While the *Bundesgerichtshof* has taken the view that "[a] defendant in doubt has *Unrechtsbewußtsein*," *id.* at 35, this Note respectfully suggests that the question of whether a defendant has doubts more properly belongs exclusively in the analysis of the avoidability of his mistaken obedience. For a more thorough discussion of what might suffice to show knowledge of wrongfulness, see generally *supra* Part II.B.

245. *Cf. supra* note 105 and accompanying text.

246. *Cf. supra* note 106 and accompanying text. Comparing superior orders to mistakes of law, van Verseveld explains that "[b]oth in the cases of 'isolated' mistake of law and in cases of superior orders as a *specialis* of mistake of law the true issue is whether the defendant could have avoided making the mistake and whether he can, therefore, fairly be blamed for his committing the wrongful act." VAN VERSEVELD, *supra* note 24, at 95–96.

247. *Cf. supra* note 122 and accompanying text.

248. *Cf. id.*

249. The following three-part test is drawn directly from Claus Roxin's proposed approach for analyzing the avoidability of a mistake of law under Section 17 of the German Criminal Code. *See* VAN VERSEVELD, *supra* note 24, at 39 (citing ROXIN, *supra* note 115). *See generally supra* Part II.B (discussing Roxin's approach to avoidability).

250. *See supra* Part II.B.

251. *See id.* (discussing the conditions under which, pursuant to Roxin's approach to avoidability, an individual would have a reason to investigate the lawfulness of his conduct).

252. *See id.*

knowledge of the wrongfulness of his conduct.[253] In assessing all three factors, this Note suggests that a subjective approach to the defendant's course of conduct would best serve the interests of justice.[254] If a court found all three of the above factors satisfied—that the defendant had reason to investigate, that he did not adequately investigate, and that, if had he investigated with sufficient effort, he would have realized the wrongfulness of his conduct—then the defendant's obedience to superior orders was an avoidable mistake that could at most mitigate his punishment.[255] If any of the above factors were not met, however, and the defendant's conduct was the result of an unavoidable mistake, he might invoke the defense of superior orders.[256]

B. *Normative Implications*

Infusing Article 33(1)(c) with the *Schuldtheorie* doctrine's analytical process would remedy both criticisms of Article 33 discussed in Part IV, *supra*. First, if Article 33(1)(c) were applied under the *Schuldtheorie* framework, Article 33 would no longer run afoul of previously established customary international law.[257] Second, applying Article 33(1)(c) under the *Schuldtheorie* framework would provide a standard with the potential to produce desirable results, thereby addressing some of the criticisms of Article 33(1)(c)'s manifest illegality standard.[258]

Critics have argued that Article 33 departs from previously established customary international law because it provides for superior orders as a substantive defense and because it apparently permits application of the superior orders defense in cases of war

---

253. *See id.*

254. *See* Cryer, *supra* note 128, at 60–63. As discussed in Part IV.B, Cryer suggests that the manifest illegality of a command should not depend solely upon the command itself. *See id.* at 62 ("What is manifest should not depend only on the content of the order, but also, *inter alia*, on the length of time a person has to evaluate the order, their level of training, and their familiarity with the appraisal of orders."). As Cryer points out, such a subjective approach to manifest illegality may be preferable to an objective approach insofar as "[a] purely objective standard may . . . be too harsh on [subordinates] who, through due lack of training or mental capacity, simply could not have correctly evaluated the order as unlawful." *Id.*; *see also* VAN VERSEVELD, *supra* note 24, at 98 (recommending a solution that would allow for abandonment of the separate defense of superior orders, but noting that "[i]f . . . the defence of superior orders is upheld, Cryer's suggestion that the manifest illegality test in Article 33 could be interpreted as a subjective test, resembling the unavoidability or reasonableness test, should be supported").

255. *See supra* note 247 and accompanying text.

256. *See supra* note 248 and accompanying text.

257. For a discussion of the ways in which Article 33 may conflict with previously established customary international law, see *supra* Part IV.A.

258. For a discussion of the criticisms leveled against the "manifest illegality" requirement of Article 33(1)(c), see *supra* Part IV.B.

crimes.[259] A *Schuldtheorie* analysis would render Article 33 consistent with customary international law by excusing a subordinate's conduct not on the basis of superior orders but because a defendant who could not reasonably be expected to know that his actions were illegal acts without culpability in the first place.[260] Where a mistake of law is found to have been unavoidable, the defendant is not blameworthy and should not be punished.[261] Thus, under a *Schuldtheorie*-infused Article 33(1)(c), the rationale for exculpation would not be that a defendant's conduct was culpable of its own right but excusable because he acted under orders;[262] rather, the rationale would be that a defendant unable to ascertain the wrongfulness of his conduct was never culpable to begin with.[263] Were unavoidability of mistake of law inherent to acts in obedience to superior orders qualifying for the superior orders defense under Article 33, the apparent departure from customary international law would be explainable on an independent basis: the avoidability of the mistaken unlawful act.[264]

Critics have also argued that regardless of Article 33's position in respect to previously established customary international law, its manifest illegality standard is not practicable and leads to undesirable results.[265] These critics contend that Article 33(1)(c)'s manifest illegality standard allows invocation of the superior orders defense in cases in which, although the order was not manifestly unlawful, a reasonable subordinate should have known that it was unlawful.[266] As Professor Mark Osiel argues, in cases involving "close judgment calls to choose the best course of action," a command will rarely be found to have been manifestly unlawful.[267]

---

259. *See supra* Part IV.A (explaining that insofar as war crimes are not included in the list of crimes to which the defense is inapplicable, the defense may inappropriately be left available to defendants charged with war crimes).

260. *See* Wise, *supra* note 201 "([T]here is still no special defense: the real ground of exculpation is the broader one that someone who could not reasonably be expected to know that his conduct was illegal, or who could not reasonably be expected to have disobeyed an order, acts without culpability.").

261. *See id.*

262. *See id.*

263. *See id.* (suggesting that another "real ground of exculpation is the broader one that someone who could not reasonably be expected to know that his conduct was illegal, . . . acts without culpability").

264. *See id.* (explaining that unavoidable mistaken obedience to an unlawful command does not exculpate on the contentious basis of superior orders, but rather acknowledges that a subordinate with no opportunity to discover the illegality of a command is not culpable to begin with).

265. For a discussion of criticisms of Article 33(1)(c)'s manifest illegality requirement, see *supra* Part IV.B.

266. *See* Osiel, *supra* note 127, at 971.

267. *See id.* ("In cases depending on close judgment calls to choose the best course of action, very few mistakes will rise to the level of manifest illegality.").

Application of the *Schuldtheorie* framework to Article 33(1)(c) would address this latter set of criticisms by encouraging reasonable situational judgment by subordinates. As it stands, Article 33(1)(c)'s manifest illegality requirement appears to render the defense available to any judgment call made by a subordinate who assesses the commands of his superior, no matter how unreasonable the subordinate's resulting judgment might be.[268] So long as a judgment call was made, the order will likely be found to have been of questionable legality, rendering the order outside the realm of manifest illegality and granting the defendant access to the superior orders defense.[269] Applying Article 33(1)(c) under the *Schuldtheorie* framework would remedy this tacit approval of unreasonable situational judgment. Under the *Schuldtheorie* framework, in the context of commands eliciting the exercise of situational judgment on the part of subordinates, the defense of superior orders would only be available to defendants who made reasonable judgment calls.[270] The rationale for the avoidability prong of German mistake of law doctrine rests upon a desire to promote reflection upon legal duties.[271] The question would thus be whether the judgment call made by the subordinate was reasonable, not simply whether a judgment call was made in the first place. Under this approach, a subordinate exercising situational judgment and arriving at an unreasonable conclusion cannot be said to have made an "unavoidable" mistake of law. Only a subordinate who considers the command and circumstances at hand and reasonably, though mistakenly, concludes that the command is a

---

268. *See id.* ("A decision . . . might prove mistaken, even unreasonably so, given what was known or should have been known about the situation. Though such a mistake could easily produce unlawful consequences, this type of mistake would rarely be classified as *manifestly* illegal, unless the degree of unnecessary overkill was both very great and readily foreseeable in advance.").

269. *See id.*

270. *See supra* Part V.A (describing the three-prong approach to the *Schuldtheorie* mistake of law suggested by Roxin and proposing extension of this approach to the defense of superior orders). This Note proposes that a defendant reaching an unreasonable conclusion in exercising his situational judgment would fail the second and third prongs of the analysis, thereby rendering their mistake avoidable and, by extension, eliminating their access to the superior orders defense).

271. *See* VAN VERSEVELD, *supra* note 24, at 37–38 (quoting JESCHECK & WEIGEND, *supra* note 100). The English translation provides:

> A citizen must be led by the desire to act according to the law, the legal order requires him every time to make an effort to ascertain whether he acts accordingly. This is why, even in cases where the defendant in good faith (subjectively) believes in the lawfulness of his behavior, he is still blameworthy, when he did not make a reasonable effort to determine the legal implications of his behavior.

Id.

lawful order, can be said to have made an "unavoidable" mistake of law.[272]

By turning the inquiry to one of reasonable avoidability, rather than manifest illegality as understood today, a *Schuldtheorie* approach to Article 33(1)(c) would narrow availability of the superior orders defense by requiring subordinates to investigate their doubts to the extent feasible.[273] The *Schuldtheorie* approach would then tailor the consequences of obedience—mitigation or defense—accordingly.[274] Finally, application of the *Schuldtheorie* analysis would address vagueness concerns by providing a three-part inquiry to be applied by courts assessing the applicability of the defense.[275]

VI. CONCLUSION

The 1952 decision of the *Bundesgerichtshof* endorsing the *Schuldtheorie* mistake of law doctrine has been described as "the perfection of the principle of guilt as an indispensable requirement for criminal responsibility."[276] Article 33(1)(c) of the Rome Statute, if read under the *Schuldtheorie* framework, would provide relief for defendants on a narrow and independent basis.[277] Pursuant to the *Schuldtheorie,* a defendant could plead superior orders as a substantive defense only if he was not conscious of the unlawfulness of the obeyed command, if and only if his mistaken belief that the order was lawful was unavoidable. Thus, the *Schuldtheorie* framework, as applied to Article 33(1)(c) of the Rome Statute, would not extend the availability of the superior orders defense but rather narrow its application.[278] While the "paucity of litigation"[279] of the superior orders defense at the international level leaves the practical effect of such an analytical shift open to question, this Note proposes that such an approach would render Article 33(1)(c) more consistent

---

272. *See supra* Part V.A (describing Roxin's approach to culpability under the *Schuldtheorie* mistake of law framework and the functional implications of its application in the context of superior orders).

273. *See supra* Part II.B (introducing the German approach to the role of doubts in the context of a claimed mistake of law excuse).

274. *See supra* Part V.A (outlining available results under the proposed framework).

275. *See* Osiel, *supra* note 127, at 969–75 (arguing that the term "manifest illegality" has proven vague and providing reasons for its continued imprecision).

276. VAN VERSEVELD, *supra* note 24, at 26–27 (footnote omitted).

277. *Cf.* Wise, *supra* note 201.

278. *See supra* note 273 and accompanying text.

279. *See* Osiel, *supra* note 127, at 969–70 (recognizing that, due to the minimal litigation in this area, the applicable legal standards remain uncertain).

with previously established customary international law and produce desirable results by encouraging reasonable, context-specific investigation into the legality of commands.

Lydia Ansermet[*]

* Candidate for Doctor of Jurisprudence 2015, Vanderbilt University Law School. B.A., Criminology and Criminal Justice 2012, Southern Illinois University. I would like to thank Alexandra Spartz for her assistance in translating German sources, as well as Emily Rickard, Katherine West, David Roberts, Leland Frost, Alandis Brassel, Caraline Rickard, and the entire staff of the *Vanderbilt Journal of Transnational Law* for their dedication and support.

***