GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

VOLUME 41 2012 NUMBER 1

ARTICLES

THE SUPERIOR ORDERS DEFENSE: A PRINCIPAL-AGENT ANALYSIS

Ziv Bohrer[*]

TABLE OF CONTENTS

I. INTRODUCTION 3

II. THE CORE PREMISE OF THE CURRENT SUPERIOR ORDERS DEFENSE DISCOURSE 7
A. The Balancing Test 7
B. The State of Applied Law 13
1. International Law 14
2. American Military Law 17

III. AGENCY ANALYSIS OF OBEDIENCE TO ORDERS 19
A. Use of Agency Models 19
B. Agency Model of Obedience to Orders 20
C. Command Responsibility Rule 23

[*] Research Fellow, Sacher Institute, Hebrew University Faculty of Law (2012–2013); Visiting Research Scholar, University of Michigan Law School (2011–2012). The ideas in this Article were developed as part of my doctoral thesis, *see* Ziv Bohrer, The Superior Orders Defense in Domestic and International Law—A Doctrinal and Theoretical Revision (June 21, 2012) (unpublished Ph.D. dissertation, Tel Aviv University) (on file with author). I am extremely grateful to Eyal Benvenisti (my doctoral thesis supervisor) and to Re'em Segev (who served as an additional academic instructor) whose support, guidance, comments, and encouragement made all the difference. I wish to thank Steven R. Ratner for his readiness to read and comment on an earlier draft of this Article. I am deeply indebted to Ro'i Zultan who taught me much of what I know with regard to agency analyses, as well as to Ifat Gavish-Abramovich and Matan Gavish who also helped me learn this subject matter. I am also very grateful to Lena Bohrer and Vivian Chang for their dedicated help and comments, as well as to Michele Manspeizer and Nicki Weinberg. Lastly, I wish to thank the Fulbright Foundation for its support.

D. Agency Analysis of the Five Commonly Endorsed Approaches 26
1. Equal Liability, Respondeat Superior, and Reduced Sentence Approaches 26
2. Agency Analysis of Conditional Liability Approaches 31

IV. ANY ONE-RULE-FITS-ALL POLICY IS INAPPROPRIATE: FURTHER INDICATIONS 34
A. Agency Analysis, Excusatory Considerations, and Conditional Liability Approaches 34
1. Mistake of Law and the Factual Approach 35
2. Psychological Coercion and the Normative Approach 38
B. Applying the Agency Analysis to the International Arena 40
C. Effects of Discretion in a Subordinate's Determination of Legality 42

V. SOLUTION—A MODULAR POLICY 45
A. Choosing a Fragmentation Level 45
1. Case-by-Case Regulation is Inappropriate 46
2. Choosing the Proper Level of Specification 50
B. Criminal Orders in Non-Emergency Situations 53
C. Other Illegal Orders 55
D. Orders Given in Emergency Situations 56
E. Protecting Civilians from Harm 63
1. Rules Applicable in All Emergency Actions 63
2. Use of Force in Emergencies Other Than Armed Conflicts 65
3. Use of Force in Armed Conflicts 67

VI. CONCLUSION 73

I. INTRODUCTION

Imagine that Jane is a soldier who just received an order to abuse prisoners, as in the case of Abu Ghraib, Iraq;[1] to kill innocent civilian villagers, as in the case of My Lai, Vietnam;[2] or to participate in the persecution and extermination of an ethnic group, as in the case of the Holocaust.[3] While we can argue over the specific details of the law that should govern the extent to which soldiers have a duty to obey their commanders' orders, can anyone argue that the law should *instruct* a soldier like Jane to obey orders in any of those three situations? Can anyone truly argue that a soldier like Jane should *not* be expected to know that such orders are illegal? Furthermore, let us assume that Jane obeys the order, she is put on trial, and she raises the superior orders defense; a criminal law defense that allows a subordinate to avoid culpability for an illegal act committed under orders. Setting aside the question of if and when subordinates should be allowed to raise this defense, does anybody truly think a soldier like Jane should be sheltered from punishment by claiming obedience to orders?

Let us now consider the case of another soldier, Sue, who is a supply sergeant. Her commander gives her an order to supply certain ammunitions to a battalion in the field. Sue has doubts as to whether the ammunitions she is instructed to supply in massive quantities are legal according to the law of war, but she has no time to clarify the issue.[4] If Sue is right, and the order is

---

[1] *E.g.*, United States v. Smith, 68 M.J. 316, 318 (C.A.A.F. 2010) (describing an order to use unmuzzled military working dogs as a scare tactic during interrogations).

[2] *E.g.*, United States v. Calley, 22 U.S.C.M.A. 534, 538 (C.M.A. 1973) (describing an order "to kill every living thing — men, women, children . . . and under no circumstances . . . leave any Vietnamese behind").

[3] *E.g.*, UNITED NATIONS WAR CRIMES COMM'N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF LAWS OF WAR 287 (1948) (noting that most defendants before the International Military Tribunal at Nuremberg pleaded not guilty on grounds of superior orders).

[4] Such a situation can occur not only due to a "simple" case of legal ignorance or a commander's malice, but confusion may be caused by an array of other reasons such as: (1) There are several weapons that are clearly permitted during law enforcement activities and are clearly forbidden during combat, such as tear gas and expanding bullets. Armed forces, however, often engage in both kinds of activities. 1 JEAN-MARIE HENCKAERTS & LOUIS DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 265, 270 (2005). Thus, a soldier might be confused as to when and where certain ammunitions can be used. (2) Many of the International Humanitarian Law (IHL) rules dealing with means of warfare are extremely technical and without any governing rationale, which may lead to confusion. For example, international law prohibits the manufacturing of booby-traps that look like harmless portable objects (e.g., making a bomb that looks like a camera) but allows attaching booby-traps to existing harmless portable objects (e.g., attaching a bomb to a camera). Protocol on Prohibitions or Restrictions on the Use of Mines, Bobby-Traps and other Devices (Protocol II) (As Amended on May 3, 1996), art. 6, Oct. 10, 1980, 1342 U.N.T.S. 137, *entered into force* Dec. 3, 1998; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF

illegal, then obeying it will enable the commission of a war crime on a massive scale. If Sue is wrong, and the order is legal, a legitimate military attack might fail due to her mistaken refusal to supply the ammunitions. When should Sue be punished for such obedience, if the order turns out to be in violation of the law of war?

Lastly, consider a third case dealing with domestic law. Jill is an airplane mechanic in the Air Force. Her commander gives her the order to do a quick fix on an airplane engine. Jill vaguely recalls that Air Force regulations forbid the kind of procedure she has been instructed to perform for safety reasons, but she has no time to check the governing regulations. If Jill is right that the order is illegal and obeys it anyway, the airplane might crash and soldiers might die. If Jill is wrong and disobeys the order that is legal and safe, an important military operation will be unnecessarily delayed. When should domestic law obligate Jill to obey? Moreover, if Jill was correct in suspecting the order to be illegal and yet decided to obey because she was unsure of her assessment, should she be allowed to raise the superior orders defense if she is later prosecuted?

When we think of the superior orders defense, we usually think of cases like Jane's. But, we should also have in mind cases like Sue's and Jill's, as well as many others where the illegality and immorality of an order is less apparent. Moreover, in this Article I will argue that by paying more attention to cases like Sue's and Jill's, we can actually create a law that reduces the likelihood of soldiers obeying orders in cases like Jane's.

How do we want illegal acts committed under military orders, known as crimes of obedience, to be regulated by the law? Jurists are in wild disagreement on this subject and have only been able to agree that the issue should be regulated by a "one-rule-fits-all policy" (i.e., the same legal rule should be applied regardless of the subordinate's rank or the kind of military activity in which the order is given).[5] Moreover, this dispute is not only an

---

INTERNATIONAL ARMED CONFLICT 65 (2004).

[5] It is commonly agreed in current legal discourse that there are three main approaches dealing with obedience to illegal orders. The first approach is the "absolute liability" approach. According to this approach, a military order can never serve as a basis for a criminal law defense. The second approach is the "absolute defense" approach. According to this approach, a military order is always a basis for a criminal law defense. The third approach is the "conditional liability" approach. According to this approach, military orders serve as a basis for a criminal law defense as long they are not manifestly unlawful. *E.g.*, Abdul Ghafur Hamid, *The Defence of Superior Orders, Manifest Illegality Principle and the Statute of the International Criminal Court*, *in* THE THEORY AND PRACTICE OF INTERNATIONAL LAW: RESPONSES TO A VARIETY OF INTERNATIONAL LEGAL ISSUES 1, 5–7 (Abdul Ghafur Hamid ed., 2009); Massimo Scaliotti, *Defences Before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility—Part 1*, 1 INT'L CRIM. L. REV. 111, 127–28 (2001). Notice that each of these three approaches attempt to regulate the issue through the use of a "one-rule-fits-all policy." This description of the three approaches is

academic one; in many legal systems, including international law, judges differ in their interpretation of the relevant law on the books, causing uncertainty and inconsistency in the applied law.[6]

This failure to agree upon a regulating norm is not due to a lack of effort. Combatants are the perpetrators of the vast majority of war crimes,[7] and they often perform such crimes under orders.[8] Thus, the superior orders defense issue "has long been a critical issue in international criminal law."[9] The law pertaining to obedience of orders is also a core issue for any domestic system of military criminal law, since obedience to orders is the "cardinal virtue"[10]

---

somewhat inaccurate, since jurists vary in the ways they interpret each of the approaches. Yet, these different interpretations do not attempt to change the one-rule-fits-all characteristic of the approaches. As such, this common (though somewhat inaccurate) "three approaches description" still helps to demonstrate the extensive consensus that currently exists regarding the need for a "one-rule-fits-all policy." Currently, the option of adopting an approach that does not regulate the issue in such a manner is raised only rarely. *See, e.g.*, DAVID ORMEROD, SMITH AND HOGAN CRIMINAL LAW 357–58 (12th ed. 2008) (debating the possible English adoption of a conditional liability approach when illegal orders are given during combative actions and an absolute liability approach when illegal orders are given in non-combat situations). Due to the varying interpretations of these three approaches, for the purpose of accuracy in this Article, instead of referring to a single conditional liability approach, I shall distinguish between two different conditional liability approaches. And, instead of referring to a single absolute liability approach, I shall distinguish between a reduced sentence approach and an equal liability approach. *See infra* Part II.*A*. Elsewhere, I have presented an even more extensive survey of the different approaches that exist (i.e., the different interpretations of the three approaches stated above). Ziv Bohrer, The Superior Orders Defense in Domestic and International Law—A Doctrinal and Theoretical Revision 9–16 (June 21, 2012) (unpublished Ph.D. dissertation, Tel Aviv University) (on file with author). Within the limits of this Article, I focus on examining the five main approaches of current legal discourse. Since the analysis in this Article shows that the application of *any* one-rule-fits-all policy is inappropriate, it also disproves the other approaches, even though they are not explicitly examined.

[6] *See infra* Part II.*B*.

[7] Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond*, 5 J. INT'L CRIM. JUST. 638, 639 (2007) (identifying combatants as the primary perpetrators of war crimes).

[8] Aziz Mohammed, Military Culture, War Crimes, and the Defence of Superior Orders, 5–7 (Aug. 30, 2008) (Doctoral Thesis in Legal Science, Bond Univ.), *available at* http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1071&context-theses.

> In armed conflicts, too often there are gross violations of international humanitarian law, and atrocities are committed against civilians and members of the armed forces alike. . . . One of the most distinctive features about this unimaginable loss of lives is that most deaths have occurred as a result of atrocities committed under the disguise of obedience to superior orders.

Id.

[9] Hiromi Sato, *The Defense of Superior Orders in International Law: Some Implications for the Codification of International Criminal Law*, 9 INT'L CRIM. L. REV. 117, 117 (2009) ("The defense of obedience to superior orders has long been a critical issue in international criminal law. . . . However, till date, there has been much debate on the legal consequences of the above mentioned defense.").

[10] MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF

of the military profession and the "backbone" of any armed force.[11] Despite this issue being central for both domestic and international law, it has yet to be resolved.[12] Moreover, in the past decade, this issue has even experienced a surge of legal interest. This is in part due to the United States' and other countries' prolonged involvement in Iraq and Afghanistan,[13] as well as the ratification by many states of the Rome Statute of the International Criminal Court (ICC), which includes a superior orders defense.[14] Sadly, this increased discussion has neither resolved the scholarly dispute, nor has it reduced uncertainty and inconsistency in the application of the law.[15]

Thus, this Article re-examines the issue from a new perspective that originates from the field of microeconomics; principal-agent analysis. This analysis demonstrates that the core premise of current legal discourse—regulation through a one-rule-fits-all policy—is flawed. Furthermore, the principal-agent analysis' concussions help to formulate, in this Article, a model for a new legal policy; one that can better regulate the issue of obedience to illegal orders.

The Article proceeds in the following manner: Part II discusses the current approaches to crimes of obedience, all of which are one-rule-fits-all policies. The actual harm caused by the current inability to agree on a policy is also discussed, as are the reasons for the legal community's inability to come to a consensus. Part III offers a new way to assess the public aims relevant to regulating crimes of obedience, by applying a principal-agent analysis. This analysis shows how each of the currently suggested policies influences subordinates' and commanders' behavior. It further uncovers the lawmaker's gains and harms under each policy. Doing so enables one to compare the different policies—with regard to the extent each is beneficial to the lawmaker. The analysis shows that none of the currently adopted policies should be applied in all scenarios (i.e., in different situations, a different policy will be the one most beneficial to the lawmaker). Part IV discusses three additional matters that strengthen the conclusion that

---

WAR 1 (1999).

[11] Mohammed, *supra* note 8, at 7.

[12] *See supra* notes 5–9 and accompanying text; *see also* Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 1944 BRIT. Y.B. INT'L L. 58, 70 ("The problem raised by the plea of superior orders is, by general admission, one of great complexity both in international and in municipal law."); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 590 (2011) (reaffirming Lauterpacht's observation).

[13] *See, e.g.*, Sunita Patel, *Superior Orders and Detainee Abuse in Iraq*, 2008 N.Z.Y.B. INT'L L. 91 (stating that "[t]he recent . . . cases in Iraq have thrown into sharp relief some of the uncertainties surrounding the defence" since the mid-twentieth century).

[14] Rome Statute of the International Criminal Court, art. 33, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[15] *See supra* notes 5–9 and accompanying text.

obedience to illegal orders should not be regulated through a one-rule-fits-all legal policy. First, it shows that even if the superior orders defense is viewed as an excuse defense, it does not follow that regulation of obedience to illegal orders should be done through a blanket application of one legal norm. Second, it argues that, despite differences between international law and domestic law, regulation of obedience to illegal orders through a one-rule-fits-all legal policy is inappropriate in both contexts. Third, it points to an element largely ignored in the current legal discourse—the fact that not all laws subject to infringement by a military order are cut from the same cloth. This variety, it is argued, serves as a further indication that crimes of obedience should not be regulated through the application of a single policy across the board. Part V suggests an alternative to current attempts to regulate through a uniform policy. It proposes that different policies should be applied in different circumstances, such that the policies are tailored to accommodate the varied situations in which military orders are given. More specifically, based upon the analysis' conclusions, the main norms of such a modular policy are formulated herein for use in international as well as domestic law. These norms are designed with the idea that the law should account for: (1) the rank of the subordinate soldier, and (2) whether the order was given during an emergency situation.

II. THE CORE PREMISE OF THE CURRENT SUPERIOR ORDERS DEFENSE DISCOURSE

A. The Balancing Test

Maintaining a military is a necessity for states, as most would be unable to protect either the instruments of government or the citizenry without one.[16] A military cannot function efficiently if decisions are made only after prolonged discussion between soldiers of different ranks. Thus, subordinates are expected to comply with their superiors' orders.[17] At the same time, we

---

[16] PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 4 (2003).

[17] Jeffrey F. Addicott, *The Lessons of My Lai*, 31 MIL. L. & L. WAR REV. 73, 88 (1992). Moreover, as the court, in the classic case of *McCall v. McDowell*, stated:

> The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867) (No. 8673); *see also* 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 210 (1984). Robinson argues against extending a superior orders

do not wish the military to use its force in a wrongful manner. Accordingly, the law limits the powers of the military by deeming certain actions illegal.[18] Therefore, when determining the extent to which soldiers should be encouraged to obey military orders, we should take into account both the benefits of such obedience, as well as the harm that might result if such encouragement leads soldiers to help their commanders commit illegal acts.[19] It is important to make this assessment with the understanding that a soldier's knowledge of the law is usually imperfect.[20] Thus, the more strongly they are encouraged to disobey illegal orders, the more likely it is they will mistakenly disobey some legal orders as well.

Moreover, one should acknowledge that asking a soldier to review the legality of her commander's orders places her in an extremely difficult position, given time constraints, the authority the commander has over her, and the soldier's imperfect knowledge of the law.[21] Given these factors, if a soldier commits an illegal act under orders, we should take into account, not only the social harms and benefits resulting from the soldier's action, but also the *excusatory* considerations that might arise in such a situation.[22]

How should these considerations be translated into a legal norm? Almost all jurists believe that this issue should be regulated through a one-rule-fits-all policy.[23] Moreover, there is consensus that such a rule should result from balancing the rule of law against interests of military discipline and the different excusatory considerations just stated.[24] For example, in the leading

---

defense to subordinates of governmental agencies other than the military because "[t]he special social interest in an effective military force, requiring strict discipline and nearly unquestioned obedience to orders, is not always applicable to general public service." *Id.* He further states that compared to the military a greater "measure of independent judgment and personal reflection" should be encouraged in other governmental agencies. *Id.*

[18] FEAVER, *supra* note 16, at 4, 93.

[19] State v. Sparks, 27 Tex. 627, 632–33 (1864).

[20] Matthew R. Lippman, *Humanitarian Law: The Development and Scope of the Superior Orders Defense*, 20 PENN. ST. INT'L L. REV. 153, 248 (2001); Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939, 961 (1998).

[21] Patrick White, *Defence of Obedience to Superior Orders Reconsidered*, 79 AUSTL. L.J. 50, 56 (2005).

[22] Excusatory considerations can be defined as considerations that do not affect the negative characteristics of the act, but support the conclusion that, due to the conditions under which the person committed the act, the person should be viewed as less culpable or even not culpable at all. *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 203, 225, 240 (1982) (describing the circumstances that could exculpate an actor when they conduct an otherwise criminal act).

[23] *See supra* note 5.

[24] For only a few examples out of the many articles that explicitly use the balancing procedure, see, e.g., John H.E. Fried, *Book Review*, 61 AM. J. INT'L L. 1088, 1089 (1967) (reviewing YORAM DINSTEIN, THE DEFENCE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW (1965)); Robert Cryer, *Superior Orders and the International Criminal Court*, *in* INTERNATIONAL CONFLICT AND SECURITY LAW 49, 55 (Richard Burchill et al. eds.,

American case on the subject,[25] Judge Duncan supported a particular rule by stating:

> [It] properly balances punishment for the obedience of an obviously illegal order against protection to an accused for following his elementary duty of obeying his superiors. Such a test reinforces the need for obedience as an essential element of military discipline by broadly protecting the soldier who has been effectively trained to look to his superiors for direction. It also promotes fairness by permitting the military jury to consider the particular accused's intelligence, grade, training, and other elements directly related to the issue of whether he should have known an order was illegal.[26]

Moreover this "balancing procedure" is used not only in the context of domestic law, but also in the context of the international law on the subject.[27] For example, Matthew Lippman has presented the issue in the following manner:

> The superior orders defense presents the perennial and persistent problem of legal regulation over the military management of armed conflict. Military organizations require the expeditious and unquestioning implementation of policy directives and subordinates are trained to conform and to comply with superior orders. On the other hand, there are permissible parameters on the pursuit of warfare. The implementation of commands which contravene these constraints poses a threat to innocents and may spark a spiral of savagery. Legally limiting the obligation of subordinates to adhere to superior orders, however, places combatants in the precarious position of being compelled to choose between patriotism and possible international criminal culpability. This also assumes that the law of war is sufficiently clear and

---

2005); Jordan J. Paust, *Superior Orders and Command Responsibility*, *in* 1 INTERNATIONAL CRIMINAL LAW 223, 225 (M.C. Bassiouni ed., 2d ed. 1999); 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, 596 (2011). It should be noted that, sometimes, the balancing procedure is only implicitly referenced; jurists state the public aims they claim should be taken into account and then argue one or another approach properly takes into account these aims.

[25] United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973) (deciding a case arising out of the massacre at My Lai).

[26] *Id.* at 32 (Duncan, J., concurring).

[27] *See, e.g.*, sources cited *supra* note 24.

> concise to be comprehended by both high-echelon and lower-ranking combatants functioning within the fast-moving field of combat. High-ranking officers and commanders undoubtedly are better positioned than subordinate soldiers to adjudge the legality of orders by reason of education, experience, expertise, information and perspective. The jurisprudence of the superior orders defense is an exercise in balancing these competing considerations.[28]

However, what is the *content* of this one-rule-fits-all policy? Interestingly, jurists reach very different conclusions regarding the rule that achieves the proper balance of the considerations stated above. Currently, five approaches are generally recognized.

In order to illustrate the varying implications of these approaches, I shall apply each of them to a single case, showing how the fate of a soldier changes considerably depending on the approach applied. The case analyzed is one where a subordinate soldier is given an order from her commander to commit the war crime of fighting while wearing enemy uniforms.[29] Let us now apply the different policy approaches to this case.

The first approach, the "equal liability approach," punishes both commander and subordinate equally; whether a subordinate was obeying an order is irrelevant.[30] Accordingly, in the enemy uniforms case, both the commander and the subordinate would be equally punished.

The second approach, the "reduced sentence approach," considers the commission of a crime under orders as a mitigating, but not exonerating, factor.[31] If this approach is applied to the enemy uniforms case the soldier will be convicted, but the fact that it was a crime of obedience could mitigate her punishment.

---

[28] Lippman, *supra* note 20, at 248.

[29] *See, e.g.*, Trial of Otto Skorzeny and Others, War Crime Comm'n, 9 U.N. Law Reports of Trials of War Criminals 90, 93 (1947) (General Military Government Court of the U.S. Zone of Germany) (trying ten German soldiers for obeying an order to wear American uniforms). Currently, Article 8(2)(b)(vii) of the Rome Statute of the International Criminal Court forbids "[m]aking improper use . . . of the military insignia and uniform of the enemy[,] . . . resulting in death or serious personal injury." Rome Statute, *supra* note 14, art. 8(2)(vii).

[30] *See, e.g.*, *In re* Greiser, 13 Ann. Dig. 387, 390–91 (Supreme National Tribunal of Poland 1946) (applying the equal liability approach in international law context); United States v. Carr, 25 F. Cas. 306, 308 (C.C.S.D. Ga. 1872) (No. 14,732) (applying the equal liability approach in domestic law).

[31] *See, e.g.*, A. v. Hayden (1984) 156 CLR 532, 550 (Austl.); LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 55 (1992) (citing *Formulation of the Nuremberg Principles*, art. 8, [1950] 2 Y.B. INT'L L. COMM'N 181, U.N. Doc. A/CN.4/22). The reduced sentence and the equal liability approaches are usually not distinguished, and instead are often referred to jointly as the "absolute liability" approach.

The third and fourth approaches both fall within the category of "conditional liability approaches."[32] Under a conditional liability approach, a superior orders defense should be afforded to a subordinate only under limited circumstances, which are usually identified according to the "manifest illegality test."[33] According to this test, "[a] person is not criminally liable who performs an action commanded by a lawful authority, unless the action is manifestly unlawful."[34] However, this test is extremely vague, and differences in the interpretation of this test lead to the different conditional liability approaches.[35]

The first conditional liability approach, the "normative approach," calls for the acquittal of a soldier committing a crime of obedience if the illegal act was not grossly immoral.[36] Thus, this approach places a high value on maintaining military discipline, as a soldier is only under a duty to disobey if an order is both illegal *and* grossly immoral.[37] Under this approach, the subordinate in the enemy uniforms case would probably be acquitted since an order to wear such uniforms, albeit illegal, is not grossly immoral.[38]

---

[32] This division is based on Enker's division in *Superior Orders Defense—A Symposium Summary*, 20 MISHPATIM 591, 598 (1991) (Heb.).

[33] 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, 176 n.7 (1999).

[34] *See, e.g.*, CODE PÉNAL [C. PÉN.] arts. 122–124 (Fr.), *translated in* John R. Spencer, *Criminal Code of the French Republic* (2005), http://legislationline.org/documents/section/criminal-codes (demonstrating the manifest illegality test as codified in the French penal code).

[35] *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 136 (2001) (discussing the fact that this test has been interpreted in a number of ways).

[36] *See, e.g.*, Mil. Appeal 279-283/58 Military Court of Appeals, Ofer v. Chief Military Prosecutor, 44 PE 362 (Isr.) *translated in Kafr Qassem: A Civilian Massacre*, 2 PAL. Y.B. INT'L L. 69, 108 (1985) [hereinafter Ofer Military Appeal] (discussing a conditional liability approach); *see also* Montana v. Christopher, 345 F. Supp. 60, 61 (1972) (applying a normative approach without referring to the manifest illegality test). For a discussion of the support for this approach in international law, see OSIEL, *supra* note 10, at 71–90.

[37] *See, e.g.*, OFFICE OF J. ADVOCATE GEN., U.S. WAR DEP'T, A MANUAL FOR COURTS-MARTIAL 355 (1920), *available at* http://www.babel.hathitrust.org (stating that for a soldier to disobey an order of his superior, "the order must be one requiring something to be done which is palpably a breach of law and a crime . . . or is of a serious character"); *see also* Ziv Bohrer, *Clear and Obvious? A Critical Examination of the Superior Order Defense in Israeli Case Law*, 2 ISR. DEF. FORCES L. REV. 197, 221–22 (2005–2006) (stating that, under the normative approach, a soldier can refuse to obey an order only if it is both illegal and grossly immoral).

[38] *See, e.g.*, 1 HENCKAERTS & DOSWALD-BECK, *supra* note 4, at 214–15 ("Some practice was found that considers the wearing of enemy uniforms as perfidious. This does not square entirely, however, with the definition of perfidy inasmuch as enemy uniforms are not entitled to specific protection under humanitarian law, even though the wearing of such uniforms may invite the confidence of the enemy . . . . Other practice considers it a violation of the principle of good faith."). For examples of illegal orders that most would agree are grossly immoral see cases cited *supra* notes 1–3.

According to the second conditional liability approach, the "factual approach," soldiers have a duty to obey only *legal* orders. Thus, if a soldier obeyed an order when she knew it was illegal, she cannot later raise the superior orders defense. However, an obedient soldier may be acquitted if she was reasonably mistaken the order was legal.[39] According to this approach, if the soldier in the enemy uniforms case knew the order was illegal, she would be convicted. Even if she did not know, she might still be convicted if a court rules that a reasonable soldier should have known such an order was illegal.

The fifth approach, the "respondeat superior approach," places the subordinate under an absolute duty to obey *all orders*, both legal and illegal. When a crime of obedience has been committed, the subordinate *always* benefits from the superior orders defense, whereas the commander is held responsible.[40] As such, the soldier in the enemy uniforms case would be acquitted. The respondeat superior approach lost support following WWII[41] and thus, it is almost never endorsed.[42]

---

[39] Hamid, *supra* note 5, at 5–6; JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, R.C.M. 916(d) (2008) [hereinafter 2008 MANUAL FOR COURTS-MARTIAL], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2008.pdf.

[40] *See, e.g.*, Quincy Wright, *The Outlawry of War*, 19 AM. J. INT'L L. 76, 79 (1925) ("Efforts to hold individuals liable before an international tribunal for such acts when committed under orders . . . would be destructive of discipline."); Clyde Eagleton, Editorial Comment, *Punishment of War Criminals by the United Nations*, 37 AM. J. INT'L L. 495, 497 (1943) ("It is suggested also that the principle *respondeat superior* be in general accepted. . . . [I]t is repugnant to the average person to think of punishing a soldier who, in the first place, would be ignorant of the legality or illegality of his act and, in the second place, would be shot immediately if he refused to obey the order to perform the illegal act.").

[41] *See* Gary B. Solis, *Obedience of Orders and the Law of War: Judicial Application in American Forums*, 15 AM. U. INT'L L. REV. 481, 483–84 (2003) (stating that World War II and Nuremberg "materially altered the legal position of the soldier who pleaded obedience to superior order in defense of his war crimes" and that "society as modernly organized cannot tolerate so broad an arch of official irresponsibility" as the one afforded under the respondeat superior approach).

[42] As stated above, in current legal discourse it is commonly stated that there are only three main approaches dealing with obedience to illegal orders: "absolute liability," "absolute defense," and "conditional liability." *See supra* note 5. Such a description ignores the verity of ways in which the term "manifestly unlawful" is interpreted and thus inaccurately assumes that only a single conditional liability approach exists. This description also conflates the equal liability and reduced sentence approaches–viewing them as a single "absolute liability" approach. It does so by focusing on a main attribute these approaches share in common–the complete rejection of a superior orders defense–and by ignoring the difference that exists between these two approaches with regard to issue of sentencing. As for my use of the term "respondeat superior approach" and not "absolute defense approach": currently, when the three-approaches description is used, these two terms are usually viewed as interchangeable. Yet, in the past, another approach was advanced that, currently, when the past sources supportive of it are not ignored, they are usually conflated with the past sources supportive of the "respondeat superior approach." This past approach is the "Act of State" approach. Due to the current common disregard to this approach, I chose, within the limits of this Article, not

The diversity of outcomes that results from the application of each of these approaches indicates that the use of a balancing procedure is flawed. Otherwise a consensus as to which approach achieves the most appropriate balance should have been developed. This lack of consensus is a common result when jurists attempt to formulate legal policy by balancing *abstract* public interests.[43] For example, everyone can agree that maintaining military discipline is an aim that should be taken into consideration when determining whether a superior orders defense is appropriate. However, what sort of discipline do we envision when we say this, and how much weight should it be given? Is military discipline undermined only when a legal order is disobeyed, as supporters of the equal liability approach[44] and the reduced sentence approach[45] argue? Or is it undermined in all cases in which a soldier disobeys an order, even an illegal one, as supporters of the respondeat superior approach[46] and many supporters of the conditional liability approaches[47] argue?

B. The State of Applied Law

The state of current applied law (*lex lata*)[48] serves as an additional indication that applying either an abstract balancing procedure or a one-rule-fits-all policy is flawed. Although jurists in many legal systems claim *lex lata* is consistently applied, it is often the case that different jurists within the same legal system disagree on what legal rule is applied.[49] This situation

---

to examine it, nor to discuss the differences between it and the respondeat superior approach.

[43] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 975 (1987) (noting decisions that reach conflicting conclusions when attempting to "strike the unstrikeable balance").

[44] *E.g.*, *In re* Greiser, 13 Ann. Dig. 387, 390–91 (Supreme National Tribunal of Poland 1946).

[45] *E.g.*, Shlomit Wallerstein, *Why English Law Should Not Incorporate the Defence of Superior Orders*, 2010 CRIM. L. REV. 109, 114, 120 (explaining that soldiers only have a duty to obey lawful orders and cannot assume that the duty to obey superiors overrides the law).

[46] *E.g.*, Wright, *supra* note 40 (arguing that holding an individual liable for acts committed under orders is "destructive of discipline").

[47] *E.g.*, sources cited *supra* note 17.

[48] A common distinction in legal analysis is between the law as it is (*lex lata*) and the law as it should be (*lex ferenda*). WALTER JOHN RAYMOND, DICTIONARY OF POLITICS 281 (7th ed. 1992). Another important distinction is between *lex lata* as it is declared to be by lawmakers and courts (and to some extent also by legal scholars), which is commonly referred to as "law in books," and *lex lata* as it actually is, which is commonly referred to as "law in action." Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910). The current section presents different legal sources that declare what *lex lata* is in order to show that the law in action (i.e., the actual *lex lata*) is uncertain and inconsistent.

[49] *Compare, e.g.*, JONATHAN HERRING, CRIMINAL LAW – TEXTS, CASES, AND MATERIALS 706 (2006) ("Superior orders has never been recognized as a defence in English and Welsh law."), *with* Koji Kudo, Command Responsibility and the Defence of Superior Orders 40 (Oct.

both indicates that the applied law is in fact inconsistent and uncertain, and that the current way in which the issue of obedience to orders is dealt with only aggravates this uncertainty.[50]

Given that even jurists disagree on what the law is, how can we expect a field soldier to immediately recognize which orders she must disobey? This ambiguity leads to unjust consequences for those soldiers who might be charged with crimes of obedience, as it violates principles of fair notice.[51] Moreover, the inconsistent application of law within a legal system violates the principle of fair treatment under the law because soldiers, committing similar crimes, are held to different standards.[52]

1. International Law

Inconsistent application of the obedience-to-orders law is evident in the realm of international law, where extensive disagreement regarding the content of the relevant customary international law exists.[53] Moreover, supporters of each view can point to case law, international documents, and statements of various states to support their argument.[54]

2007) (unpublished Ph.D. thesis, University of Leicester) ("[T]he current position of the UK is similar to the manifest illegality principle."). In many countries, the law adopts a "manifest illegality test," the adoption of this test rules out the application of approaches other than ones of conditional liability. Yet, adopting this test does not resolve the problems of uncertainty and inconsistency. Often, in such a legal system inconsistency exists in the way the "manifest illegality test" is interpreted; i.e., different jurists, within such a legal system, often differ in the conditional liability approach that they attribute to this test. *See, e.g.*, Bohrer, *supra* note 37, at 213–19.

[50] *See* Patel, *supra* note 13, at 129 (stating that case law in the U.K., the U.S., and in international law "has been erratic and at times inconsistent"); Andreas Zimmermann, *Superior Orders*, *in* I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 957, 965 (A. Cassese et al. eds., 2002) ("[T]he leading scholars in the field themselves cannot agree as to what the standard should be *de lege ferenda* and even less what it is *de lege lata*."); White, *supra* note 21, at 51, 60 (discussing international, New Zealand's, Australia's, Canada's and U.S. law); Bohrer, *supra* note 37, at 213–19 (discussing uncertainty and inconsistency in Israeli law).

[51] Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 364–67 (2005).

[52] *Id.* at 366–67.

[53] Zimmermann, *supra* note 50, at 965.

[54] The following section points to such contradictory sources of international law from recent years, but this phenomenon is not new. For example, post-World War II case law is extremely inconsistent on the legal implications of obedience to illegal orders. Some point out this inconsistency and argue that a customary international law has not developed. *E.g.*, Osiel, *supra* note 20, at 947–48. Others, however, pick and choose from case law the legal sources supportive of their view, claiming that those chosen are the obligatory precedents and discounting contradictory sources as non-obligatory (or, alternatively, reinterpreting such sources to support their position). *Compare* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 236–40 (2003), *and* Gaeta, *supra* note 33, at 183–85 (arguing, based on post-World War II case law, that the superior orders defense is not codified in customary international law),

This inconsistency is demonstrated by how this issue has been regulated in the last two decades. The international statutes establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) rejected the adoption of any sort of superior orders defense.[55] But, this approach was not subsequently adopted by all in the realm of international law. By the mid-1990s, a large group of states reached an agreement on a general rule regarding crimes of obedience, which was then incorporated into Article 33 of the Rome Statute of the International Criminal Court.[56] Interestingly, unlike in the legal norm decreed for ICTY and ICTR, here a rule that explicitly rejects the superior orders defense was not adopted. Article 33 states that obedience to orders will not relieve a person of criminal responsibility unless she "did not know that the order was unlawful," and "the order was not manifestly unlawful."[57] However, despite its adoption by many states, Article 33 also did not resolve legal uncertainty.

First, Article 33 has been interpreted in a variety of ways. Some interpret this rule as supportive of the factual approach.[58] Some argue that almost all orders to commit war crimes are manifestly unlawful, and therefore Article 33, despite its phrasing appearing to support the factual approach,[59] truly espouses a reduced sentence or equal liability approach.[60] A third group argues that not all orders to commit war crimes are manifestly unlawful and, since only grossly immoral orders are of sufficient gravity to support war crime prosecutions, Article 33 actually supports a normative approach.[61]

Furthermore, the adoption of Article 33 did not prevent inconsistency in the practices of international and internationalized tribunals. Despite Article 33's adoption of a phrasing that allows for the application of a conditional liability approach, the statutes of many ad-hoc tribunals formed afterwards

---

with Scaliotti, *supra* note 5, at 133–35, *and* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 296–301 (2d ed. 1961) (arguing, based on the post-World War II case law, that customary international law is supportive of a conditional liability approach).

[55] S.C. Res. 827, art. 7.4, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the International Criminal Tribunal for the former Yugoslavia); S.C. Res. 955, art. 6.4, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the International Tribunal for Rwanda).

[56] Rome Statute, *supra* note 14.

[57] *Id.* art. 33.1(b)–(c).

[58] *See, e.g.*, Hilaire McCoubrey, *From Nuremberg to Rome: Restoring the Defence of Superior Orders*, 50 INT'L & COMP. L.Q. 386, 386 (2001) (arguing that Article 33 merely recognizes the "ought to know doctrine" of customary international law rather than creating a new approach).

[59] *See* Gaeta, *supra* note 33, at 173 (admitting that it seems as if the article's phrasing supports the factual conditional liability approach).

[60] *See id.* at 185; CASSESE, *supra* note 54, at 233 (contending that orders resulting in war crimes are always manifestly unlawful and thus will always result in soldier's being held liable).

[61] *E.g.*, Ariel Zemach, *Fairness and Moral Judgments in International Criminal Law: The Settlement Provision in the Rome Statute*, 41 COLUM. J. TRANSNAT'L L. 895, 913–15 (2003).

did not follow its path. These statutes, similarly to those of ICTY and ICTR, adopted phrasing that clearly bars the application of any superior orders defense.[62] Moreover, although the statutes of the different ad-hoc tribunals include a similarly phrased rule, how the tribunals applied the rule is far from similar. In separate cases, the ICTY[63] and the Special Court for Sierra Leone[64] have both ruled that when orders are manifestly unlawful they cannot be considered as a mitigating factor. Furthermore, the ICTY trial chamber admitted in another case that "the current case law of the Tribunal does not evidence a discernible pattern of the Tribunal imposing sentences on subordinates that differ greatly from those imposed on their superiors."[65] These rulings indicate that an equal liability approach was applied. On the other hand, in many cases the East Timor Tribunal considered obedience to orders as a mitigating factor, even when the orders were manifestly illegal.[66] Additionally, the Iraqi Tribunal, when reviewing the compatibility of its statute's rejection of the superior orders defense with the principle of *nullum crimen sine lege* ("no crime without law"), stated a rationale applicable only to high-ranking soldiers, thus implying support for a conditional liability approach with regard to low-ranking soldiers.[67]

This inconsistency exists even within the same tribunal. For example, contrary to the general policy of the East Timor Tribunal stated above, judges of that Tribunal would sometimes refer to "mitigating factors such as . . . subordinate position," but then mechanically discount these factors arguing they "cannot be given any significant weight in a case of this gravity."[68] Jurists within the ICTY have also disagreed, as evidenced by

---

[62] The Statutes of the tribunals in East Timor and Sierra Leone, as well as that of the Iraqi Special Tribunal explicitly state that obedience to orders cannot relieve a soldier of criminal responsibility, and only allow obedience to be considered "in mitigation of punishment if a panel determines that justice so requires." U.N.T.A.E.T. Reg. 2001/15, art. 21, U.N. Doc. UNTAET/REG/2001/15 (June 6, 2000) (establishing panels with exclusive jurisdiction over serious criminal offenses in East Timor); Statute of the Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138; *Statute of the Iraqi Special Tribunal*, 44 AL WAQAI AL-IRAQIYA [OFFICIAL GAZETTE OF IRAQ] 127 (2003) (codifying the reduced sentence approach in Art. 15(e)).

[63] Prosecutor v. Mrdja, Case No. IT-02-59-S, Sentencing Judgment, ¶¶ 65, 67 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2004).

[64] Prosecutor v. Brima, Case No. SCSL-04-16-T, Sentencing Judgment, ¶¶ 121–122 (Special Ct. for Sierra Leone July 19, 2007).

[65] Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 709 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

[66] *See generally* Suzannah Linton & Caitlin Reiger, *The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders*, 4 Y.B. INT'L HUMANITARIAN L. 167 (2001).

[67] *Anfal Campaign Case* (2007) Ref. No. 1/CSecond/2006, Iraqi High Tribunal, 2d Criminal Court, Trial Judgment, 11.

[68] Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 565 (2005).

President Cassese's dissenting opinion in the *Erdemovic* case, which implicitly supports a conditional liability approach by stating that "[i]f the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order."[69] Thus, the fate of soldiers committing similar crimes of obedience may be considerably different depending on the tribunal and the judge adjudicating their cases; a result that severely violates the principle of equal protection under the law.

2. American Military Law

It has been suggested that the United States' legal approach to crimes of obedience does not suffer from uncertainty and inconsistency.[70] Indeed, since 1951, the Manual for Courts Martial includes a rule clearly supporting the factual approach to the superior orders defense.[71] But, promulgation of this rule did not resolve a struggle that exists between U.S. supporters of different conditional liability approaches, a fact which is readily apparent in courts martial rulings after 1951.[72]

An attempt to resolve this issue was made in *United States v. Calley*, which dealt with the My Lai massacre.[73] In *Calley*, the trial judge instructed the jury to apply the factual approach adopted by the Manual for Courts Martial. On appeal, the defense claimed the normative approach should have been applied instead.[74] Thus, *Calley* presented the court with an opportunity

---

[69] Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 1997).

[70] *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 570 (1978) ("Not all justificatory claims are vague . . . superior orders [is] . . . as precise as any prohibitory norm.").

[71] *See* United States v. Calley, 22 U.S.C.M.A. 534, 545 n.2 (C.M.A. 1973) (Duncan, J., concurring) (discussing the Manual published in 1951 as being the first military manual in which the current standard has been explicitly adopted).

[72] *See, e.g.*, United States v. Miles, 29 C.M.R. 438 (1960) (in this case the majority supported the factual approach; the minority judge, on the other hand, supported the normative approach, while giving some lip service support for the factual approach). In many cases, the ruling is an intricate combination of phrases originating from one approach, interspersed with phrases originating from the other. Due to this ambiguous wording, the identity of the approach actually being supported in such rulings can only be understood from the decision's general tone. *See, e.g.*, United States v. Whatley, 20 C.M.R. 614, 618 (A.B.R. 1955) (supporting the normative approach despite discussion of a knowledge requirement); United States v. Kinder, 14 C.M.R. 742, 773–76 (A.B.R. 1954) (supporting the factual approach despite a discussion of the manifestly unlawful requirement which interpret this requirement, at least in some parts of the case, in the manner in which it is interpreted by the normative approach).

[73] 22 U.S.C.M.A. 534 (C.M.A. 1973).

[74] *Id.* at 541–42. U.S. case law presents a unique version of the normative approach, where the illegality of an order needs to be so apparent that even the soldier with the "commonest understanding" would immediately recognize its illegality. This approach is phrased in terms that focus on a soldier's knowledge, but it is often assumed that the soldier with the "commonest understanding" will recognize the illegality of an order only when core social or

to clarify which approach should be endorsed by U.S. military tribunals, but the court did not do so. Although the dissenting opinion examined several approaches in coming to the conclusion the normative approach should be applied,[75] the majority was not as robust in its analysis and rejected the appeal based on procedural and formalistic reasons.[76] Moreover, in a concurring opinion, Judge Duncan stated "[p]erhaps a new standard, such as the dissent suggests, has merit; however, I would leave that . . . *for the cause where the record demonstrates harm* from the instructions given. I perceive none in this case."[77]

Furthermore, although some claim the factual approach is the rule of the day,[78] a more in-depth examination of the issue shows that the current legal situation is more complex. First, opinions still use language that borrows from the normative approach.[79] There are even cases where judges seemingly hide their support for the normative approach behind their token obeisance to the factual approach.[80] Second, *obiter dicta* that implies support for a normative approach can be found. For example, a 1995 opinion states "[t]he duty to disobey an unlawful order applies only to 'a positive act that constitutes *a crime*' that is 'so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.' "[81] This statement implies that a soldier should obey if the illegal act ordered does not constitute a crime, which appears to be a normative approach.

Third, even though the "law on the books" (i.e., the Manual for Courts Martial since 1951) states that a factual approach should be applied, once prosecutorial policy is taken into account, it seems that a normative approach is actually being applied.[82] Military culture still supports the normative

---

moral norms are grossly violated by the illegal order. Thus, this test actually applies the normative conditional liability approach and not the factual one. For the leading classic cases supportive of the "commonest understanding" test, see *McCall v. McDowell*, 15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867) and *In re Fair*, 100 F. 149 (C.C.D. Neb. 1900).

[75] *Calley*, 22 U.S.C.M.A. at 546–48 (Darden, C.J., dissenting).

[76] *Id.* at 544–45.

[77] *Id.* at 545 (Duncan, J., concurring) (emphasis added).

[78] *See* 2008 MANUAL FOR COURTS-MARTIAL, *supra* note 39; MICHAEL J. DAVIDSON, A GUIDE TO MILITARY CRIMINAL LAW 68 (1999); *see also* United States v. Girouard, ARMY 20070299, 2010 CCA LEXIS 49, at *15–16 (A. Ct. Crim. App. Apr. 23, 2010) (stressing the actual knowledge of the defendant).

[79] *See, e.g.*, United States v. Cherry, 22 M.J. 284, 286 (C.M.A. 1986); United States v. New, 50 M.J. 729, 744 (A. Ct. Crim. App. 1999) (discussing obedience to manifestly unlawful orders).

[80] *E.g.*, United States v. Pacheco, 56 M.J. 1, 6–11 (C.A.A.F. 2001) (Sullivan, J., dissenting).

[81] United States v. Huet Vaughn, 43 M.J. 105, 114–15 (1995) (quoting United States v. Calley, 22 U.S.M.C.A. at 543) (emphasis added); *see also* DEP'T OF DEF., THE ARMED FORCES OFFICER 16 (1988) ("Only when the order is unlawful and obviously a crime must it be disobeyed.").

[82] For a discussion of the common phenomenon of a difference between the law as it is

approach, and U.S. J.A.G. policy is thus to refrain from prosecution unless the act ordered and committed is grossly immoral.[83] However, the law on the books still requires a soldier to disobey an order if she knows it to be illegal, which creates a fair-notice problem for a soldier who receives an order she thinks is illegal, but not grossly immoral. Should she disobey and suffer the ire of her commander, as well as risk the chance she is mistaken and the order is legal? Or, should she obey and rely on an unofficial prosecutorial policy that might easily be changed?

III. AGENCY ANALYSIS OF OBEDIENCE TO ORDERS

A. Use of Agency Models

In light of the inability to resolve the issue through the conventional use of the balancing procedure, the time has come to examine the issue from a new perspective. This perspective should examine the relevant considerations in a less abstract manner than the current balancing procedure, which can be achieved using principal-agent analysis.

The basic situation analyzed by microeconomics agency models can be described as follows: The principal profits from the acts of its agent and seeks to minimize costs while creating an incentive structure (i.e., rewards or sanctions) that will lead the agent to perform the acts in a way that maximizes the principal's utility. One fundamental problem the principal faces, often referred to as "moral hazard," stems from the principal's inability to obtain perfect information about how the agent acts. If the agent knows that her actions are unobservable, she can attempt to maximize *her* own personal gains, even if that conflicts with the principal's gains. Agency analyses often focus on ex ante conditions that a principal can set to minimize this problem.[84]

Agency analyses have been expanded to examine situations in which more than one agent exists.[85] This sort of expanded analysis is commonly used when examining a corporation's vicarious liability.[86] Such analyses examine a three-tiered hierarchy of principals and agents, where a

---

stated in the books and the law as it is actually applied, see Pound, *supra* note 48.

[83] OSIEL, *supra* note 10, at 76; Walter M. Hudson, *Book Review*, 161 MIL. L. REV. 225, 226–27 (1999) (reviewing OSIEL, *supra* note 10).

[84] *See, e.g.*, ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 477–88 (1995) (describing the principal-agent problem).

[85] *E.g.*, Yeong Ling Yang, *Degree of Supervision, Moral Hazard and Hierarchical Control*, 26 J. ECON. BEHAV. & ORG. 93 (1995).

[86] *See* Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1233 (1984) (noting that agency theory is essential to understanding the consequences of vicarious liability).

corporation's employees are viewed as agents of the corporation, and both the corporation and its employees are viewed as agents of the lawmaker.[87] The core question examined is: When should the lawmaker, in an attempt to prevent wrongful corporate acts, enact a law that sanctions the corporation, the employees, or both?

B. Agency Model of Obedience to Orders

An in-depth agency analysis of crimes of obedience has never been performed. However, Eric Posner and Alan Sykes have recently examined the relationship between state and individual responsibility for violations of international law, treating it as analogous to vicarious liability analysis. Within their study, they entertain a short discussion of the superior orders defense:

> The question arises, why the qualification for "patently" illegal orders? Why not hold soldiers liable for all war crimes, just as an employee will be held liable for committing domestic crimes, and the fact that the employer ordered him to commit the crimes would be no defense? The answer is probably that states do not want to go give soldiers an excuse for insubordination. The rule balances the desire to deter soldiers from engaging in war crimes, and the need to maintain discipline on the field.[88]

While I agree with Posner and Sykes that crimes of obedience should be examined using agency analysis, their examination of the issue, as the discussion made hereinafter will show, is flawed. Posner and Sykes fall prey to the same flaw that plagues the rest of the field. They attempt to balance two public aims, the rule of law and military discipline, in an abstract manner instead of determining *how* these considerations should be factored into an agency analysis. When this concern is addressed at the outset, a detailed agency analysis of the issue leads to a different conclusion than the one reached by Posner and Sykes.

---

[87] Scholarly writings on the subject have not been consistent in the names of the roles given to each of the three participants in this relational structure. Usually in these analyses, the corporation is dubbed as the principal and the lawmaker is treated as an external (but superior) source of influence on the corporate agency relation. *But see* Mark A. Cohen, *Optimal Enforcement Strategy to Prevent Oil Spills: An Application of a Principal-Agent Model with Moral Hazard*, 30 J.L. & ECON. 23, 25 (1987) (explicitly dubbing the government as the principal of the corporation).

[88] Eric A. Posner & Alan O. Sykes, *An Economic Analysis of State and Individual Responsibility Under International Law*, 9 AM. L. & ECON. REV. 72, 129 (2007).

A crime is an act that the lawmaker wishes to prevent through the use of penal law (i.e., an act harmful to the principal). A person will want to commit a crime when the potential gains outweigh the potential losses. Therefore, a lawmaker can deter an individual from committing a crime by increasing the severity of the punishment or by increasing the probability that an individual will be caught and convicted.[89]

A crime of obedience is an act that is harmful to the lawmaker and that is committed as the result of a joint action by two agents: the commander who issues the order, and the subordinate who physically commits the illegal act. In the context of crimes of obedience, the gains against which individual actors measure the potential costs of a crime may sometimes be societal, as opposed to personal, gains. Soldiers often commit crimes wrongly believing the illegal act will serve a greater good.[90]

If both subordinate and commander stand to gain equally from a crime and have the same probability of being punished, then the same legal threat of punishment can deter each of them from taking part in the crime. Moreover, since a crime of obedience only occurs when *both* of them participate, the lawmaker need only adopt a law that threatens to punish *either* subordinate or commander. Furthermore, if the lawmaker is only concerned with efficiency, she will be indifferent as to which individual the law targets.[91]

Let us demonstrate this issue using the following example: (1) both the soldier and commander are willing to commit a crime as long as they expect to receive a term of imprisonment less than ten years; (2) for both parties, a 50% chance of being caught and convicted for a term of twenty years is as much a deterrent as a certainty of being sentenced for ten years; (3) law enforcement agencies have a 50% chance of catching and convicting either party; and (4) once one party has been caught and convicted, there is a 100% chance of catching and convicting the second party. Under these conditions, the lawmaker needs to set a sentence of twenty years to ensure neither party will participate in the crime of obedience. And, since only one party need be deterred for a crime of obedience to be prevented, it is sufficient to threaten *either* the subordinate or commander with a sentence of twenty years.

In reality, the analysis is not so neat, as substantial differences exist that distinguish a subordinate's cost-benefit analysis from that of a commander's. On one hand, disobeying an illegal order often harms the subordinate

---

[89] *E.g.*, Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 249 (1987).

[90] *See* S.E. FINER, THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS 32–53 (2d ed. 1988).

[91] *Cf.* Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1358–60 (1982).

because a commander can sanction her for such behavior on-site.[92] There is thus an additional incentive for a subordinate to commit a crime of obedience. Therefore, all else being equal, it will be harder to deter a subordinate than a commander. On the other hand, because subordinates are the ones that physically perform crimes of obedience, while commanders are sometimes not even present during the commission of the crime, it is often easier to catch and convict a subordinate.[93] As a result, a law that addresses *only* the commander suffers from an evidentiary deficit, which effects its deterrence capabilities, that a law addressing either the subordinate, or both the subordinate and the commander, does not.

Also, in reality, the lawmaker is limited in her ability to increase punishment as a means to deter the commission of a crime. First, economic, moral, and constitutional considerations generally limit the lawmaker's ability to do so. Without such limits, one can imagine a utilitarian lawmaker instituting the death penalty as the punishment for all crimes.[94] Second, when setting the maximum penalty for each crime, the lawmaker must consider whether the punishment set would sufficiently deter the commission of the relevant crime *regardless* of whether individuals are acting under orders. For example, murders are committed by both obedient soldiers and individuals not acting under orders. Thus, the penalty set for murder needs to deter both cases.[95] To deal specifically with crimes of obedience, the lawmaker will thus often need to supplement the general legal prohibition

---

[92] Natasha Gonzalez, Moral Monsters or Ordinary Men Who Do Monstrous Things? Psychological Dimensions of the Military and Their Implications for War Crimes Tribunal Defenses 112 (June 2004) (unpublished Psy.D. dissertation, Widener University) (on file with Widener University). Such sanctions can be formal or informal.

[93] DINSTEIN, *supra* note 4, at 237–38 (discussing this issue in the context of war crimes); Jeffrey I. Ross, *Controlling Crimes by the Military*, *in* CONTROLLING STATE CRIME 115, 126–27 (J.I. Ross ed., 2d ed. 2000) (discussing this issue in the context of domestic crimes).

[94] *See, e.g.*, Samuel Kramer, *An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions*, 81 J. CRIM. L. & CRIMINOLOGY 398, 404 (1990) (discussing negative enforcement costs as the reason harsh punishment is not uniformly adopted for all crimes—the death penalty is the harshest punishment I can imagine); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 20–22, 30–32 (implying a need to take constitutional and moral considerations into account). For a general discussion of such considerations not by law and economy scholars, see Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997) *and* FELICITY STEWART ET AL., SENT'G ADVISORY COUNCIL – VICT. AUSTL., MAXIMUM PENALTIES: PRINCIPLES AND PURPOSES, at vii (2010). *See also* sources cited *infra* note 96.

[95] Supposedly, the lawmaker can create two sets of penal codes; one for crimes not committed under orders, and the other for the same prohibited acts committed under orders. I know of no legal system that has chosen such an option. It is most likely the costs that usually accompany over-detailed legal policies have led lawmakers not to endorse such an option. For a brief discussion of the costs of over-detailed legal policies, see *infra* Part V.*A.2*.

with legal norms that deal specifically with this issue. These norms can take the form of setting the act of giving or obeying an illegal order as a mitigating, exculpating, or aggravating condition. However, when setting such rules, the lawmaker will also be limited by moral and constitutional considerations.[96]

Lastly, setting a law that addresses only the subordinate is not really an option, as moral concerns should prevent lawmakers from adopting such a policy. Even though subordinates physically commit the illegal acts, the commander should be considered the main perpetrator of such crimes, both because of the power she has over the subordinate and because the commander issues the order in the first place. As such, as a general rule, the commander should never be considered *less* culpable than the obedient soldier.[97] Therefore, it would be wrong for the lawmaker to adopt a legal norm that punishes only the subordinate and not the commander, or punishes the commander less severely than the subordinate. The options available to a lawmaker are thus a legal policy that addresses only the commander, or a policy that addresses both the commander and subordinate.

C. Command Responsibility Rule

A law targeting *only* commanders can be efficient only if the evidentiary problem can be solved. This can be done by utilizing a strict-liability-command-responsibility rule that holds the commander *automatically* responsible for all illegal acts committed by her subordinates.[98]

In the context of many crimes of obedience, it is easier to find evidence that a crime has been committed by soldiers of a specific unit than to find

---

[96] Actual domestic criminal justice systems are based on a theoretical basis that combines consequentialist and deontological rationales. *E.g.*, Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 326 (2004). That is also the case in international criminal law. *See* Gonzalez, *supra* note 92, at 63. In such a system, as Coughlin stated, "principles derived from one of the dominant theories attenuate the excesses that the other would achieve in an undiluted form." Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 9–10 (1994). Accordingly, the deontological principles place limits on the ability to hold subordinates and commanders culpable for acts initiated by the other agent. *See, e.g.*, text accompanying *infra* note 97 and the limits placed on command responsibility rules, *infra* Part III.*C*.

[97] *Judgment in Case of Lieutenants Dithmar and Boldt Hospital Ship "Llandovery Castle*,*"* 2 ANN. DIG. 436 (1921), *reprinted in* 16 AM. J. INT'L L. 708, 721, 723 (1922); Miriam Gur-Arye, *Commission of an Offence: Various Modes*, 1 PLILIM 29, 47–49 (1990) (Heb.); *see also* United States v. Duffy, 47 C.M.R. 658 (A.C.M.R. 1973) (finding the commander who orders an act is a principal actor and not merely an accessory, and thus ruling the commander can be convicted even when the obedient soldier is not).

[98] Osiel, *supra* note 20, at 1113; Victor Hansen, *What's Good for the Goose is Good for the Gander Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L. REV. 335, 347 (2007).

evidence proving which individual soldier committed the criminal act.[99] It is even more difficult to prove the illegal act was ordered by a commander, especially if the commander was not physically present during the commission of the crime.[100] Moreover, without the aid of the subordinates who received the order it would often be extremely difficult to prove the commander ordered the crime, and subordinates will not be incentivized to implicate their commanders if the law does not also target subordinates.[101] But, a strict-liability-command-responsibility rule solves this difficulty because adopting such a rule would mean the aid of the subordinates would no longer be required. This rule would make it easier to convict a commander of a unit than it would be to convict any particular subordinate.

Yet from a deontological perspective, it is inappropriate to hold the commander criminally responsible for the acts of her subordinates when her direct involvement in the crime (e.g., giving the illegal order or participating in the crime) has not been proven.[102] The increasing influence of this perspective on both domestic and international criminal law constrains lawmakers' ability to enact an efficient law that only addresses commanders.

Even in the context of war crimes, adopting a strict-liability-command-responsibility rule is currently seen as unacceptable.[103] For example, according to the Rome Statute there is a need to prove: (1) the "military commander . . . either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes";[104] and (2) the "military commander . . . failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."[105]

Because currently a lawmaker is barred from adopting a command responsibility rule harsher than the one just stated, she should not adopt a

---

[99] *E.g.*, Prosecutor v. Naser Orić, Case No. IT-03-68-A, Appeal Judgment, ¶ 189 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008).

[100] *See* sources cited *supra* note 93.

[101] *See* White, *supra* note 21, at 61; Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 CRIM. L. F. 281, 312 (2006) (arguing the ICTY's prosecution of lower-ranking soldiers ultimately led to prosecution of higher ranking individuals).

[102] *See* KWAME ANTHONY APPIAH, THINKING IT THROUGH: AN INTRODUCTION TO CONTEMPORARY PHILOSOPHY 288–89 (2003) (discussing the readiness of utilitarian views, and the objection of deontological views, to punish uninvolved individuals).

[103] Osiel, *supra* note 20, at 1064; Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. *passim* (2005); *see also* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶¶ 488–489 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

[104] Rome Statute, *supra* note 14, art. 28(a)(i).

[105] *Id.* art. 28(a)(ii); *see also Jean-Paul Akayesu*, Case No. ICTR-96-4-T, ¶¶ 488–491 (recognizing the potential for an even more restrictive rule for civilian superiors).

policy that only addresses commanders. Instead, in addition to adopting the "permitted" command responsibility rule, the lawmaker should also adopt a rule that will be addressed to the obedient soldier. The experience of legal systems that adopted this latter policy indicates that it can attain greater crime prevention than the former one. As past cases in such legal systems indicate[106] the likelihood of successfully convicting a commander on the basis of the "permitted" command responsibility rule is, at least sometimes, lower than the likelihood of successfully convicting subordinates for being directly involved in the commission of the crime (because as previously discussed, it is sometimes easier to find evidence against subordinates).

The deontological perspective has further influenced the field by lowering the socially acceptable level of punishment in cases where direct involvement of the commander has not been proven.[107] This effect is less apparent in prosecutions of war crimes in international tribunals, since the statutes of such tribunals usually include a single maximum penalty for all international crimes.[108] Yet in domestic law, the deontological perspective has already had a substantial effect. It is most significant in the context of domestic crimes committed outside of war. With regard to such crimes, penal sanctions are generally considered inappropriate unless direct involvement of the commander in the crime is stipulated. That is, in cases dealing with indirect involvement of a commander in the crime (i.e., cases where just a commander's failure to know or prevent a subordinate's crime is alleged) only administrative and disciplinary sanctions, and not the harsher penal ones, are considered appropriate.[109] Moreover, even in the context of domestic, war-related crimes, if no direct involvement in the crime is proven, the maximum penalty a commander can receive is, usually, substantially lower than the maximum penalty for the war-related crime itself.[110]

---

[106] *E.g.*, *Naser Orić*, Case No. IT-03-63-A, ¶ 189. Furthermore, compare the conviction of subordinate Calley, in the context of the My Lai massacre, *United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973)*, with the acquittal of superior Medina as discussed in Natalia M. Restivo, Defense of Superior Orders in International Criminal Law as Portrayed in Three Trials: *Eichmann*, *Calley* and *England* (Sept. 12, 2006) (graduate student paper, Cornell Law School), *available at* http://schoolarship.law.cornell.edu/cgi/viewcontent.cgi?article=1035&context=lps_papers.

[107] *See* Danner & Martinez, *supra* note 103, at 99–100 (noting that, in the context of the law of command responsibility, a demand exists for the application of culpability principles that ensure individuals are convicted because they had a role in the commission of the crime, not just because a crime occurred).

[108] Jennifer Clark, *Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 96 GEO. L.J. 1685, 1688–89 (2008).

[109] IAN LEIGH & HANS BORN, ORG. FOR SEC. AND COOPERATION IN EUR., HANDBOOK ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF ARMED FORCES PERSONNEL 211, 214 (2008).

[110] *See* Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 275 (2009) (comparing the Uniform Code of Military Justice's six month maximum penalty for a commander's dereliction of duty with

Trends in domestic law also have substantial effects on international criminal law, since many war crimes are prosecuted by domestic courts.[111] Often in these domestic prosecutions, the individual is formally charged with violating a domestic offense that is an analogue of an international offense.[112] In the United States for example, commanders who fail to know about and prevent war crimes committed by subordinates are usually prosecuted in domestic courts martial for "dereliction of duty," which carries a much lower maximum penalty than that of any war crime.[113] Because of this difference in the permitted harshness of maximum penalties, the lawmaker is limited in her ability to rely on a command responsibility rule as a means to deter crimes of obedience. Thus, although the law should target commanders and apply a command responsibility rule to the extent permitted, it will generally be more effective for the law to also target the subordinate.

D. Agency Analysis of the Five Commonly Endorsed Approaches

1. Equal Liability, Respondeat Superior, and Reduced Sentence Approaches

There are several alternatives for a legal approach that addresses both subordinates and commanders. One such alternative is the equal liability approach, which sets the same level of culpability for both commanders and subordinates for their direct involvement in the commission of a crime of obedience.[114] This approach will deter subordinates, in some situations, from *obeying* illegal orders even when the penalty for the crime, or the commanders' probability of being caught and convicted, would not deter commanders from *issuing* such orders. Because subordinates physically

---

federal law's twenty or thirty year penalties for war crimes). In Israeli law, for example, the main way to hold a commander liable for the acts of her subordinates is to charge her with the military offense of "Failure to Prevent an Offence." In the past, the maximum penalty for a commander convicted of such an offense was half the maximum penalty for the offense she failed to prevent. *See* Art. 74 of the Emergency Regulations (Military Justice Constitution) of 1948, 20 Official Paper, 2d appendix 105 (Isr.). Currently, the maximum penalty still cannot be more than half the maximum penalty for the offense the commander failed to prevent. Yet, additionally, the sentence for the failure to prevent most offenses cannot exceed three years. *See* Military Justice Act, 5715-1955, SH. No. 171, art. 134 (Isr.).

[111] Joseph Rikhof, *Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*, 20 CRIM. L. F. 1, 51 (2009).

[112] *See* Knut Dörmann & Robin Geiβ, *The Implementation of Grave Breaches into Domestic Legal Orders*, 7 J. INT'L CRIM. JUST. 703, 709–10 (2009) (noting that most countries have constitutional prohibitions against criminal sanctions based solely on international law, thus requiring a domestic basis for punishment); *see also* Rikhof, *supra* note 111, at 15 n.61.

[113] Sepinwall, *supra* note 110, at 275.

[114] *See supra* note 30 and accompanying text.

perform the crime,[115] it will sometimes be easier to find evidence sufficient to convict the subordinate for her direct involvement in the crime than it would be to convict a commander, even under a command responsibility rule and even though the latter rule does not require proof of direct involvement. Thus, the equal liability approach, by holding both the commander and subordinate responsible, can prevent crimes of obedience that would be committed under a law that addresses only the commander.[116] Some argue this has been the reason for the application of this approach in international law following World War II. As M.C. Bassiouni states, "it became clear after World War II that holding only the superiors responsible would not accomplish the goals of deterrence and prevention. Consequently, a new policy approach was developed whereby those carrying out unlawful orders would be held criminally accountable, in addition to those who issued the orders."[117]

Another alternative is the respondeat superior approach, which allows the subordinate to always benefit from a superior orders defense while holding the commander responsible.[118] Under the respondent superior approach, a soldier is not likely to be deterred from obeying illegal orders, since she could avoid punishment and enjoy a superior orders defense simply by showing the act was a crime of obedience.[119] But, this approach could deter commanders from giving illegal orders more effectively than a law that only addresses commanders. It would incentivize soldiers to implicate their

---

[115] *See* sources cited *supra* note 93.

[116] *See* BASSIOUNI, *supra* note 12, at 586 (noting that the humanitarian goals of deterring and preventing harm to protected targets cannot be accomplished by holding only superiors responsible).

[117] *Id.*

[118] *See supra* note 40 and accompanying text.

[119] This approach, in the way it was applied in the past, threatened the subordinate with punishment for disobeying any illegal order. *See id*. But even without such a threat, a subordinate soldier is unlikely to be deterred from obeying illegal orders under a respondeat superior approach since she could avoid punishment by showing the crime was a crime of obedience. It is true that such a policy places some burden of production of evidence on the subordinate, whether formally, or simply because she has an incentive to do so. Thus, one can imagine a situation in which: (1) a subordinate knows she has a high probability of getting caught and convicted; and (2) she further knows that if caught she will have no ability to show the act was ordered by her commander. In such a situation, even under a respondeat superior approach, the subordinate may still disobey. Yet, these situations are likely to be rare for two reasons. First, due to moral and constitutional considerations, the burden of proof a lawmaker can demand from a subordinate is much lower than demanding her to prove beyond a reasonable doubt the act was ordered by her commander. *See* ROBINSON, *supra* note 17, at 209; GEERT-JAN KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 259–61 (2d ed. 2007) (articulating the relevant burden of proof). Second, the subordinate will often have at least some evidence implicating the commander. *See* Ross, *supra* note 93, at 126–27; White, *supra* note 21, at 61; Murphy, *supra* note 101, at 312.

commanders, thus increasing the probability commanders would be caught and convicted.[120]

In some situations, the respondeat superior approach can more effectively deter crimes of obedience than the equal liability approach. For example, as previously discussed, the lawmaker often will not be able to successfully deter a commander as well as she is able to deter a subordinate, due to a difference in the probability of getting caught and convicted.[121] Let us further assume two things: (1) the lawmaker cannot further increase the maximum punishment for the crime as a means of deterrence;[122] and (2) due to budgetary or other such limitations, the lawmaker is unable to rely on the efforts of law enforcement agencies as a means of increasing the probability of catching crimes of obedience.[123] Thus, we can expect situations will exist in which, under the equal liability approach, both the subordinate and the commander will not be deterred, and the lawmaker will not be able to use increases in penalties or law-enforcement efforts to increase deterrence.

In some of these cases, choosing the respondeat superior approach over the equal liability approach can increase deterrence. While switching to the respondeat superior approach will not change the behavior of the subordinate (since she is likely to obey illegal orders when the lawmaker adopts the respondeat superior approach) adopting the respondeat superior approach can increase deterrence against the commander. Under the equal liability approach the subordinate does not have an incentive to implicate the commander, since it will not have any effect on her fate. On the other hand, under the respondeat superior approach, she has a strong incentive to implicate her commander. She could assert a superior orders defense by showing her action was a crime of obedience, thereby avoiding punishment. The evidence supplied by the subordinate can then be used against the commander, increasing the probability of the commander being implicated and convicted.[124] This increased probability will, at least sometimes, be

---

[120] *See* Ross, *supra* note 93, at 126–27; White, *supra* note 21, at 61 (discussing the consequential effects of prosecuting lower ranking soldiers).

[121] *See supra* Part III.*C* (discussing the command responsibility rule).

[122] *See, e.g.*, Rome Statute, *supra* note 14, art. 77 (establishing maximum penalties for crimes). Moreover, as previously discussed, there are different considerations that limit the ability of the lawmaker to use punishment to deter crimes in general, and crimes of obedience specifically. *See* sources cited *supra* notes 94, 96–97 & Part III.*C*.

[123] This is a very realistic assumption. *See* Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 L. & SOC'Y REV. 163, 185 (1988) ("[T]he criminal justice system may [sometimes] be able to do very little in terms of changing actual probabilities of arrests for crimes. . . .").

[124] The evidence could be used at the commander's trial to prove she ordered the crimes. Moreover, even if the evidence will not be sufficient to prove beyond a reasonable doubt the commander ordered the crimes, we can assume they will make it easier to show the commander knew, or should have known, about the crimes, or that she failed to prevent them.

sufficient to deter the commander from ordering the crime in the first place. Thus, situations exist in which the respondeat superior approach will prevent crimes more efficiently than the equal liability approach.[125]

However, the respondeat superior approach will not always be more effective than the equal liability approach. Many situations can be found in which threatening the subordinate with punishment will deter her from obeying the illegal order. In some of these situations, a commander will not be deterred by either the equal liability or the respondeat superior approach. In other words, in some of these situations, even the increased probability of detection and conviction of the commander under the respondeat superior approach will be insufficient to deter her.

United States v. Calley, a case arising out of the My Lai Massacre, provides a convenient example for illustrating these situations.[126] In *Calley*, the subordinate alleged that he committed the acts under orders from his superior, Medina.[127] His claim was sufficiently robust so that, at trial, the jury was instructed to consider whether Calley is eligible for a superior orders defense.[128] Further, there is a strong possibility the jury was convinced Calley had obeyed such orders.[129] However, despite the evidence supplied by Calley, at Medina's trial the prosecution failed to prove that Medina gave the orders, or that Medina even knew or should have known that his subordinates committed the crimes.[130] This case thus indicates that situations can be found where: (1) it will be easier to prove the direct involvement of a subordinate than to prove either the direct or indirect

---

[125] The likelihood of such situations is high because a subordinate has an additional incentive to commit the crime that the commander does not have; the fear of being sanctioned by her commander for disobedience. *See* Gonzalez, *supra* note 92. Thus all else being equal, it will be harder to deter subordinates from obeying illegal orders than it will be to deter commanding officers from issuing them.

[126] 22 U.S.C.M.A. 534 (C.M.A. 1973).

[127] *Id.* at 538 ("Asked if women and children were to be killed, Medina said he replied in the negative. . . . However, Lieutenant Calley testified that Captain Medina informed the troops they were to kill every living thing. . . .").

[128] At trial, evidence supporting both Medina's and Calley's claims was presented. The trial judge instructed the jury "unless you find beyond a reasonable doubt that he was not acting under orders . . . you must determine whether Lieutenant Calley" knew or should have known the orders were illegal. *Id.* at 542.

[129] The U.S. District Court for the Middle District of Georgia, ruling on a habeas corpus petition presented by Calley, determined it is very likely the jury was improperly influenced by news reports to decide Medina did not give the orders. Calley v. Callaway, 382 F. Supp. 650, 685–86 (M.D. Ga. 1974). Yet on appeal that decision was overturned, and the Fifth Circuit affirmed prior rulings of the military courts that found a strong possibility the jury concluded Calley had received the orders from Medina, yet decided to convict regardless. Calley v. Callaway, 519 F.2d 184, 193–94 (5th Cir. 1975) ("[T]he military jury could have found either that the alleged order to kill was not issued, or, if it was, that the order was not a defense to the charges. The military courts found ample evidence to support either hypothesis.").

[130] Restivo, *supra* note 106, at 18–19.

involvement of a commander; and (2) a commander may not be convicted or deterred even given an incentive structure that encourages subordinates to implicate their commanders.

In other words, there is a tradeoff between the respondeat superior approach and the equal liability approach. When crime prevention is more likely to be achieved by a policy focused on attempts to deter the commander, the respondeat superior approach will be more efficient. On the other hand, when crime prevention is more likely to be achieved by a policy focused on attempts to deter the subordinate, the equal liability approach will be more efficient.

An alternative approach exists, however, that can act as a better deterrent than either approach. Until now, we have assumed that a soldier will only implicate her commander if she receives full protection from punishment through a superior orders defense. In reality however, the commander only has a modest ability to pressure a soldier who has already been caught because the prosecuting authority can often protect the subordinate by removing her or the commander from the unit, or taking other protective measures.[131] As such, a very small incentive will often suffice to convince the soldier to implicate her superior.[132]

Thus, a reduced sentence approach that offers a soldier the smallest sentence reduction possible to encourage her to implicate her commander has the advantages of both the equal liability and the respondeat superior approaches. Commanders would be deterred, just as they would under the respondeat superior approach, because subordinates would still be incentivized to implicate them. Moreover, the deterrent effect of each additional day in prison is likely to be less than that of the previous day. Accordingly, a small sentence reduction is not likely to have a significant influence on the law's deterrent effect on subordinates. Thus, the deterrent effect the reduced sentence approach has on a subordinate is almost identical to the deterrent effect of the equal liability approach.[133]

---

[131] *E.g.*, DEP'T OF THE ARMY, ARMY REG. 27-10, MILITARY JUSTICE (2011), *available at* http://www.apd.army.mil/pdffiles/r27_10.pdf (discussing means available to protect soldiers who are witnesses).

[132] *Cf.* Ada Kewley, *Murder and the Availability of the Defence of Duress in the Criminal Law*, 57 J. CRIM. L. 298, 299 (1993) (stating with regard to the duress defense: "[g]enerally, it should be noted that the defence is not available where the defendant has a realistic opportunity to seek official protection").

[133] *Cf.* A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 3–4 (1999) (arguing it is likely that the deterrent effect of each additional day in prison is less than that of the previous day, thus plea bargains are unlikely to reduce deterrence); Andreas Reindl, *Background Note*, *in* ORG. FOR ECON. COOPERATION & DEV., DAF/COMP(2007)38, POLICY ROUNDTABLES: PLEA BARGAINING 21, 43 (2007) (arguing that if the prosecuting authority is able to exert strict sanctions in plea bargain agreements, which it is if there is a credible threat of sanctions at

Despite these benefits, the reduced sentence approach should not be applied in every situation. The reduced sentence approach requires the subordinate soldier to recognize illegal orders and disobey them (otherwise she would be held criminally responsible). In reality, soldiers do not have perfect knowledge of the law. Therefore, a duty to disobey illegal orders may lead to two kinds of mistakes: (1) the soldier might mistakenly obey illegal orders, thinking they are legal; or (2) she may mistakenly disobey legal orders, thinking they are illegal. In comparison, when a subordinate is afforded a superior orders defense, such as under the respondeat superior approach, it is unlikely the subordinate will disobey orders regardless of their legality, and similar concerns about mistakes do not exist.

Thus, the likelihood a subordinate will make a mistake has an effect on whether the reduced sentence rule should be adopted as opposed to an approach that affords a superior orders defense. The greater the possibility subordinates will mistakenly obey illegal orders, the less there is a crime prevention benefit from adopting a reduced sentence rule. Furthermore, a reduced sentence rule can encourage a soldier to mistakenly disobey legal orders, which is harmful to the lawmaker when she benefits from the performance of legal military actions.[134]

Thus, when the gains (i.e., the crime prevention achieved by obligating the soldier to disobey orders she thinks are illegal) will be smaller than the harm caused by mistaken acts of disobedience to legal orders, a reduced sentence approach should *not* be adopted. Instead, the subordinate should be encouraged to obey orders she thinks are illegal, by way of affording her a superior orders defense.

2. Agency Analysis of Conditional Liability Approaches

By demonstrating that neither affording a superior orders defense nor applying a reduced sentence approach will *always* maximize a lawmaker's utility, agency analysis has shown the appropriate solution is an intermediate one. This Section thus examines whether either of the two commonly endorsed conditional liability approaches should be adopted (i.e., the factual approach and the normative approach) since both of these approaches advance an intermediate solution.

Both the reduced sentence approach and the factual conditional liability approach instruct subordinates to disobey any order they believe is illegal.[135] Yet, each approach has a different effect on a subordinate's behavior. As previously stated, soldiers do not have perfect knowledge of the law. Under

---

trial, plea bargains are unlikely to reduce deterrence).

[134] Osiel, *supra* note 20, at 967.

[135] *See supra* note 39.

both approaches, a soldier will be punished if she mistakenly disobeys a legal order. The two approaches differ in how they treat a soldier who mistakenly obeys an illegal order. The reduced sentence approach calls for the punishment of such a soldier, whereas the factual approach allows for the acquittal of a soldier whose mistaken obedience is deemed reasonable. Thus, a higher threshold of doubt is attached to the factual approach than is attached to the reduced sentence approach. Under the factual approach, a soldier will only disobey when she thinks it is relatively clear an order is illegal, while under the reduced sentence approach, the soldier will tend to disobey even when she is less certain about an order's legality.

But how certain a soldier is that an order is illegal, and the probability that her assessment is *correct*, are two very different issues.[136] To say that a soldier is 90% sure an order is illegal, is not the same as saying that 90% of the times in which she receives orders similar to the order just received, such orders will be illegal. Therefore, the factual approach encourages a soldier to obey in cases of doubt more frequently than the respondeat superior approach, and yet it often does not increase the accuracy of the soldier's determinations. Thus, situations exist in which the reduced sentence approach will better serve the lawmaker, even though it will increase mistaken acts of disobedience.

Other situations also exist where, even under the factual approach, mistakenly disobeying legal orders will lead to great harm. The probability that a soldier might mistakenly disobey legal orders, even under a factual approach, is relatively high in certain military situations, especially during combat. Because a commander has more expertise than a subordinate, as well as more access to sensitive information, a factual approach will often elicit "disobedience to orders that appear wrongful from the soldier's restricted perspective but which are actually justified by larger operational circumstances."[137] Thus, we can imagine cases where the factual approach will lead to harm caused by mistaken acts of disobedience, which will outweigh the crime prevention benefits it might otherwise offer the lawmaker. In these cases, the lawmaker should adopt an approach that further encourages a subordinate to obey orders she suspects are illegal. The normative approach is one such approach.

Unlike the factual approach, the normative approach is an intermediate solution that does not instruct the subordinate to disobey all illegal orders; instead it instructs her to obey some, but only some, illegal orders. That is, it

---

[136] Joseph Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1195 (1989) (discussing limits on deference to authority).

[137] OSIEL, *supra* note 10, at 64; *see also* Richard A. Wasserstrom, *Individual Responsibility in Warfare*, *in* LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE 194, 195, 202 (Peter D. Trooboff ed., 1975).

instructs subordinates to disobey only when an order is both illegal and grossly immoral.[138] Supporters of this approach assume most soldiers can recognize when an order is both illegal and immoral, and thus this approach reduces the chance subordinates will mistakenly disobey legal orders while also increasing the accuracy of the soldiers' determinations of an order's legality.[139] Yet, this is often not the case. In many combat situations, the subordinate either does not have sufficient expertise or access to all the necessary information needed to evaluate the situation. Thus, "[a]n act that seems to the uninformed as manifestly wrong may actually be morally justified."[140] Therefore, like under the factual approach, there will be situations in which the harm from mistaken acts of disobedience to legal orders will still be too high, and a way needs to be found that further restricts subordinates' discretion.

Supporters of the normative approach also claim it sufficiently reduces the harm caused by crimes of obedience because of its prohibition against committing grossly immoral illegal acts.[141] As such, the most harmful crimes of obedience are prevented, while the harm caused if soldiers are further encouraged to disobey orders they suspect are illegal is also averted. However, this premise is not always true, and the lawmaker's utility (i.e., the balance between the crime prevention gains, on the one hand, and the harm caused by mistaken acts of disobedience to legal orders, on the other) will sometimes be better served if the subordinate is instructed to disobey orders she suspects are illegal even if they are not grossly immoral.

For example, in an Israeli court martial dubbed "The Bread Case," the following domestic-law scenario was dealt with: a soldier and a commander were delivering bread when the commander gave the soldier an illegal order to throw seventy-eight loaves of bread to the side of the road so they could go home early.[142] While such an order is not grossly immoral, subordinates can easily recognize it is illegal and are not likely to confuse such an illegal order with any legal order. Therefore, the approach adopted in this instance should instruct soldiers to disobey the order even if it is not grossly immoral, which is exactly what the Israel court martial did.[143]

---

[138] *See supra* notes 36–37 and accompanying text.

[139] *See* sources cited *supra* notes 36–37.

[140] Barak Medina, *Political Disobedience in the IDF: The Scope of the Legal Rights of Soldiers to Be Excused From Taking Part in Military Activities in the Occupied Territories*, 36 ISR. L. REV. 73, 82 (2002).

[141] *See supra* notes 36–37.

[142] Mil. Appeal/15/65 Chief Military Prosecutor v. Gil & Hadar, 1965 PDZ 28 (Isr.).

[143] *Id.* at 30 (ruling that an illegal order, given in order to serve a private end of a commander, should always be disobeyed). A similar rule has been adopted in many other legal systems. *See, e.g.*, 2008 MANUAL FOR COURTS-MARTIAL, *supra* note 39, art. 90(c)(2)(a)(iv) (United States); LEIGH & BORN, *supra* note 109, at 213 (Belgium and Lithuania); Sahir Erman, *Compliance with Superior Orders Under Domestic Criminal Law and Under the Law of War*, 10 MIL. L. & L.

In sum, agency analysis indicates that supporters of any of the commonly endorsed approaches were wrong in advancing a one-rule-fits-all application of their preferred approach. If the relationship between crime prevention (i.e., rule of law) and the benefits to the lawmaker from a well-functioning armed force (i.e., military discipline) is examined in a less abstract manner than a single balancing test, the conclusion that should be reached is that none of these approaches is preferable in all situations. Between adopting a reduced sentence norm and the alternative of adopting a superior orders defense, each legal policy will only sometimes be preferable to the other. Furthermore, a respondeat superior norm should not be endorsed in every situation in which a reduced sentence norm should not be applied. Instead, in many situations an intermediate solution should be adopted. Yet, the kind of intermediate solution that should be adopted differs according to the individual situation. Thus, the findings of agency analysis have a further reaching implication; indicating that the core premise of current legal discourse—regulation through a one-rule-fits-all policy—is flawed.

IV. ANY ONE-RULE-FITS-ALL POLICY IS INAPPROPRIATE: FURTHER INDICATIONS

Agency analysis indicates no single approach is preferable in all situations. This Part further strengthens that conclusion. First, it examines claims that there are reasons, other than efficiency concerns, to adopt a conditional liability approach as a one-rule-fits-all policy. Second, it addresses the argument that it is especially appropriate to adopt a reduced sentence approach as a one-rule-fits-all policy in the realm of international law. Lastly, it points out that not all laws that an order can violate are cut from the same cloth; an element that has been ignored in the current discourse. This element serves as a further indication the issue should not be regulated through a one-rule-fits-all policy.

A. Agency Analysis, Excusatory Considerations, and Conditional Liability Approaches

We return to the question that opened this Article. Why, and when, do we want to give soldiers the opportunity to raise a superior orders defense? Is this defense useful only because there are situations in which adopting it would maximize a lawmaker's utility? Or, do we wish to also acknowledge the difficulty soldiers face when they are given an order and need to decide whether to obey or disobey? This latter reason suggests we should take into

---

WAR REV. 371, 398–99 (1971) (Germany and Sweden).

account considerations other than efficiency; namely, the types of considerations that allow for excuse defenses ("excusatory considerations").[144]

According to many views, in particular deontological ones, excuse defenses should sometimes be adopted even in cases where applying such a defense will not serve the lawmaker's utility.[145] Thus, if excusatory considerations mandate the adoption of a one-rule-fits-all policy, the conclusions of the agency analysis may be superfluous. In other words, we must determine whether an excuse defense must be set in all situations, which would mandate the adoption of a different approach than that suggested by the agency analysis. This Subsection will examine the excusatory considerations relevant to crimes of obedience in a less abstract manner than they are currently examined, as well as the relationship between these considerations and the conclusions of the agency analysis. This examination will help us determine whether these excusatory considerations support the adoption of a one-rule-fits-all policy, or whether they supply further evidence against regulating obedience to orders in such a manner.

1. Mistake of Law and the Factual Approach

One category of situations in which many agree that an excuse defense should be afforded is when a person violates the law due to a reasonable mistake made following an order of a governmental official.[146] Adopting such a defense allows courts in each case to separately examine the culpability of individuals who followed illegal orders, and to make discrete findings that a person should not be held culpable when: (1) she thought the order was legal; and (2) that mistake was reasonable. It is often argued the factual approach should be adopted in the context of obedient soldiers, as it adapts this more general mistake of law defense to the unique conditions of the military.[147] If this argument were true, then agency analysis sheds no light on the issue, as there will always be an excusatory consideration obligating the adoption of the factual approach. That is, there is an

---

[144] *See supra* note 22 (explaining excusatory considerations).

[145] According to deontological views that strongly influence criminal law jurisprudence, when it is unjust to hold a person culpable a criminal law excuse defense should be afforded, even if doing so does not serve the lawmaker's utility. *See* sources cited *supra* notes 96, 101. Moreover, many consequentialist views, other than strict utilitarianism, will also support excuse defenses in such cases. *See* Antony Duff, *Legal Punishment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), http://plato.stanford.edu/archives/fall2008/entries/legal-punishment.

[146] *See* Re'em Segev, *Justification, Rationality and Mistake: Mistake of Law Is No Excuse? It Might Be a Justification!*, 25 L. & PHIL. 31, 32 n.3 (2006) (noting the obviousness and general consensus of this view).

[147] *E.g.*, WILLIAMS, *supra* note 54, at 297; Stanley Yeo, *Mistakenly Obeying Unlawful Superior Orders*, 5 BOND L. REV. 1, 15 (1993).

excusatory aim that obligates the lawmaker to allow courts to conduct a case-by-case examination of subordinates' culpability, by examining whether (a) the individual subordinate soldier thought the order was legal; and whether (b) her specific mistake was reasonable.

However, this argument is false. There are certain categories of situations in which, even from a deontological point of view, the lawmaker can choose to bar such individual judicial determinations.[148] These situations are ones in which there is a moral justification allowing the lawmaker to place a person under a duty to learn the law.[149] There are two main categories of these situations.

First, it is commonly accepted that all individuals are expected to know and learn certain core moral rules that are protected by specific legal prohibitions.[150] Therefore, a mistake of law defense can be barred in cases where orders have led to violations of such norms. For example, individuals who obey orders of governmental officials to commit murder will generally be barred from raising a mistake of law defense. Not only is it unlikely that individuals will fail to realize such an order is illegal, or that any mistake will not be unreasonable, but allowing individuals to rely on a mistake of law defense is fundamentally inappropriate. "Instead of treating individuals as moral agents capable of and responsible for knowing and weighing desirable moral values and choices . . . allowing the defense in these situations encourages us to cede our moral agency to the state."[151]

Second, in areas which require professional expertise, it is considered morally appropriate to deny professionals the same mistake of law defense afforded to laymen, since it is an expert's duty to learn the legal norms regulating her profession.[152] For example, an accountant should not enjoy the same mistake of law defense a layman would be able to enjoy for tax-related crimes because she has a duty to know the relevant law.[153] And policemen, it is often argued, cannot enjoy a superior orders defense, even of the kind afforded by the factual approach (i.e., they cannot enjoy a mistake of law defense for reasonable mistakes made following illegal orders of their superiors) because of policemen's duty to learn and know the law.[154]

---

[148] *See* John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 24–25 (1997) (listing reasons why reliance defense should not be allowed in situations that violate central moral values).

[149] *Id.*

[150] *Id.* at 25.

[151] *Id.* at 26.

[152] John Kaplan, *Mistake of Law*, *in* 2 JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES 1125, 1140–45 (1988).

[153] *E.g.*, United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964).

[154] Doern v. Police Complaint Comm'r, 2001 CarswellBC 1414, ¶ 20 (Can. B.C.C.A.) (WL); United States v. Konovsky, 202 F.2d 721, 730–31 (7th Cir. 1953); Brannan v. Peek [1948] 1 K.B. 68, at 72 (Eng.). For the realm of torts, see RESTATEMENT (SECOND) OF TORTS

The existence of these categories demonstrates there are instances in which the factual approach need not be adopted. First, with respect to certain specific acts, it is morally justifiable to mandate all soldiers know that such acts are illegal, either because of their professional duties or because such acts are obviously immoral. Second, high ranking officers, as professional soldiers, can be mandated to learn the legal norms that regulate their profession. In these two categories of situations, there is no reason to adopt a factual approach, and a lawmaker is thus free to determine whether to apply another approach based on the agency analysis' conclusions.[155]

Furthermore, there is also a category of situations in which the factual approach should not be adopted, even if excusatory considerations are taken into account. Imagine a situation where the agency analysis leads to the conclusion that a normative approach should be adopted. In such situations, if this approach, which affords a more extensive defense, is adopted instead of the factual approach, the only difference is that even those soldiers who knowingly obeyed an illegal order, which is not grossly immoral, will also not be prosecuted. Thus, adopting a more extensive defense will still shield those obedient soldiers who have a valid mistake of law excuse defense.

Therefore, the existence of this excusatory consideration does not inevitably lead to the conclusion that the factual approach should be adopted in all situations. This consideration and not the conclusions of the agency analysis should determine the content of the law dealing with obedience to orders only in the limited situations where (1) this consideration is relevant but (2) the agency analysis supports adopting a reduced sentence approach (i.e., the only approach more restrictive than the factual approach that is likely to sometimes serve a lawmaker's utility). Moreover, the fact that this excusatory consideration is only relevant in some crimes of obedience

---

§ 121 cmt. i (1965) ("[N]o protection is given to a peace officer who, however reasonably, acts under a mistake of law other than a mistake as to the validity of a statute or ordinance.").

[155] Deontological perspectives do not endorse ignoring the consequences of a conduct rule. Rather, they argue that a norm should be adopted despite possible harmful consequences if, and only if, a strong deontological value exists that trumps the need to take into account such consequences. JOHN RAWLS, A THEORY OF JUSTICE 26–27 (1971). It should be noted that with regard to the first category in which the defense is barred (i.e., violations of core moral values), some deontological perspectives will sometimes argue there is a duty to punish the obedient subordinate soldier. *See* Douglas N. Husak, *Malum Prohibitum and Retributivism*, *in* PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS 410, 423 (2010) (stating that some versions of retribution insist that each and every perpetrator of a moral wrong must be punished); Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 413 (1958) (giving the following as the rationale for baring the mistake of law defense from being applied in the context of crimes that prohibit the violation of core moral norms: "[f]or any member of the community who does these things without knowing that they are criminal is blameworthy, as much for his lack of knowledge as for his actual conduct.").

further indicates it is improper to regulate all crimes of obedience through a one-rule-fits-all policy.

2. Psychological Coercion and the Normative Approach

Soldiers may face strong psychological pressure to obey orders, which has been well documented by psychological studies.[156] In particular, Stanley Milgram conducted an experiment where subjects were instructed to provide shocks to a man every time he made a mistake.[157] All of the subjects ended up following the instructor's commands to give increasingly severe shocks to the man, up to 300 volts, even when the man writhed and kicked the wall in pain (the man was an actor and did not actually receive electric shocks, but subjects were not aware of this fact).[158] Sixty-five percent of the subjects used the maximum voltage, at which point they were led to believe the man had lost consciousness.[159]

This research indicates individuals are, at least sometimes, conditioned to obey orders, even if they demand the commission of wrongful acts.[160] Moreover, research further indicates military conditions often uniquely promote this conditioned behavior of obedience.[161] Thus, many agree that the coercive pressures a soldier faces should be taken into account when formulating a law to deal with crimes of obedience.[162] The attempt to balance the coercive pressures a soldier faces against the rule of law has led some to support the normative approach.[163] Furthermore, at first glance the research seems to support the adoption of the normative approach, since it indicates an individual is less likely to obey an order when it contradicts her moral values,[164] especially if the act ordered is both illegal and immoral.[165]

---

[156] *See* Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963) (presenting Milgram's seminal research on obedience); HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY 146–66 (1989) (discussing the psychological researches examining the issue of obedience).

[157] Milgram, *supra* note 156, at 373–74.

[158] *Id.* at 375–76.

[159] *Id.* at 374.

[160] STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 205 (1974).

[161] JEAN-JACQUES FRÉSARD, THE ROOTS OF BEHAVIOUR IN WAR: A SURVEY OF THE LITERATURE 82–86 (2004); Gonzalez, *supra* note 92, at 92–155.

[162] *E.g.*, Gonzalez, *supra* note 92, at 156–65; *see also* V. Lee Hamilton, *Intuitive Psychologist or Intuitive Lawyer? Alternative Models of the Attribution Process*, 39 J. PERSONALITY & SOC. PSYCHOL. 767, 771 (1980) (arguing for greater legal recognition of research demonstrating human propensity for obedience).

[163] Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801, 817–18 (1997) (stating this policy is commonly endorsed by prosecutors).

[164] KELMAN & HAMILTON, *supra* note 156, at 92.

[165] Legally backing the moral norm reduces the likelihood that a psychological process of

This seemingly leads to the conclusion there is always an excusatory aim that obligates the adoption of the normative approach. However, research reveals the strength of the coercive effect of orders varies among different situations. During emergency situations psychological factors that increase the tendency for conditioned obedience are much stronger than in non-emergency situations.[166] Furthermore, there is a correlation between the tendency to obey and the strictness of military discipline demanded from a soldier. That is, the tendency for conditioned obedience to orders tends to be lower when the discipline required of a soldier is less strict.[167] Thus, a tendency for conditioned obedience is not likely to exist in the higher ranks of the chain of command, where lax discipline is generally practiced.[168] Research also indicates that if a second authoritative body makes a normative proclamation that contradicts the wrongful order, subordinates will be less likely to obey on impulse and instead will rationally consider the conflicting messages.[169] Supposedly, a lawmaker sends such a proclamation when the law states soldiers should only obey legal orders, or that all grossly immoral, illegal orders must be disobeyed.[170] The problem, however, is that such general messages are often ineffective because soldiers have a limited ability to determine whether an order is illegal or grossly immoral.[171] Yet, it is still likely that more specific laws that delineate categories of orders that should be disobeyed will reduce conditioned obedience.[172] Thus, this excusatory consideration does not lead to the conclusion that the normative approach should always be adopted. However, this excusatory consideration should be

---

rationalization will lead subordinates to view orders given to them as being an exceptional situation in which the moral norm does not apply. DANIEL MUÑOZ-ROJAS & JEAN-JACQUES FRÉSARD, THE ROOTS OF BEHAVIOR IN WAR: UNDERSTANDING AND PREVENTING IHL VIOLATIONS 15 (2004).

166 NICO KEIJZER, MILITARY OBEDIENCE 61–64 (1978); Gonzalez, *supra* note 92, at 121–27.

167 Gonzalez, *supra* note 92, at 111.

168 *See* Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 64, 73 (2007) (arguing that high-ranking state agents act in a calculating manner); CASSESE, *supra* note 54, at 246 (listing situations in which orders are more likely to be questioned).

169 KELMAN & HAMILTON, *supra* note 156, at 159 ("It is likely that divided authority reduces the strength of binding forces even in situations in which one of the authorities is clearly of higher status."); *see also* Danielle S. Beu & M. Ronald Buckley, *This is War: How the Politically Astute Achieve Crimes of Obedience Through the Use of Moral Disengagement*, 15 LEADERSHIP Q. 551, 565 (2004).

170 For a listing of normative limits on authority that can reduce conditioned obedience, see KELMAN & HAMILTON, *supra* note 156, at 134–35.

171 *See supra* notes 137, 140 and accompanying text; *see also* OSIEL, *supra* note 10, at 119, 241 n.21 ("[I]t is likely that most illegal orders will be obeyed, given the overwhelming influence of the military's hierarchical structure . . . .").

172 *See* KELMAN & HAMILTON, *supra* note 156, at 159.

taken into account, mainly when addressing low-ranking subordinates in emergency situations.

Thus, there are not any excusatory considerations that mandate the adoption of either of the two conditional liability approaches in all instances. When the different excusatory considerations are closely examined, we see that each is only relevant in a limited set of circumstances.

B. Applying the Agency Analysis to the International Arena

Agency analysis uncovers the main harm of adopting the reduced sentence approach as a one-rule-fits-all policy. Such an approach may lead a soldier to (mistakenly) disobey orders beneficial to the lawmaker (i.e., legal orders). Yet, adopting a reduced sentence approach as a one-rule-fits-all policy can still lead to maximal utility if the lawmaker never gains from the performance of legal orders. Given the state grants the military the legal authority to carry out acts for its benefit,[173] it seems obvious that the wholesale application of a reduced sentence approach will not have maximal utility in practice. However, some implied that this conclusion only applies to domestic law, and a reduced sentence approach can still have maximal utility in the realm of international law.

States are the main lawmakers and enforcers of international law, which implies domestic lawmakers are often the real architects of international law.[174] But, there is a difference between domestic lawmakers' uses of domestic law and their uses of international law. A state does not need to rely on international law to dictate the behavior of its own agents; it can use domestic law. Thus, by trying to convince other states a certain prohibition is the international customary law or by agreeing with other states via treaty that a certain act is prohibited, a domestic lawmaker attempts to influence the behavior of foreign agents.[175] Because the core aim of a military is to win

---

[173] *See* Peter D. Feaver, *The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control*, 23 ARMED FORCES & SOC'Y 149, 152–53 (1996) ("[The military] is subordinate to the political authority of the state.").

[174] Eitan Diamond, *Before the Abyss: Reshaping International Humanitarian Law to Suit the Ends of Power*, 43 ISR. L. REV. 414, 418 (2010) ("After all, it is States who make international law, and it is they who can unmake it. When they, the authors of IHL, challenge the validity and aptness of IHL rules, the implications are likely to be more far-reaching than when any other actor does so."); *see also* Kirsten Schmalenbach, *Article 53: Treaties Conflicting with A Peremptory Norm of General International Law ("Jus Cogens")*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 897, 918 (Oliver Dörr & Kirsten Schmalenbach eds., 2012). One should not, however, ignore the difference in procedures between the two systems, and that each domestic lawmaker has less power in the international arena than she has domestically.

[175] *See* Francesco Parisi, *Rethinking Opinio Juris: A Law and Economics Perspective*, 4 INT'L LEGAL THEORY 21, 21–22 (1998) (stating that "states articulate desirable norms as a way to signal that they intend to follow and be bound by such rules" and implying that such a norm

wars[176] and the disciplined obedience to orders (certainly legal ones) facilitates attainment of this aim, it is unlikely a state will be harmed when enemy soldiers, in attempting to disobey internationally illegal orders, will mistakenly disobey legal ones. As such, it has been argued that a superior orders defense should never be recognized in international law, and instead a reduced sentence rule should be adopted in all situations.[177]

However, this critique reflects an inaccurate conception of the role of international law. By attempting to advance a certain norm in the international arena, a state may actually wish to achieve two goals. First, a state might wish to deter enemy soldiers from violating international humanitarian law.[178] Second, a state might wish to influence the manner in which its own soldiers will be treated by the enemy.[179] A reduced sentence rule will not always be preferable in light of this second goal.

If the enemy, or a third state, reciprocates and applies a reduced sentence rule when prosecuting the state's soldiers, the state's interest in protecting its soldiers from foreign prosecution will be undermined. Moreover, even if the state does not wish to protect its own soldiers who commit "war crimes of obedience" from foreign prosecution, the state may still be harmed by advancing a reduced sentence rule in the international arena. If other states reciprocate and apply a reduced sentence rule when prosecuting the state's soldiers, and if that deters the state's soldiers, the state is likely to be harmed by the mistaken acts of disobedience to legal orders that tend to occur under a reduced sentence rule. When these harms outweigh the crime prevention gains a state receives under a reduced sentence rule in the international arena, a state will attempt to advance an approach that incorporates a superior orders defense.

In other words, as in the domestic context, adopting either a reduced sentence rule or a superior orders defense will only sometimes be preferable to the other. Moreover, we can expect that, in many situations, an intermediate solution should be adopted, and the kind of intermediate solution that should be adopted will vary among different situations.

---

will be able to attain its desirable aim only if other states will adhere to it as well, so that it will become the norm that governs the relevant actions of states at the international level).

[176] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955); Feaver, *supra* note 173, at 52.

[177] Alexander N. Sack, *War Criminals and the Defense of Superior Order in International Law*, 5 LAW. GUILD REV. 11, 14 n.25a (1945) ("The claim of application of . . . the defense of superior order of the enemy . . . [is] quite absurd . . . . [T]he defense serves, primarily, as a rule of discipline and morale, and there is nothing in the scriptures enjoining a belligerent to help in maintaining discipline and morale of his enemy who wants to destroy him.").

[178] *See* Parisi, *supra* note 175, at 21–22.

[179] A proclamation of a state concerning the international *lex lata* often is actually an attempt to signal to other states the conduct rule it wishes all states to adopt. *See id.*

C. Effects of Discretion in a Subordinate's Determination of Legality

The lawmaker is more likely to keep the commander on the "right" path if the law consists of clear and detailed rules. Such rules ensure commanders will be less likely to mistakenly violate the law, and clear, detailed rules also often make it easier for the lawmaker to recognize when the commander violates the law.[180]

Compare the following two laws: (1) destruction of a religious site is forbidden unless the enemy is conducting an attack from that site; and (2) destruction of civilian property is not allowed unless some military necessity exists that justifies its destruction. To determine whether the commander violated the first law (i.e., a legal rule delegating a task to the commander), only two factual issues need to be determined: (1) Was the attacked site a religious site?; and (2) Did the enemy launch an attack from that site? On the other hand, to determine whether the commander violated the second law (i.e., a legal norm delegating discretion to the commander), the lawmaker needs to know what constitutes "military necessity," in addition to the examination of the relevant factual questions. This can be hard to determine for a person who is not a military expert.

Moreover, the lawmaker's lack of expertise is also often the reason why clear legal rules are not always used in the first place.[181] An individual agent is often better equipped than the lawmaker to determine what actions will maximize the lawmaker's utility.[182] Accordingly, vast areas of the law are legislated in a way that accords discretion to agents. This is most notably the case with regards to administrative laws[183] and laws that deal with emergency situations.[184] Furthermore, this is also the case with negligence laws, which necessarily grant discretion to individual actors to determine what is reasonable.[185] Yet, due to differences in expertise, when the law is discretionary the lawmaker is faced with a problem. The lawmaker lacks "an effective means of reversing the agent's decisions . . . . [T]he agent is chosen because of expertise, so the principal must acquire expertise or hire another expert to evaluate and then alter the agent's choice."[186]

---

[180] *See* Cohen, *supra* note 87, at 31 (comparing negligence and strict liability norms).

[181] *See* Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 685–89 (1991) (discussing the reasons that lead lawmakers to adopt discretionary norms and not bright-line rules).

[182] *See* Feaver, *supra* note 173, at 150–52 (analyzing the expertise related issues which lead to the delegation of authority from the citizens as a collective to the lawmakers and from them to the fighting force).

[183] WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 5 (4th ed. 2000).

[184] See a discussion of this issue in the text accompanying *infra* notes 191–93.

[185] *See* RONALD DWORKIN, LAW'S EMPIRE 281–82 (1986) (describing the law of negligence in terms of delegation of decision-making authority from lawmakers to individuals).

[186] McNollgast, *The Political Economy of Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS

When a lawmaker instructs a subordinate to disobey illegal orders, she attempts to utilize the subordinate to evaluate and then alter the commander's choices. Interestingly, for reasons that will now be explained, the likelihood a subordinate will correctly recognize whether an order is illegal is influenced by whether a commander was given discretion in the first place. If the commander was not given discretion and only concrete tasks have been delegated to the commander, a subordinate's duty is relatively limited in scope. She is only expected to know the relevant rules set by the lawmaker and act accordingly. But, if a commander is given discretion, in addition to being required to know the relevant law, the subordinate needs to make an independent assessment of her commander's judgment to determine whether an order is legal. For example, she needs to assess whether there is a "military necessity" to destroy the civilian property to determine whether that order is legal. In this situation, placing the subordinate under a duty to review the superior's orders gives the subordinate the concomitant discretion to determine whether the act ordered should be performed.

Yet, this latter scenario presents a problem because a commander is likely to possess better resources, knowledge, and skills.[187] Therefore, placing the subordinate under a duty to review the superior's orders is likely to yield results that do not serve the lawmaker's goals because it delegates discretion to a less qualified agent. Accordingly, a legal policy instructing the subordinate to disobey illegal orders is often more likely to cause mistakes, (i.e., disobedience of legal orders and obedience to illegal ones), when the law that determines whether the order is legal is one that delegates discretion to the commander. Moreover, as the difference in capability and skills between subordinate and commander increases, so too does the likelihood that instructing a subordinate to disobey illegal orders will result in mistakes.

An example of this can be seen in the recent Canadian case of *R. v. Liwyj*.[188] Liwyj, a vehicle technician, received an order to perform a brake adjustment on a vehicle without caging bolts. He refused to do so under the belief that it was unsafe, even though his more qualified commanders determined it was safe. Liwyj was prosecuted for disobedience and argued the order was illegal because the army's "Safety Directive" instructed soldiers to stop unsafe activities.[189] The court wished to set a legal policy that would defer to commanders' determinations. The court did so by

---

1651, 1704 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

[187] Lippman, *supra* note 20, at 248; Re'em Segev, *Moral Justification, Administrative Power and Emergencies*, 53 CLEV. ST. L. REV. 629, 654 (2005).

[188] R. v. Liwyj, 2010 CarswellNat 4984 (Can. Ct. Martial App. Ct.) (WL).

[189] *Id.* ¶¶ 2–9, 33.

finding Liwyj guilty and adopting a normative approach (i.e., by instructing soldiers to knowingly obey even some illegal orders).[190]

In requiring a subordinate to review the legality of her commanders' orders, the greatest negative effect will occur when the law allows the commander to infringe upon general legal rules in exceptional situations. These legal exceptions almost always are allowed to be employed by agents only in emergency situations.[191] Furthermore, such legal norms are, usually, based on a very strict lesser-evil rationale.[192] That is, these laws instruct the relevant agents to use such legal authority given to them as a last resort to be used only in exceptional situations.[193] Placing a subordinate under a duty to review the legality of her commander's orders in such situations requires the subordinate to independently assess whether the generally prohibited conduct should nevertheless be allowed under the circumstances. Because the law instructs individuals to view the infringement of the general legal rule as an act allowed only in exceptional (usually emergency) situations, a subordinate may tend to err on the side of disobeying an "infringing" order. Thus, because a superior will likely have more information and expertise, asking a subordinate to review a superior's orders in emergency situations may lead soldiers to often mistakenly disobey legal orders.[194]

A 2008 Israeli case illustrated this problem.[195] Israeli law forbids the export of medicine without the Health Ministry's approval. The Israeli Defense Force (IDF) decided to send medical supplies to the Palestinian authorities so that they would be able to treat civilians injured during combat in Gaza. Due to the urgent need to deliver the medication, the IDF made the delivery without first seeking the approval of the Health Ministry. At the border, the IDF asked the head of the Israeli customs unit to allow the convoy to pass. He agreed, yet one of his subordinates refused to allow the trucks to pass because the Health Ministry had not given its approval, even though he was explicitly ordered to do so by his superior.[196] When tried for disobedience, the subordinate claimed that the order was illegal and that

---

[190] *Id.* ¶¶ 32–34.

[191] Segev, *supra* note 187, at 629; *see also* FLETCHER, *supra* note 70, at 791–96 (discussing generally the theory of lesser evils as the basis for criminal law defenses that deal with emergency situations).

[192] Segev, *supra* note 187, at 629; Robinson, *supra* note 22, at 203.

[193] *See* MICHAEL INGATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 8 (2004) (discussing the lesser evil approach as applied to legal policy dealing with emergencies); JOYCELYN M. POLLOCK, CRIMINAL LAW 86 (Elisabeth Roszmann Ebben & Michael C. Braswell eds., 9th ed. 2009) ("The defense of necessity should be and has been very strictly applied.").

[194] Wasserstrom, *supra* note 137, at 202; OSIEL, *supra* note 10, at 64.

[195] Civil Service Appeal 11196/07 Michaeli v. Commissioner of the Civil Service (unpublished) (2008) (Isr.). It should be noted that Michaeli was not a soldier but a civil servant, yet according to Israeli law the superior orders defense applies to civil servants as well.

[196] *Id.* ¶¶ D–E, G(7).

serious health risks could occur if medication was exported without the Health Ministry's prior approval.[197] The Israeli Supreme Court ruled that the order was legal because of the existence of "necessity," stressing the fact that the decision was made by much higher ranked and better qualified state agents than the subordinate.[198] The court wished to set a policy that would lead the superiors' determinations to be preferred, and thus ruled in support of the normative approach.[199]

In sum, it is likely that a rule encouraging disobedience to unlawful orders will cause more mistakes when the law at issue is discretionary, and especially when that law is one that regulates emergency situations. Moreover, the considerations a lawmaker faces when constructing a policy to govern crimes of obedience differ depending on which law the orders are expected to violate. If the law sets clear rules, the lawmaker needs to assess the subordinate's ability to learn these rules. If the law affords discretion to the commander, the lawmaker needs to assess the subordinate's expertise in the issue regulated by the law. Current legal discourse has ignored the existence of this difference, yet this difference further indicates different crimes of obedience should be treated differently.

V. SOLUTION—A MODULAR POLICY

In light of the failure of current attempts to regulate crimes of obedience, this Section offers an alternative. Instead of a one-rule-fits-all policy, a modular one should be adopted. Legal solutions should be tailored to accommodate the varied situations in which military orders are given.

A. Choosing a Fragmentation Level

According to agency analysis, the factors that should be considered when determining how to regulate crimes of obedience depend heavily on the situation in which the order was given. As such, it is inappropriate to regulate the issue via a one-rule-fits-all policy. This subsection thus examines the alternatives to the application of such a policy. It rules out the option of letting the relevant decision makers regulate the issue on a case-by-case basis. It then advocates for a new approach, which would divide crimes of obedience into narrower, discernible categories, each governed by a different policy.

---

[197] *Id.* ¶ D.
[198] *Id.* ¶ G(7).
[199] *Id.* ¶¶ G(1)–(7).

1. Case-by-Case Regulation is Inappropriate

The lack of consensus about how to regulate crimes of obedience is not merely the result of disagreement among supporters of different approaches. Instead, as this Article uncovers, a more fundamental problem plagues the current discourse on this subject. Contrary to current consensual premise, there is, in fact, not one approach that is appropriate in all situations.

For practical purposes, one might therefore argue that it is appropriate to allow the law to be as vague as it currently is because it enables courts,[200] as well as states with respect to international law,[201] to regulate crimes of obedience on a case-by-case basis. Furthermore, there is some evidence indicating courts tend to rule in particular ways depending on the type of situation presented.[202] Similarly, other evidence suggests the shifting nature of reciprocity is one reason for international law's inconsistency with respect to the law governing crimes of obedience.[203] In other words, one may argue there is not, truly, a problem of inconsistency in the current law, and current legal vagueness actually enables treating different cases differently.

Yet, such a claim exaggerates the positive effects of current legal vagueness (i.e., it is both descriptively and normatively flawed). As a descriptive matter, case law of many legal systems clearly shows that the case-by-case discretion made possible by current legal uncertainty leads to substantial legal inconsistencies when evaluating crimes of obedience, and causes similar cases to be treated differently.[204]

---

[200] *See, e.g.*, Nico Keijzer, *A Plea for the Defence of Superior Orders*, *in* 8 ISR. Y.B. HUM. RTS. 78, 103 (1978) ("It must always be realized, however, that all doctrines and formulas are not more than the means by which to determine whether a defendant is reasonably to blame and they must, therefore, never be interpreted, so as to hinder attainment of just results.").

[201] Sato, *supra* note 9, at 125–26; 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 516–19 (1968).

[202] *E.g.*, Albert Ehrenzweig, *Soldiers' Liability for Wrongs Committed on Duty Under American and International Law*, 30 CORNELL L. Q. 179, 179–80 (1944); Bohrer, *supra* note 37, at 262–67.

[203] *See* Robert Cryer, *The Boundaries of Liability in International Criminal Law, or 'Selectivity by Stealth*,' 6 J. CONFLICT & SEC. L. 3, 11–16, 30–31 (2001) (comparing the norms of the ad-hoc tribunals to those of the ICC); *see also* Sack, *supra* note 177, at 14 n.24 (discussing the reason behind the U.S.'s & U.K.'s pre-WWI position).

[204] For a claim implying similar cases are treated alike, see Keijzer, *supra* note 200, at 103. However, if similar cases are not treated alike, the results cannot be considered just. *See, e.g.*, Bohrer, *supra* note 37, at 228–29 (discussing similar crimes of obedience that were not treated alike under Israeli case law because each courts-martial applied a different approach). The clearest example of such inconsistency in international law can be seen by comparing the rulings of the two main trials that dealt with the perpetrators of the Ardeatine Cave Massacre; a massacre committed under Hitler's orders as reprisals for the killing of S.S. soldiers by Italian partisans. *Compare In re Kappler*, 15 Ann. Dig. 471 (Italy, Military Tribunal of Rome 1948), *cited in* CASSESE, *supra* note 54, at 236–37 (acquitting the subordinate soldiers based on a reapondeat superior approach masked as a ruling on mens rea), *with Priebke's* case,

As a normative matter as well, as explained hereinafter, courts should not be afforded such discretion by domestic or international law when dealing with obedience to illegal orders. Nor should international law allow such discretion to states.

Assessing the considerations relevant to the issue of obedience to illegal order is not an exact science. Judges necessarily vary in their assessments, and thus similar cases are often not treated similarly, which creates a fairness problem.[205] This variation reduces the likelihood of developing clear rules ex ante. As such, a fair-notice problem is created as well.[206] Moreover, since such a policy fails to create clear instructions for soldiers, it leads to inefficiencies. Agency analysis shows that a lawmaker should take into consideration the probability a subordinate will correctly obey or disobey orders as instructed.[207] Choosing a legal policy that sends a convoluted message is therefore counterproductive, given that it increases the probability subordinates will obey when the lawmaker would wish them to disobey and vice versa.

Similarly, it is unjust to allow states to determine the international law regarding crimes of obedience according to the level of reciprocity between the states involved in a specific conflict. A person's culpability for war crimes should be determined by her actions, not based on the identity of her state or the identity of the tribunal in which she is prosecuted.[208]

Moreover, increased support for complementarity mechanisms and the use of universal jurisdiction indicate that allowing states such discretion is inefficient. States can choose not to adopt a general prohibition, which would force regulation to be necessarily restricted to a specific conflict and dependent on the aims and capabilities of the specific states involved in that conflict.[209] The adoption of a general prohibition (i.e., declaring a certain act prohibited by international criminal law) is achieved, however, when states attempt to maximize their utility in the long run.[210] During multilateral

---

discussed in Francesca Martines, *The Defences of Reprisals, Superior Orders and Duress in the* Priebke *Case Before the Italian Military Tribunal*, 1 Y.B. INT'L HUMANITARIAN L. 354, 356–57 (1998) (convicting the subordinate soldier based on a conditional liability approach).

[205] *See* sources cited *supra* note 204; *see also supra* notes 51–52.

[206] Emily Sherwin, *Rule-Oriented Realism*, 103 MICH. L. REV. 1578, 1592–93 (2005) (reviewing HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION (2004)); *see also* Robinson, *supra* note 51 and accompanying text.

[207] *See supra* Part III.*D*.

[208] *See* RATNER & ABRAMS, *supra* note 35, at 25 (explaining criminality "should be measured . . . by an objective standard"); Drumbl, *supra* note 68, at 556–59.

[209] *See* James D. Morrow, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J. LEGAL STUD. S41, S54 (2002) (describing the pros and cons of bilateral, pre-war treaty making).

[210] *Id.* at S54–55; *see also* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 57 (1990).

negotiations, most states involved are usually those that have not recently been, are not currently, and do not anticipate being involved in armed conflict.[211] Because these states are not engaged in an armed conflict, they are less likely to inject case-specific, self-serving concerns into the drafting process.[212] Instead, the process becomes more focused on whether the long-term harm states can expect to suffer without an international prohibition on certain conduct is greater than the long-term gains states can expect from having their agents perform that conduct. Thus, this decisionmaking process has the potential to be as close as practically possible to one made under a veil of ignorance.[213]

However, if the rules of enforcement are allowed to vary between conflicts, states' attempt to maximize their utility in the long run will fail. "[T]rying individual violators from other states during wartime is likely to lead to reciprocal spirals between states rather than deterrence of individual violations" since "[s]tates at war cannot demonstrate to one another that such trials are fair."[214] When a reciprocal spiral occurs, each state retaliates by further punishing soldiers of the other side, as well as by violating other international norms in reprisal.[215] Such retaliation may lead to a vicious circle and an abandonment of international legal norms that both states wish to maintain.[216] Moreover, the concern about a reciprocal spiral often leads to an opposite result, such that states avoid prosecuting enemy soldiers who commit war crimes in fear of reprisal by foreign states.[217] Thus, relying on the interests of individual states in each conflict to enforce the prohibitions of international criminal law will often lead to failure.

Some of these problems can be resolved by employing universal jurisdiction. Universal jurisdiction minimizes the concern that prohibitions of international criminal law will not be enforced, since the abdication of any one state of its authority to prosecute will not prevent other parties from initiating prosecution.[218] However, a state might still view the prosecution of its soldiers by a foreign state as unfair, and thus a reciprocal spiral might still occur.[219] This concern is resolved by allowing prosecution by foreign states

---

[211] Morrow, *supra* note 209, at S54–55.
[212] *Id.*
[213] *Id.*
[214] *Id.* at S57.
[215] *See id.* at S56–57 (giving the treatment of POWs during WWII as an example).
[216] *Id.* at S48–52.
[217] *E.g.*, *id.* at S57.
[218] *See, e.g.*, Rikhof, *supra* note 111, at 51 (discussing global increase in prosecutions of war crimes by different states and international tribunals, including on the basis of universal jurisdiction, which resulted in war criminals, currently, having "fewer places to hide").
[219] *See, e.g.*, MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW 62 (2005) (stating that the proposed universal jurisdiction provision to

to be used only as a complementary enforcement mechanism,[220] such that each state holds the primary responsibility for prosecuting its own soldiers and foreign states are allowed to step in only when the state fails to enforce international criminal law and prosecute its own soldiers.[221] Under such a legal regime, states' ability to abuse their authority to prosecute enemy soldiers is reduced. At the same time, each state still has a strong incentive to prevent and punish international crimes committed by its own soldiers. Therefore, the likelihood a state would conclude a belligerent is shirking its international obligations decreases, thereby reducing the likelihood a reciprocal spiral will ensue.[222]

However, this enforcement mechanism cannot work if the norms that determine the responsibility of individuals, such as the norms that determine the responsibility of subordinates for crimes of obedience, are determined by each state based on its interests in each specific conflict. If such norms are not set ex ante, states will never be able to demonstrate to one another that their prosecution of foreign soldiers is fair or that their decision not to punish their own soldiers is done in good faith.[223] Further, the necessary fairness cannot be demonstrated, even if international standards for individual criminal responsibility have been adopted ex ante, if states are allowed to diverge from them and apply harsher standards in cases in which they are prosecuting foreign soldiers for international crimes. Similarly, the necessary good faith cannot be demonstrated, if states are allowed to apply laxer standards than the international ones in cases where they are prosecuting their own soldiers for international crimes. Without such general applicability of international standards that are set ex ante reciprocal spirals

---

the UN Genocide Convention was opposed due to a "deep-rooted mistrust [by each state] of the judicial systems and proceedings within other States" which led to a concern that adopting a universal jurisdiction for genocide will increase "international conflicts among States, entailing new threats to peace").

[220] Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crimes Against Humanity and War Crimes, art. 3(c)–(d) (Institute of International Law Seventeenth Commission, 2005).

[221] Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK Y.B. U.N. L. 591, 596 (2003).

[222] Morrow, *supra* note 209, at S56–57.

[223] *Cf. id.* at S59–60 (discussing the need for clear rules); *see also* Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 VA. J. INT'L L. 839, 842, 850–51, 856 (2002) (distinguishing between "primary rules," which determine the substantive manner in which an issue would be regulated, and "secondary rules," which determine what acts would be considered as violations of the primary norm; and arguing that states have a greater incentive to set ex ante general secondary rules because irrespective of their substantive interest in each case, states have a joint interest to clarify which acts should be considered as violations in order to facilitate reliable communication and prevent mistaken acts of retaliation).

will not be prevented. An international law dealing with crimes of obedience should, therefore, be one that attempts to maximize a state's utility in the long run, and accordingly it should be based on a decision-making process that resembles one made behind a veil of ignorance.

Behind this veil of ignorance, several issues should be viewed as preconditions (i.e., as issues already agreed upon by the states). Mainly, it should be assumed that states have accepted the substantive criminal act is harmful in the long run, and further agreed *not* to apply, with respect to war crimes of obedience, a laxer standard of individual responsibility on their own soldiers, or a harsher stranded on foreign soldiers, than the one they adopt as the international standard on the matter. Also, as it is a decision made behind a veil of ignorance, we need to assume that states do not know whether they will be the ones prosecuting foreign soldiers or whether their own soldiers will be prosecuted by others. Thus, differences in states' ability to retaliate can be negated.[224] Therefore, in international law as in domestic law, the determination of the proper legal policy to deal with crimes of obedience should be made by weighing the crime prevention benefits of holding subordinate soldiers accountable against the harm caused by mistaken acts of disobedience to legal orders if subordinates are held accountable.

In sum, although a single rule should not be applied to all cases, we should also not allow courts or states unfettered discretion to regulate crimes of obedience on a case-by-case basis. Justice and efficiency demand that courts, states, and soldiers be guided by clear legal rules set ex ante.[225]

2. Choosing the Proper Level of Specification

While laws are necessarily general in nature, there is a limit on the level of generalization that is appropriate.[226] The more general a law is, the more inefficient it will be due to over-inclusiveness. Instead of each issue being regulated by a legal norm tailored to efficiently deal with that issue, different issues are all regulated in a single manner by one legal norm. This leads to an excessive number of cases where the optimal result is not reached.[227]

---

[224] *See* David Rodin, *The Liability of Ordinary Soldiers for Crimes of Aggression*, 6 WASH. U. GLOB. STUD. L. REV. 591, 600–01 (2007); RAWLS, *supra* note 155, at 378 (discussing what should be assumed in the "original position").

[225] *See* Schauer, *supra* note 181, at 658–61 (discussing the ability of clear rules, if adopted ex ante, to prevent inconsistency among implementing organs).

[226] *See generally* Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217 (2004); LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 18–20, 31–32 (2001).

[227] *See* Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 74 (1928) (describing how due to a "process of widening generalizations" legal categories "were expanded to include diverse states of fact with the result that the very devices designed to bring and keep the courts close to the issues of life before them operated to remove them to positions more

Moreover, an overly generalized law forces framers to use abstract terms (such as the term "manifestly unlawful orders"), which leads to legal uncertainty.[228]

But in an overly fragmented legal scheme, the likelihood for legal uncertainty also increases. In such a law, this is due to an increased likelihood that an overlap will exist between definitions of different categories.[229] Additionally, the more detailed a law is, the more costly it is to draft and teach to the relevant agents.[230] Thus, at a certain point, specification will lead to suboptimal results, legal uncertainty, or both.

How should the level of specification be determined? A lawmaker could examine each individual case in an attempt to find similarities between cases and then divide the issue into categories based on those perceived similarities.[231] But this method would be too costly, if not impossible, to implement, and it would often prove difficult to objectively determine what constitutes a similarity.[232] A better way of subdividing while maintaining clear distinctions between legal categories would be to have the categories track the way the social issues the lawmaker wishes to regulate are divided and subdivided in practice.[233] Doing so would make the boundaries between categories more straightforward and less disputed because the new legal categories would reflect common cultural understandings.[234] As such, the

---

and more remote from the life which they regulated, with the result that they regulated it with an ever-decreasing feeling for its realities"); Hanoch Dagan, *Codification, Coherence and Proprietary Competitions* 5 (Tel-Aviv Uni. Law Sch. Law Faculty Paper No. 34, 2006) (stating, in the context of private law, that the use of over-inclusive generalizations is inappropriate, because "narrow categories . . . represent a tentative suggestion for slicing the social universe into economically and socially differentiated segments, recognizing that each 'transaction of life' has some features that are of sufficient normative importance to justify distinct legal treatment").

[228] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 18–19 (1992) (describing, in the context of American law, how an aspiration for unification and generalization has led to a tendency to use overly abstract terms resulting in legal uncertainty).

[229] *See* Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U.W. AUSTL. L. REV. 1, 16 (1996) ("One advantage of a good classification is that it . . . militates against the tricks that complex language can play in concealing similarities and unnecessarily proliferating entities.").

[230] ALEXANDER & SHERWIN, *supra* note 226, at 31–32; *see also* WILLIAM SHAW, CONTEMPORARY ETHICS: TAKING ACCOUNT OF UTILITARIANISM 164 (1999) (arguing rules need to be simple enough to be learned yet specific enough to maximize utility).

[231] *See* 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE: OR THE PHILOSOPHY OF POSITIVE LAW 116–17 (R. Campbell ed., 1875).

[232] *See* STEPHEN WADDAMS, DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING 229 (2003) (describing the difficulty of accurately categorizing legal issues).

[233] Dagan, *supra* note 227, at 5–6; Karl N. Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431, 439 (1930).

[234] Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and*

existence of a common understanding is likely to reduce legal uncertainty. Moreover, such an approach has proved to be the "most effective and secure way of handling legal problems"[235] by shaping legal rules in a way that is "close and contemporary" to the human problems they deal with.[236]

Because cultural understanding varies amongst legal societies, this Article will only be able to offer a general model legal policy based on common features present in modern militaries.[237] However, these common features could serve as the basis for the advised level of specification when addressing crimes of obedience in international law, because the shared cultural background is limited in the international arena and the laws of war are often phrased based on a common denominator all states can agree upon.[238] As to domestic law, before adopting the suggested policy in any specific legal system, the model policy should first be adapted to accommodate the cultural background of that specific society. However, the common experience of modern militaries does expose several important divisions regarding military discipline.

It was once believed military discipline would be harmed unless a rule favoring unquestioning obedience at all times was adopted.[239] However, support for the respondeat superior approach has been abandoned, and military discipline has since become much less rigid.[240] Despite such changes, it is still often argued that because "discipline is embedded in all areas of military life and activity," there is "no ability to sort it or to divide it

---

Constitutionalism, 27 J. LEGAL STUD. 725, 752 (1998); *see also* A.P. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 600 (3d ed. 2007) (arguing legal meaning is better conveyed when publically shared moral distinctions exist and are reflected in the law).

[235] Oliphant, *supra* note 227, at 74.

[236] Hanoch Dagan, *Restitution's Realism* 11 (Tel-Aviv Uni. Law Sch. Law Faculty Paper No. 67, 2007) (citing Oliphant, *supra* note 227, at 73–74).

[237] Such common experience does exist, both in the context of military culture, *see* SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE 13 (1957) (discussing the universal skills of soldiers), and in military law. *See* CLIFTON D. BRYANT, KHAKI-COLLAR CRIME 31 (1979) (discussing the near universality of military justice norms).

[238] Robin Geiss, *Humanitarian Law Obligations of Organized Armed Groups*, *in* NON-STATE ACTORS AND INTERNATIONAL HUMANITARIAN LAW 93, 96–97 (Maurizio Moreno ed., 2010) (denoting IHL as the lowest common denominator that all sides agree upon).

[239] *E.g.*, KEIJZER, *supra* note 166, at 75 (discussing the position of the French Senate in 1882).

[240] LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 305–06 (2d ed. 2000).

according to issues,"[241] and thus a one-rule-fits-all policy should be adopted.[242]

But this claim is inaccurate and misleading. Modern military forces have in fact recognized two major distinctions in the levels of discipline that should be applied. There are differences between: (1) higher and lower ranking soldiers;[243] and (2) routine and emergency situations.[244] Therefore, a legal policy that recognizes these distinctions is likely to increase efficiency while decreasing legal uncertainty. Thus, these distinctions should guide the way crimes of obedience are addressed.

B. Criminal Orders in Non-Emergency Situations

Criminal conduct is strongly regulated by rules and not discretionary legal norms, due in part to the strong fair-notice considerations the subject raises.[245] There are only a few exceptions to the rule-based regulation of the field, namely norms of criminal law governing emergency situations[246] and negligence offenses.[247] Outside of these exceptions, not much discretion is delegated to the individual. As such, a legal policy which instructs subordinates to disobey an order that violates a penal prohibition does not require the subordinates to exercise much discretion when the order does not concern a negligence offense and is not given in an emergency situation.[248] Moreover, in non-emergency situations, subordinates and commanders will often have the same general access to relevant legal and factual information.[249] And, even if the commander initially has more information,

---

[241] General Order of the High Command, 6.0302 Discipline — Commander Responsibility and the Responsibilities of the Staff, art. 2 (Isr.) (translated from Hebrew by the author); *see also* United States v. Lusk, 21 M.J. 695, 700 (A.C.M.R. 1985) ("In combat, . . . obedience to orders is vital. . . . In peacetime, soldiers must be trained in the same climate of obedience. The discipline which enables armies to prevail cannot be switched on and off like a lightbulb.").

[242] *See, e.g.*, Addicott, *supra* note 17, at 87–88; Sandra L. Visser, *The Soldier and Autonomy*, *in* 1 MILITARY MEDICAL ETHICS 251, 262 (Thomas E. Beam & Linette R. Sparacino eds., 2003).

[243] *See infra* Part V.*D*.

[244] MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER, at xix, 4–5 (2d ed. 1971).

[245] H.L.A. HART, THE CONCEPT OF LAW 21 (2d ed. 1994); SIMESTER & SULLIVAN, *supra* note 234, at 28.

[246] *See, e.g.*, FLETCHER, *supra* note 70, at 570–73 (discussing the need to use vague terms in many justification defenses due to the fact that they deal with exceptional emergency situations); Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 769 (1990) ("Indeed, reduced standards of precision may be necessary for justifications. The situationally-dependent nature of these doctrines means that, to remain communicable rules of conduct, justifications cannot be stated with great specificity.").

[247] SIMESTER & SULLIVAN, *supra* note 234, at 26 n.26, 28–29.

[248] *See supra* Part III.*C*.

[249] The difference between expected knowledge in emergency and non-emergency situations

often there will not be a heightened need to either maintain secrecy[250] or respond immediately.[251] Thus, the legal and factual basis for the order can be explained to the subordinate. Therefore, in this context, adopting a legal rule that instructs subordinates to disobey illegal orders is not likely to cause a significant increase in the number of mistaken acts of disobedience to legal orders or obedience to illegal ones. In non-emergency situations, lawmakers should thus adopt a rule demanding subordinates of all ranks to disobey orders that violate penal prohibitions, when such prohibitions are not negligence offenses.

As such, either the factual conditional liability approach or the reduced sentence approach should be adopted here. The difference between these two policies, as previously discussed, lies in the level of doubt regarding an order's legality that will lead a soldier to disobey an order.[252] Because we can assume an information gap will still exist between low-ranking subordinates and commanders, adopting a factual approach will be more efficient with regard to low-ranking subordinates. Such an approach would provide a limited incentive to these subordinates to err on the side of obedience. Moreover, because of asymmetric access to information, we can expect low-ranking subordinates to rely on their commanders' legal determinations. Thus, excusatory considerations also support the adoption of a reasonable mistake defense for obedience to illegal orders. Of course, it is certainly possible there are subcategories of non-emergency situations in which the factual approach would not maximize the lawmaker's utility. However, an overly detailed legal policy is likely to cause a myriad of harms.[253] Therefore, the factual approach should still be used in a majority of non-emergency situations.

As for high-ranking subordinates, the information gap is expected to be much narrower.[254] Thus, a strong argument can be made for a reduced sentence approach. However, the decision to employ a reduced sentence

---

is implied in e.g., LAW OF WAR WORKSHOP DESKBOOK 212 (Brian J. Bill ed., 2000) (giving the following rationales for the superior orders defense: (1) "Virtually all military activities would be criminal if committed in peacetime"; (2) "Combat involves a significant deviation from moral norms.").

[250] While secrecy always plays a role in the military, it can be expected to play a larger role during war. STEPHEN VAN EVERA, CAUSES OF WAR: POWER AND THE ROOTS OF CONFLICT 145 (1999).

[251] *See* LAW OF WAR WORKSHOP DESKBOOK, *supra* note 249, at 212 ("Subordinates cannot be expected scrupulously to weigh the legal merits of orders received in combat."); *see also* ARMED FORCES OFFICER, *supra* note 81, at 10 (emphasizing time constraints).

[252] *See supra* Part III.*D.2* (comparing a soldier's consequences for mistaken disobedience to legal orders under the reduced sentence approach to those under the factual approach).

[253] *See supra* Part V.*A.2* (discussing the harm of an overly fragmented legal policy).

[254] *See infra* Part V.*D* (discussing the unique consequences that arise when both commanders and subordinates are high-ranking officials).

approach over a factual approach should be left to the lawmakers of each specific legal system after considering the actual information gap between high-ranking subordinates and their commanders in that specific legal system.

Let us examine a main advantage of adopting a factual approach or a reduced sentence approach over adopting a normative approach. A normative conditional liability approach encourages an almost reflexive sort of obedience.[255] On the other hand, both a factual approach and a reduced sentence approach give a subordinate more freedom to express her concerns that the order is illegal. During non-emergency situations, the delay caused by allowing the subordinate to express such concerns is not likely to lead to severe harm. Moreover, it can prevent crimes as well as decrease mistaken acts of disobedience to legal orders. A subordinate is likely to obey if, after a short dialogue, the legal basis of the order is explained to her. Similarly, a commander who gives a criminal order by mistake can correct herself if a careful subordinate takes the time to point it out. Even a commander who intentionally gives an illegal order is often likely to amend it once the illegality of the order is exposed. Thus, in most non-emergency situations, a normative approach will *not* best serve the lawmaker's utility.

C. Other Illegal Orders

Orders can also be illegal because they violate either administrative legal norms or negligence offenses.[256] Obligating subordinates to disobey illegal orders that violate such laws raises unique concerns. First, since these laws are often discretionary in nature, a legal policy that instructs subordinates to disobey an order that violates such laws will delegate extensive discretion to the subordinate, which will in turn increase the likelihood mistakes will occur.[257] Second, since the punishment for violating such laws is usually not severe, the lawmaker's ability to deter subordinates from obeying such illegal orders is limited. Third, subordinates are even less likely to be cognizant of the relevant law in this context.[258] Fourth, we can often expect less harm to be caused by the violation of such laws.[259] Yet, there is a strong

---

[255] *See* sources cited *supra* note 37 (noting the rare circumstances in which a soldier is duty bound to disobey orders under a normative approach).

[256] For that distinction to be clear, orders that violate penal prohibitions such as Article 92(1) (failure "to obey any lawful general order or regulation") and Article 92(3) (dereliction of duties) of the Uniform Code of Military Justice, 10 U.S.C. § 892(1), (3) (2006), should be viewed as orders that violate administrative norms and not penal norms.

[257] *See supra* Part III.*C*.

[258] *See* GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 456 (2d ed. 1983) (discussing that even in the common law a mistake regarding a law, other than criminal law, can be a defense).

[259] ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 67–68 (3d ed. 1999).

reason for instructing subordinates to disobey such orders. Due to the harshness of criminal law sanctions and the cost of their enforcement, the lawmaker often resorts to administrative law to direct her agents' actions.[260] Therefore, encouraging subordinates to obey such illegal orders can lead to massive violations of administrative law, which can considerably diminish the lawmaker's ability to control her military agents.

These different concerns can properly be taken into account if the law distinguishes between low-ranking and high-ranking soldiers.[261] In the military, as in any hierarchical body, general policies are determined by high-ranking officials. Thus, obligating high-ranking soldiers to disobey orders that violate administrative and negligence legal norms will allow the lawmaker to retain sufficient control over the policies of the military.[262] Secondly, because high-ranking soldiers are military professionals, they can be expected to familiarize themselves with the reasonable practices and administrative procedures that govern their profession. Third, administrative and disciplinary sanctions have greater deterrent effect when carried out against a professional career officer than when carried out against a low-ranking soldier who views military service as a short and temporary experience.[263] Therefore, high-ranking soldiers should be instructed to only obey such legal orders (i.e., to disobey such illegal orders), whereas low-ranking subordinates should be instructed to obey all such orders.

D. Orders Given in Emergency Situations

In emergency situations, disobeying a legal order can endanger lives and thwart legitimate operations.[264] Also, there are certain concerns that are uniquely strong in emergency situations, such as the need to respond immediately and maintain secrecy, which constrain a commander's ability to explain an order's legal basis to a subordinate.[265] Furthermore, instructing

---

[260] McCubbins et al., *supra* note 89, at 250–53.

[261] The current section discusses the issue of obedience to orders that violate administrative law only in non-emergency situations for two reasons. First, this issue is less relevant in emergency situations because most administrative restrictions are lifted in times of emergency. *See* JANOWITZ, *supra* note 244, at 4–5; *see also* sources cited *infra* note 267 (noting the military's authoritative structure becomes more flexible in wartime). Secondly, as will be explained in the next section, in times of emergency: (1) high-ranking subordinates should be under a duty to disobey *all* orders they think are unlawful; and (2) low-ranking subordinates should be under a duty to obey even some orders that violate penal norms.

[262] It should be noted that, based on this rationale, some countries have already adopted a reduced sentence policy for high-ranking subordinates. Osiel, *supra* note 20, at 1121 n.759.

[263] William C. Cockerham & Lawrence E. Cohen, *Obedience to Orders: Issues of Morality and Legality in Combat Among U.S. Army Paratroopers*, 58 SOC. FORCES 1272, 1285 (1980).

[264] Ofer Military Appeal, *supra* note 36, ¶ 65.

[265] Medina, *supra* note 140, at 82.

low-ranking subordinates to disobey orders will often be ineffective, since low-ranking subordinates are more likely to develop a strong psychological tendency to obey orders in emergency situations, regardless of an order's legality.[266]

Moreover, even if low-ranking subordinates do not develop a conditioned tendency to "automatically" obey orders, their attempt to rationally assess whether an order is illegal will be very likely to result in a mistaken conclusion. That is because emergencies are regulated by discretionary legal norms, and most legal rules may be infringed upon in emergency situations.[267] This is not to say that individuals are given unlimited discretion in emergencies, but flexibility is necessary when dealing with emergency situations. Since emergencies are difficult to plan for, often the most the law can do to govern such situations is to adopt limits that guide and structure an agent's discretion, as opposed to bright-line conduct rules.[268] That is, the law does not tell the relevant agent how exactly to act, instead it tells the agent which consideration she should, and should not, take into account, and it also gives the agent some instructions on how to assess and balance the relevant considerations.

For example, some of these norms limit the discretion of the agent mainly by demanding there must be *necessity* to perform the infringing act,[269] allowing the infringing act only if it causes harm that is *proportional* to the benefits that will be attained by it,[270] or only allowing the use of *reasonable force* when committing the infringing act.[271]

---

[266] *See supra* Part II.*A.2*.

[267] *E.g.*, Segev, *supra* note 187, at 639–43; Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1027–31 (2003) (describing how government power expands in emergency situations).

[268] *See, e.g.*, Segev, *supra* note 187, at 638–39, 654–55 (arguing for wide executive latitude to act on lesser evil grounds rather than strict adherence to rules at times of emergency); *see also* JANOWITZ, *supra* note 244, at xix, 4–5 (noting the military's authoritative structure becomes more flexible in wartime and most restrictions placed on soldiers during times of peace through detailed general orders are lifted); Gross, *supra* note 267, at 1027–31 (discussing the value of a more flexible military authoritative system during times emergency that leads to a shift in the kind of norms used to regulate the military).

[269] What constitutes necessity differs among different emergency norms, yet in all of these norms, the agent is left with substantial discretion to decide whether necessity exists. *See, e.g.*, 1 HENCKAERTS & DOSWALD-BECK, *supra* note 4, at 25–32 (describing the military necessity test that determines which objects are legitimate targets according to IHL); POLLOCK, *supra* note 193, at 86–88 (explaining the necessity defense in criminal law).

[270] *See, e.g.*, 1 HENCKAERTS & DOSWALD-BECK, *supra* note 4, at 46–48 (discussing the IHL proportionality norm that allows incidental harm to civilian objectives, if that harm cannot be avoided in attaining a military advantage and it is not disproportionate to the military advantage).

[271] *E.g.*, POLLOCK, *supra* note 193, at 90–93 (discussing the reasonable force limit of self-defense in criminal law).

Agency analysis indicates that when the legality of an order depends on the violation of a discretionary emergency law, it is much more likely that subordinates will mistakenly disobey legal orders if they are instructed to disobey illegal ones.[272] Thus, it seems that an obedience rule that incorporates a strong superior orders defense is the most optimal legal policy. Yet, as explained hereinafter, we can make an even finer distinction based on the current disciplinary policy of modern militaries.

An order is, essentially, an act which delegates a task to a subordinate. When we think of an order, we think of a narrow directive that is not preceded by any explanation—a subordinate is told exactly what to do, such that she has very little discretion as to how to carry out the order (hereinafter strict orders).[273] This brusqueness can often increase efficiency and reduce mistakes because it leaves all authority in the hands of a single agent. This means of communication will thus often be the most appropriate in emergencies, and as such, lawmakers delegate to military commanders the authority to give such orders to their subordinates.[274]

However, reliance on strict orders is not always the best course of action. Emergency situations present an environment in which conditions can rapidly change. Subordinates on the field are often the first to observe these changes as they develop. Attempts by the subordinate to transmit information to her superior in real-time often fail,[275] and reliance on strict orders leaves the subordinate with little room to respond to new developments.[276] Furthermore, the assumption that the commander, as an expert, is the optimal decision maker is based on the notion that experts are better equipped to properly assess macro-level considerations (such as long term effects and considerations that arise from the larger context in which the specific act is performed).[277] Yet, experience has revealed that in many emergency situations this ability to take into account the big picture does not lead commanders to reach better decisions. Instead, an attempt to factor in these macro-level considerations can overwhelm even an expert decision

---

[272] *See supra* Part IV.*C*.

[273] Wallerstein, *supra* note 45, at 114 ("[A]n order connotes that the subordinate has a reason to refrain from acting on any other reason for which he might have for doing, or abstaining from doing, X.").

[274] Osiel, *supra* note 20, at 967–68; White, *supra* note 21, at 60.

[275] *E.g.*, Thomas M. Jordan, Is Decentralized Command and Control of Tactical Maneuver Units a Myth or Reality?, 6 (Dec. 21, 1992) (unpublished monograph School of Advanced Military Studies, United States Army Command and General Staff College), *available at* http://www.dtic.mil/dtic/tr/fulltext/u2/a258109.pdf.

[276] David M. Cowan, Auftragstaktik: How Low Can You Go? 4 (Dec. 1, 1986) (unpublished monograph School of Advanced Military Studies, United States Army Command and General Staff College), *available at* http://cgsc.cdmhost.com/utils/getfile/collection/p4013coll3/id/2125/filename/2126.pdf.

[277] Wasserstrom, *supra* note 137, at 202; OSIEL, *supra* note 10, at 64.

maker.[278] Therefore, allowing subordinates to examine each concrete act separately, even though they tend to negate macro-level considerations, has often proven to be more effective.[279]

Due to these problems posed by strict orders, modern militaries have adopted mission orders as an alternative means of communication.[280] According to the mission orders doctrine, a commander must first assess the big picture and then issue a "mission order" to the subordinate based on that assessment. The mission order (unlike a strict order) must include the following: an explanation of the reasons behind the order, a definition of mission objections, and a set of limitations the commander wishes to place on the ways a subordinate could achieve those objectives.[281] Beyond setting limitations, this doctrine allows the subordinate to exercise discretion in determining how to accomplish the mission.[282] Moreover, it encourages the subordinate to adapt the mission orders and *even act contrary to orders* if the orders do "not appear consistent with the developing situation."[283]

Yet, the mission orders doctrine has downsides. As discretion is delegated further down the chain of command to less experienced soldiers, more mistakes will be made. The cost-benefit analysis has thus led modern militaries to adopt mission orders,[284] but, only when certain characteristics are present in the commander-subordinate relationship; namely: (1) the difference between each individual's level of expertise and access to information must not be too extensive; and (2) both subordinate and commander must share a common professional perspective,[285] which promotes trust and reduces the likelihood the subordinate and superior will interpret orders differently, or otherwise make contradictory decisions.[286]

---

[278] Jordan, *supra* note 275, at 6.

[279] *Id.* at 6–9.

[280] Robert Egnell, *Civil-Military Aspects of Effectiveness in Peace Support Operations*, *in* THE TRANSFORMATION OF THE WORLD OF WAR AND PEACE SUPPORT OPERATIONS 122, 127 (Kobi Michael et al. eds., 2009).

[281] John D. Johnson, Mission Orders in the United States Army: Is the Doctrine Effective?, 14 (June 1, 1990) (M.M.A.S. Thesis, U.S. Army Command & General Staff College), *available at* http://www.dtic.mil/cgibin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA242667; Gene C. Kamena, Mission Orders: Is Intent the Answer?, 2–10, 15, 17, 33 (Dec. 30, 1992) (M.M.A.S. Thesis, U.S. Army Command & General Staff College).

[282] Johnson, *supra* note 281, at 20, 23–24; Jordan, *supra* note 275, at 11–12.

[283] Jordan, *supra* note 275, at 5 (quoting Charles Edward White, The Enlightened Soldier: Scharnhorst and the Militarische Gesellschaft in Berlin, 1801–1805, at 23 (1986) (Ph.D. dissertation, Duke University)); *see also* Johnson, *supra* note 281, at 12, 14, 17 (explaining the ends are more important than the means under the mission orders doctrine).

[284] Jordan, *supra* note 275, at 11–12.

[285] That is, a common professional language, knowledge, and background, and a common understanding of military doctrines.

[286] Jordan, *supra* note 275, at 8–10; *see also* Johnson, *supra* note 281, at 12, 14, 17, 24 (explaining the advantages and disadvantages of centralized and decentralized command).

Because both of these characteristics are generally present only when both commander and subordinate are high-ranking officers,[287] the mission orders doctrine is not, and should not be, the main means of communication amongst the lower ranks. It should be noted that not all orders given to high-ranking subordinates are mission orders. Yet, even when a high-ranking subordinate officer initially receives a strict order, it is very likely that the commander will respect the subordinate's attempts to clarify the order, thereby facilitating more dialogue.

Thus, in light of the capabilities of high-ranking subordinates and the discretion commonly afforded to them after receiving an order, high-ranking subordinates can and should be instructed to disobey illegal orders in emergency situations. Even though such a disobedience-rule delegates discretion to subordinates, it is likely to cause only a moderate number of errors. Importantly, modern armed forces seem to have accepted this moderate risk, as demonstrated by their use of the mission orders doctrine.[288]

As such, with respect to high-ranking subordinates, it would be appropriate either to adopt a reduced sentence approach or to afford them a superior orders defense of the kind advanced by the factual approach. Lawmakers should choose between the two based upon the extent to which their high-ranking subordinates can be demanded and expected to always know the law and recognize illegal orders, even in emergency situations.[289] At a minimum, a reduced sentence approach should be adopted for members of the "General Staff," because the discretion afforded to these very high-ranking subordinates is uniquely extensive[290] and the difference in knowledge and expertise between such subordinates and their superiors is uniquely small.[291]

A reduced sentence approach or a factual approach should not be applied, however, to low-ranking soldiers, as their lack of expertise and information

---

[287] Johnson, *supra* note 281 *passim*; Cowan, *supra* note 276 *passim*. Of course, cultural variation exists in the adoption of this doctrine. *See* Paul Johnston, *Doctrine Is Not Enough: The Effects of Doctrine in the Behavior of Armies*, PARAMETERS, Autumn 2000, at 30 (discussing the influence of culture on the implementation of the same military doctrine in different armed forces). Accordingly, in some armed forces, mission orders are often used even at the level of the battalion commander, and in others they are only commonly used at ranks higher than division commander.

[288] *See* Jordan, *supra* note 275, at 5; *see also* Johnson, *supra* note 281, at 12, 14, 17, 24.

[289] *See* Kaplan, *supra* note 152.

[290] McCoubrey, *supra* note 58, at 389; Sloane, *supra* note 168, at 64.

[291] Moreover, in relations between members of the "General Staff" and their civilian superiors we can expect the military subordinates to have better knowledge and more expertise than their superiors, in both the relevant law and matters of military necessity. *See* HUNTINGTON, *supra* note 237, at 77–78 (noting the military commander has greater ability to ascertain the legal consequences of battlefield orders).

will often lead them to mistakenly disobey legal orders.[292] Moreover, even a normative approach will not help prevent this problem because "[a]n act that seems to the uninformed as manifestly wrong may actually be morally justified."[293]

Adopting a conditional liability approach can also lead to the opposite problem of encouraging massive obedience to illegal orders. Due to the psychological conditions that exist during emergencies, low-ranking subordinates often do not critically examine the legality or morality of an order. This is true even if they are instructed by law to do so, and even if they would, in retrospect, acknowledge the ordered acts were severely immoral and clearly illegal. Therefore, they often tend to "automatically" obey illegal and immoral orders in times of emergency.[294]

Thus, the proper course of action is to further fragment the issue by formulating a list of more specific disobedience-rules. Similar to the way a normative approach attempts to serve the lawmaker's utility,[295] each rule should be adopted if the illegal act it attempts to prevent is easily recognized even by low-ranking subordinates, and the act is also extremely harmful. Yet, unlike a general instruction to disobey all illegal orders that are also grossly immoral, the lawmaker can use a list of specific rules to teach soldiers certain acts are illegal. This list will thus reduce conditioned obedience,[296] and if the lawmaker takes care to restrict the list of rules to a reasonable number, even low-ranking soldiers can be expected to know the list and recognize when an order violates one of the rules.[297]

We see this in practice, even today, as military manuals often list certain illegal acts that should be disobeyed in all circumstances,[298] and courts-martials rule that certain acts should always be disobeyed.[299] Moreover, in specific emergency situations, soldiers are sometimes handed a document listing certain acts as generally forbidden, in an attempt to help low-ranking subordinates determine how to act when discretionary emergency laws allow

---

[292] Wasserstrom, *supra* note 137, at 202; *see also* OSIEL, *supra* note 10, at 64.

[293] Medina, *supra* note 140, at 82.

[294] OSIEL, *supra* note 10, at 241 n.21; *see also supra* Part IV.*A.2* (discussing the increased psychological tendency to obey orders during emergencies).

[295] *See supra* notes 139, 141 and accompanying text.

[296] *See supra* Part IV.*A.2*.

[297] *See supra* notes 152, 230.

[298] *See, e.g.*, Dep't of Army, Your Conduct in Combat Under the Law of War, Army Field Manual 27-2, 1984, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/conduct-in-combat-1984.pdf; 2(2) JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE 3803–04 (2005).

[299] *E.g.*, Bohrer, *supra* note 37, at 239–40; *see also* United States v. Bright, 24 F. Cas. 1232, 1237–38 (C.C.D. Pa. 1809) ("[T]he order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against a charge of murder or trespass. . . .").

infringement on general prohibitions.[300] Such documents attempt to solve these subordinates' difficulty in the following manner: Instead of being demanded to assess the necessity, proportionality, or reasonableness of an act ordered (i.e., the benchmarks according to different emergency norms for determining whether the act ordered is legal),[301] subordinates are given a list of acts they must never perform, even if ordered. Furthermore, there are also rules set for specific categories of subordinates.[302]

However, currently legal systems do not consistently rely on such lists due to a concern, raised by some, that doing so will be both underinclusive and overinclusive.[303] Thus, even within the same legal system, conflicting rulings can be found amongst different courts that support a normative approach. Some state that certain acts should always be disobeyed, while others hold that the determination of whether an illegal order is grossly immoral should always be case specific, and therefore should not *always* be disobeyed.[304]

However, in light of the failure of current approaches, relying on a list of disobedience-rules should be strongly and consistently encouraged. Whether the list would be overinclusive would ultimately depend on the number and types of rules that a legal system chose to adopt. But, agency analysis demonstrates that instructing a low-ranking subordinate to disobey an order when it violates such a disobedience-rule will not result in many mistakes because it would not delegate too much discretion to that individual. Whether the list would be underinclusive would again depend on the adopted rules. To address this concern, lawmakers should formulate specific rules, mainly for orders that violate legal prohibitions that are also core moral prohibitions. Subordinates of all ranks can be required to know such

---

[300] Mohammed, *supra* note 8, at 80–81.

[301] *See supra* notes 269–71 and accompanying text.

[302] For example, an Israeli military regulation states that the final decision whether to bomb an area from the air, or to abort the mission due to a concern for a disproportional amount of civilian casualties, can only be made by the leading pilot in the flight formation. That is, an order cannot be given by higher commanders on the ground to perform the bombing if the leading pilot thinks it should be aborted due to the expected amount of civilian casualties. This military order is classified; however, its existence was admitted in HCJ 5757/04 Hess v. Deputy Chief of Staff, 59(6) PD 97, ¶ 7 [2005] (Isr.).

[303] *See, e.g.*, Appeal/90/86 Regev v. Chief Military Prosecutor, 1986 PDZ 43, 46 (Isr.) (explicitly rejecting an approach that declares certain categories of orders always manifestly unlawful, due to the concern that such a policy would be both overinclusive and underinclusive).

[304] *Compare e.g.*, *id.* (ruling that an order to punish civilians who violated the law without the punishment being legally authorized by the judiciary is not an order that should always be disobeyed, even if illegal), *with* Central District Court-Martial/325/82 Military Prosecutor v. M. (unpublished) (Isr.); Southern District Court-Martial/248/88 Military Prosecutor v. A. (unpublished) (Isr.) (ruling that such illegal orders of extrajudicial punishment should always be disobeyed).

norms,[305] and once clear disobedience-rules are formulated, the likelihood that subordinates of any rank will obey orders that violate such rules as a conditioned response will be reduced.[306] Thus, although it is true that not all situations can be contemplated beforehand, setting guidelines ex ante is preferable to leaving low-ranking soldiers in the dark, which can often lead to acts of conditioned or mistaken obedience, as well as acts of mistaken disobedience.

E. Protecting Civilians from Harm

The full list of disobedience-rules will not be identical in all legal systems. Therefore, I will not attempt to formulate a complete list. In the following Part, I will instead attempt to formulate basic norms intended to prevent the violation of laws designed to protect civilians from harm.

1. Rules Applicable in All Emergency Actions

Most schools of moral thought agree on the importance of protecting individuals from physical harm.[307] Moreover, as a constitutional matter, the domestic civilian population is considered the primary principal in all democratic societies. Therefore, lawmakers are expected to prevent the power delegated to military agents from being turned against the civilian population.[308] Similarly, the core aim of international humanitarian law is to protect civilians from the horrors of war.[309] Thus, orders that harm civilians can be viewed as orders that are extremely harmful to the principal (i.e., lawmaker) in the context of both domestic and international law, and a legal policy should be formulated to encourage subordinates to disobey, whenever possible, orders that are harmful to this aim.

Yet, a rule instructing soldiers to disobey all orders that cause harm to civilians is not plausible. In emergency situations, allowing the military to harm civilians is sometimes both necessary and legal.[310] Furthermore, in

---

[305] *See supra* notes 149–54 and accompanying text (discussing affirmative requirement imposed on military personnel to know moral and legal norms).

[306] *See supra* notes 169–71 and accompanying text (noting that more specific legal rules that delineate categories of orders that should be disobeyed will reduce conditioned obedience).

[307] Re'em Segev, *Well-Being and Fairness*, 131 PHIL. STUD. 369, 372, 388 n.4 (2006).

[308] Feaver, *supra* note 173, at 153; *see also* McNollgast, *supra* note 186, at 1662 (analyzing administrative law in democratic societies from a principal-agent perspective and viewing the civilians population as the primary principal).

[309] Gabriella Blum, *The Laws of War and the "Lesser Evil*," 35 YALE J. INT'L L. 1, 3, 56–58 (2010).

[310] *See, e.g.,* Olcy Yeúilkaya, *International Human Rights Law and Terrorism*, *in* USE OF FORCE IN COUNTERING TERRORISM 49, 62–63 (M. Uğur Ersen & Çinar Özen ed., 2010) (discussing that it is often necessary for the law to give state agents a restricted permission to use

many emergency situations, the legality of such an order will depend on whether it violates a discretionary legal norm.

However, we can use this general rule as a template for a more practical solution. For instance, a narrower rule that instructs a soldier to disobey orders to intentionally harm civilians would be an appropriate rule, as intentionally harming civilians is never justified and is always illegal and grossly immoral.[311]

We can also construct a rule that instructs subordinates to disobey, even in times of emergency, orders that are given without any consideration of the harm caused to civilians, or orders given without any attempt to reduce such harm.[312] Adding this disobedience-rule to the previous rule will increase the protection afforded to civilians and reduce a subordinate's indecision that exists when soldiers are faced with a need to ascertain their superior's intentions.[313] Yet, because this rule is likely to lead to more mistaken acts of disobedience than the previous one, a superior orders defense for reasonable mistakes should accompany it, so that subordinates have a limited incentive to err on the side of obedience.

Additionally, disobedience-rules can be formulated by identifying specific actions harmful to civilians that are universally agreed never to be legal. Rape, torture, forced pregnancy, forced medical experiments, and forced medical treatments that are done for any purpose other than for improving patient health are prototypical examples of such acts.[314]

---

force against civilians in order to enable them to properly respond to emergency situations).

[311] An act intentionally harming civilians is viewed as a greater wrong than an act where civilians are knowingly harmed in an attempt to achieve another aim. This moral intuition is commonly applied both in criminal law and in international humanitarian law. PHILLIPA FOOT, VIRTUES AND VICES 22–25 (1978); 1 GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL 316 (2007).

[312] The protection of core public aims is often extended to include a duty to consider the risk to such aims associated with one's actions. *See* George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 402 (1971).

[313] *See id.* at 404–05 (stating, in a different context than the one discussed herein, that by adopting a presumption that individuals intend the natural and probable consequences of their acts the law shifts the "question of intent to an inquiry about the natural and probable consequences of acts" which aids in avoiding the difficulties that arise when one attempts to ascertain another person's intent).

[314] All these acts are prohibited, in both domestic and international law, in both peacetime and emergencies. *See, e.g.*, Blum, *supra* note 309, at 22–23 (examining torture). Sometimes, elements of these crimes are phrased differently in different contexts. However, when such differences exist, many support a policy that unifies the definitions through interpretation. For a discussion of this policy in the context of torture and murder, see KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 44–45 (2003).

2. Use of Force in Emergencies Other Than Armed Conflicts

Other than the rules just stated, I predict lawmakers will encounter difficulties in defining more disobedience-rules that are applicable in all emergency situations. Because military emergencies vary greatly in nature, it will often be more efficient to set specific disobedience-rules governing different types of emergencies.

In emergency situations, a law instructing low-ranking subordinates to disobey what they suspect are illegal orders will usually not benefit the lawmaker, given it delegates an extensive amount of discretion to a less capable agent. But, that is not always the case. As discussed in the context of the mission orders doctrine, a low-ranking subordinate is not always less capable of making proper decisions during emergencies.[315] Thus, in situations where the low-ranking subordinate has more access to the rapidly changing situation as it develops, an attempt to assess macro-level concerns during the decisionmaking process would not be beneficial. If the harm from the commission of wrongful acts in such a situation can also be expected to be uniquely severe, the lawmaker should then give the lower-ranking subordinate the discretion to disobey illegal orders. This conclusion applies mostly to situations where force is used against civilians in non-combat emergency situations.

Most schools of moral thought, as well as the actual practice of most legal systems, agree that we can only abide the use of force against civilians when the decision to use such force is based on an analysis of the concrete, individual factors at hand,[316] barring macro-level considerations.[317] This

---

[315] *See supra* Part V.*D* (discussing orders given in emergency situations).

[316] *See* Kurt Andrew Schlichter, *Locked and Loaded: Taking Aim at the Growing Use of American Military in Civilian Law Enforcement Operations*, 26 LOY. L.A. L. REV. 1291, 1302–03, 1308–10 (1993) (comparing when peace officers and the military can use deadly force against civilians); Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 27 (1994) (comparing soldiers' authorization to use force against civilians in times of peace versus times of war); Alan M. Dershowitz, *Is It Necessary to Apply "Physical Pressure" to Terrorists—And to Lie about It?*, 23 ISR. L. REV. 192, 197 (1989) ("The necessity defense is by its very nature an emergency measure; it is not suited to situations which recur over long periods of time. This is especially so when the claimant to the benefits of the defense is a state agency (or its members)."); FLETCHER, *supra* note 70, at 795–96 (explaining why the necessity defense should be limited to times of "imminent risk"). The explanations given for how emergency norms are formulated differ between jurists, depending on the moral view they hold. Yet, despite this plurality of opinions, there is a strong consensus concerning the way legal permissions to use force against civilians in emergencies should be formulated. This consensus is of course not absolute because this issue raises complex moral dilemmas. But, this consensus is expressed extensively in moral theory and even more so in legal practice. As such, it should serve as the basis for formulating legal norms.

[317] ALEXANDER & SHERWIN, *supra* note 226, at 56, 155–56; FLETCHER, *supra* note 70, at 795; Tanya R. Ward, *Act-Consequentialism and Permitting Too Much*, *in* PHILOSOPHICAL

consensus on the use of a case-specific analysis should serve as the basis for formulating legal rules.[318] When viewed alongside the rationale behind the mission orders doctrine, it follows that in situations where civilians could be harmed, discretion should be allotted to the soldier on the field, regardless of that soldier's rank.[319]

However, one should not conclude that commanders should *never* be allowed to determine when and how much force can be used. If a commander in the field gives a lower-ranking soldier the order, it is appropriate to encourage the lower-ranking soldier to obey. To do otherwise would unnecessarily increase mistakes.

Thus, a legal rule can be formulated for those situations where orders are given to use force in a non-combat emergency. With the exception of orders given face-to-face in the field, all such orders should be disobeyed if they prevent subordinates from making more concrete assessments regarding when and how much force should be used.[320] Moreover, this rule can easily be divided into several clearer sub-rules governing non-combat emergency situations. First, any order given ex ante, or by a commander away from the field, cannot forbid subordinates from exercising their own discretion in assessing the necessity of using force.[321] Second, any order to use force against civilians that is not given in response to an immediate situation should be disobeyed, even if given face-to-face. Accordingly, orders given by a commander to use force as punishment for a civilian's past acts or to deter a civilian from committing future acts should be disobeyed.[322]

FRONTIERS 151, 154–56 (Richard H. Corrigan & Mary E. Farrell eds., 2008) (arguing the moral demand to assess long-term effects of an action depends on the extent in which we can reasonably expect the relevant agent to be able to assess such effects with sufficient accuracy); Re'em Segev, *Well-Being and Fairness in the Distribution of Scarce Health Resources*, 30 J. MED. & PHIL. 231, 241 (2005) ("[I]n resolving specific conflicts, the overall state of well-being might seem too detached, since it is comprised of actors that would often have nothing to do with the conflict at hand . . . .").

[318] *See* JOHN RAWLS, POLITICAL LIBERALISM 158–61, 165, 171 (1993), *and* FLETCHER, *supra* note 311, at 66–67 (discussing the moral significance of formulating legal norms based on an "overlapping consensus").

[319] For the current implications of this consensus on the rules of engagement for soldiers engaged in emergencies other than armed conflicts, see, e.g., Schlichter, *supra* note 316, at 1303–06; Martins, *supra* note 316, at 27; Thomas R. Lujan, *Legal Aspects of Domestic Employment of the Army*, 27 PARAMETERS 82, 88, 93–95 (1997).

[320] A similar rule already exists in many legal systems. According to this rule, in all emergencies other than armed conflicts, the use of force "must be justified by the necessity of the situation, and does not become legal by reason of the decision to call in the troops." A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 627 (15th ed. 2011); *see also* Charles R. Murray, *Civil Disturbance, Justifiable Homicide and Military Law*, 54 MIL. L. REV. 129, 153, 157 (1971).

[321] Manley v. State, 62 Tex. Crim. 392, 399 (Tex. Crim. App. 1911); McLaughin v. Ministry of Defense, [1978] N.I.J.B. (No. 7) at 11–12 [hereinafter *McLaughin*].

[322] Southern District Court-Martial/248/88 Military Prosecutor v. A. (unpublished) (Isr.);

These rules can be easily taught and implemented. Furthermore, such rules create a division of labor similar to the one suggested by the mission orders doctrine; assessments of macro-level factors should be made by higher-ranking superiors, while on-the-spot assessments should be left to those in the field.[323]

3. Use of Force in Armed Conflicts

A different solution must be formulated for orders that authorize the use of force against civilians during armed conflicts. The main norm regulating this issue during armed conflicts is international humanitarian law's prohibition against disproportional attacks. Harming civilians is legal,[324] but only if it is incidental to an attack on a military target and not clearly excessive in relation to the military advantage attained by attacking the military target.[325] Unlike the norms that deal with the use of force against civilians in other emergencies, international humanitarian law's proportionality norm does not demand a concrete, act-specific assessment.[326] Notwithstanding differences in the interpretation of the proportionality requirement,[327] there is a general consensus that the military advantage[328]

Central District Court-Martial/325/82 Military Prosecutor v. M. (unpublished) (Isr.).

[323] *See supra* Part V.*D*; *see also* Farrell v. Secretary of State for Defense [1980] 1 Eng. Rep. 166, 172 (appeal taken from Northern Ireland) (requiring soldiers on the field to use reasonableness in executing military plans); McLaughin, *supra* note 321, at 7–8 (demonstrating a soldier's responsibility to make a reasonableness assessment when conducting security operations); McMahan v. Green, 34 Vt. 69, 73 (1861).

[324] The prohibition against disproportional attack applies also to civilian property damage. I do not, however, think the rules set herein for low-ranking subordinates should be applicable when property damage is contemplated. First, it is commonly accepted that less protection can be afforded to property than to human life. *E.g.*, FLETCHER, *supra* note 70, at 779. Second, whether a particular property is a legitimate target is determined by the military advantage to be had in targeting that property. DINSTEIN, *supra* note 4, at 84–86. Thus, the status of property is often temporal, and much less clear than the status of individuals. Moreover, this makes the relevant assessment one that low-ranking soldiers are ill-equipped to make. *See* Wasserstrom, *supra* note 137, at 202 (asserting that the determination of issues of military necessity is too difficult a task to place on lower ranked soldiers).

[325] *See, e.g.*, Rome Statute, *supra* note 14, art. 8(2)(iv).

[326] For a discussion of this difference as it affects the instructions given to soldiers concerning the use of force, see Schlichter, *supra* note 316, at 1302–03, 1308–10; Martins, *supra* note 316, at 27. *See also* Blum, *supra* note 309, at 40–44 (discussing the difference between the "lesser of evils" balance that should be made in IHL and in domestic law).

[327] Hamutal E. Shamash, *How Much Is Too Much? An Examination of the Principle of Jus in Bello Proportionality*, 2 ISR. DEF. FORCES L. REV. 103, 107 (2006).

[328] A military advantage is attained when the military object attacked has an effective contribution to the enemy's military operation. 1 HENCKAERTS & DOSWALD-BECK, *supra* note 4, at 29. According to a commonly held view, the assessment of "the anticipated military advantage can [also] include increased security for the attacking forces or friendly forces." 1 *id.* at 31.

needs to be assessed in relation to the "attack as a whole." That is, on the one hand, the assessment of the expected advantage should not be done in relation to the whole conflict; on the other hand, it should not be assessed "bullet by bullet."[329] Instead, it needs to be made in relation to the current tactical operation as well as to several tactical operations that are connected to that operation. Usually only division commanders and higher-ranking soldiers can be expected to properly make such an assessment.[330] This makes it difficult to demand that lower-ranking soldiers make an independent assessment of proportionality, and such a legal demand would likely cause many mistakes.[331]

The problem with demanding low-ranking subordinates to make independent proportionality assessments has led scholars to support one of two views. First, some scholars claim the rule prohibiting disproportional attacks should be interpreted as addressing only commanders of a sufficiently high rank.[332] Others think this prohibition is addressed to all soldiers. However, they acknowledge the problem that arises if all soldiers are asked to make such assessments, and therefore argue that low-ranking soldiers should only be required to "be thoroughly aware, [when] carrying out [their] task, of [their] basic obligation to spare the civilian population as much as possible."[333] Yet, both of these views are problematic in the context of acts committed under orders.

Requiring only high-ranking commanders to make the proportionality assessment causes two problems. First, this course of action does not take advantage of a lawmaker's ability to deter commanders by targeting subordinates for criminal liability while offering them an opportunity to escape punishment in exchange for implicating their superiors, through the use of a superior orders defense. Second, this position ignores that even low-ranking soldiers are sometimes afforded discretion in the orders given to

---

[329] DÖRMANN, *supra* note 314, at 169–73; DINSTEIN, *supra* note 4, at 123.

[330] See the views of Switzerland, Austria, and the U.K., as cited in 1 HENCKAERTS & DOSWALD-BECK, *supra* note 4, at 54. *See also* William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 102, 108–09, 112 (1982) (claiming that the in bello proportionality norm is only addressed to soldiers of a sufficiently high rank-usually division commanders and higher ranking officers-because only such soldiers are capable of making an assessment of proportionality). Note that, as Fenrick rightly states, there is some variation between different militaries concerning the lowest rank that is authorized and capable to make such assessments. *Id.*; *see also* sources cited *supra* note 287. For a discussion of division commanders and their responsibility for high-level tactical assessments, see Johnson, *supra* note 281, at 38.

[331] Fenrick, *supra* note 330, at 109; OSIEL, *supra* note 10, at 64.

[332] *E.g.*, Fenrick, *supra* note 330, at 109–12; 1 HENCKAERTS & DOSWALD-BECK, *supra* note 4, at 54 (noting the views of Switzerland, Austria, and the U.K.).

[333] FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 100 (1987).

them, and if such discretion is given, even low-ranking soldiers should be obligated to spare civilians as much as possible.

The second view is also flawed. Commanders do not always give low-ranking subordinates discretion in how to fulfill their orders. In such situations, demanding a low-ranking subordinate to disobey whenever she disagrees with her superior's proportionality assessment has the strong potential to severely increase mistakes.

An intermediate solution should thus be adopted. A low-ranking subordinate should be placed, within the limits of the discretion left to her after being given an order, under the duty to spare the civilian population as much as possible. And, when a subordinate clearly has not done so, it is appropriate to punish her. Furthermore, to reduce the probability that a subordinate and a commander will disagree on the extent of discretion an order affords the subordinate, a presumption of discretion should be applied. This presumption would be that, unless clearly stated otherwise by the commander, a subordinate should assume the order preserved her discretion to act in a certain way during the performance of the task ordered, if acting in such a way is needed to protect civilians.[334] This presumption has several advantages. First, it encourages commanders to give explicit orders, which reduces the ability of commanders to use vaguely phrased orders as a way to allege, after the fact, they had no hand in the illegal acts of their subordinates.[335] Subordinates will also be better equipped to recognize whether an order violates the disobedience-rules discussed earlier (e.g., whether the motive behind the order is to intentionally harm civilians). Secondly, this presumption serves as a substitute for a common professional perspective.[336] If both subordinates and superiors are instructed to interpret orders with this presumption in mind, it will reduce the likelihood they will interpret an order differently. While this presumption is imperfect, it is preferable to the currently used conditional liability approaches. Soldiers often do not take the time to critically examine the legality or morality of an order when they are in emergency situations and simply obey.[337] This presumption does not represent a perfect solution to this soldiers' tendency, but because it informs subordinates they have a unique responsibility with regard to the specific issue of protecting civilians from harm, it is less likely to create a tendency for conditioned obedience to horrific, illegal orders

---

[334] *Cf.* Appeal/113/61 Rubnov v. Chief Military Prosecutor (unpublished) (Isr.) (adopting an even more extensive interpretive presumption).

[335] *See* OSIEL, *supra* note 10, at 129.

[336] *See supra* Part V.*D* (characterizing mission orders); *see also* Johnson, *supra* note 281, at 98 (discussing how common procedures reduce the likelihood for variance in interpretation of orders).

[337] OSIEL, *supra* note 10, at 119, 241 n.21; sources cited *supra* note 294; *see also supra* Part IV.*A*.*2*.

compared to a more general instruction (such as an instruction to disobey all illegal orders or an instruction to disobey all grossly immoral illegal orders).

To further prevent low-ranking subordinates from committing crimes of obedience during armed conflicts, specific disobedience-rules should be set that prohibit the commission of certain acts during armed conflicts. The main source for such rules should be the penal prohibitions of international humanitarian law.[338] Moreover, by addressing the disobedience-rules that should be formulated based in these prohibitions, the legal policy international law should adopt can be further uncovered.

Until this point, the Article has assumed that domestic legal standards should track those applied in the realm of international law.[339] However, it is important to stress that domestic legal systems can, and should, be allowed to treat their own war criminals *more* harshly than they would be treated under the international rules suggested herein for armed conflicts. As discussed earlier, states should not be allowed to be inconsistent in the way they treat foreign soldiers who commit crimes of obedience.[340] Nothing prevents a state, however, from affording its own soldiers a *less* extensive defense than the one suggested herein,[341] and doing so would be appropriate if a state could expect a low-ranking soldiers' knowledge of international humanitarian law to be more extensive than assumed in this Article. Thus, the disobedience-rules that will now be discussed for armed conflicts suggest only the minimum that should be accepted by all states.[342] States can and should seek to apply a higher standard to their own soldiers where possible.

One step that should be taken in light of the rationales of international humanitarian law is to extend the disobedience-rules already formulated herein, as they apply in armed conflicts, to prevent harm to all categories of protected persons, not just civilians. Doing so is consistent with international humanitarian law, which extends to such persons the same protections that are afforded to civilians.[343]

---

[338] Currently IHL penal prohibitions have been codified in the Rome Statute, *supra* note 14. While there has been some dispute as to whether certain norms of this code go beyond the prohibition of customary international law, this is not the case with regard to the core prohibition discussed herein.

[339] *See supra* Part V.*A*.

[340] *See supra* Part V.*A*.

[341] Osiel, *supra* note 20, at 1083; INT'L INST. HUMANITARIAN L., SAN-REMO MANUAL ON THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS ¶ 307 (2004) ("The following general principles derive from generally accepted international law and apply to crimes under international law. National laws may provide for a stricter responsibility for the commission or participation in prohibited conduct, including war crimes.").

[342] *See* Geiss, *supra* note 238, at 96–97 (denoting IHL as the lowest common denominator all sides agree upon).

[343] CURTIS F.J. DOEBBLER, INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 23–24 (2005).

Yet, other than this general policy, which specific prohibitions of international humanitarian law should serve as bases for additional disobedience-rules? Two main rationales should guide us: (1) the clarity of the relevant prohibition; and (2) the moral significance of the aim protected by the prohibition. When these rationales exist, we can assume that soldiers are likely to be able to correctly recognize such orders,[344] and the harm that will be caused if such crimes of obedience are allowed is high.

Thus, clear prohibitions of international humanitarian law that intend to safeguard civilians or other protected persons should serve as the basis for disobedience-rules. Accordingly, subordinates of all ranks should be instructed to disobey orders that: (1) are intended to force protected persons to serve in hostile armies; (2) are intended to compel foreign nationals to take part in war operations directed at their own country; (3) demand pillaging; or (4) demand taking hostages.

What about the prohibitions against genocide and crimes against humanity? Such acts have the potential to cause extensive, severe, and morally reprehensible harm to the physical wellbeing of civilians.[345] The harm from mistaken acts of disobedience that might be caused by disobedience-rules that tell soldiers to disobey such orders will often pale in comparison to the harm wrought by genocide and crimes against humanity. Thus, strong support exists for rejecting the applicability of any superior orders defense in the context of orders to commit genocide or crimes against humanity.[346] The problem, however, with adopting such a policy is that it is difficult to view each and every participant in such acts as morally blameworthy, because, sometimes, low-ranking subordinates will not be able to recognize the act they are ordered to perform is part of a crime against humanity or genocide. Therefore, to completely reject the applicability of the superior orders defense in the context of such crimes is inappropriate.[347] That is not to say, however, that low-ranking subordinates should have a duty to obey such orders. The policy suggested thus far offers a solution to this problem. In the context of low-ranking subordinates, the disobedience-rules suggested in this article thus far that intend to safeguard civilians from harm are able to strongly aid in the prevention of crimes against humanity and genocide. At the same time they provide clearer guidance to

---

[344] *See supra* Part IV.*A*.

[345] Some even view the crime of genocide as intrinsically more immoral than other international crimes. *See* Steven R. Ratner, *Can We Compare Evils? The Enduring Debate on Genocide and Crimes Against Humanity*, 6 WASH. U. GLOB. STUD. L. REV. 583, 584–87 (2007).

[346] Rome Statute, *supra* note 14, art. 33(2).

[347] BASSIOUNI, *supra* note 12, at 612–13; Ilias Bantekas, *Defences in International Criminal Law*, *in* THE PERMANENT INTERNATIONAL CRIMINAL COURT 263, 273 (Dominic McGoldrick ed., 2004).

subordinates, and thus take into account the relevant excusatory considerations.

In international humanitarian law, however, additional penal prohibitions exist that attempt to advance public aims other than securing protected persons' safety; namely preventing unnecessary suffering of combatants and regulating interaction between belligerents.[348] Should these prohibitions serve as the basis for the formulation of disobedience-rules? Many of these norms are phrased technically, such as those that list which weapons are prohibited, and therefore, low-ranking subordinates cannot be expected to know all of them.[349] Moreover, since intentional suffering of soldiers is allowed and considered a legitimate public aim during an armed conflict, it is clear that the significance of the aim protected by such norms is weaker. Thus, low-ranking subordinates should not be expected to disobey illegal orders that violate such prohibitions and a superior orders defense should be afforded when they do so.

With that said, it should be acknowledged that it is impossible to create a completely clear boundary separating prohibitions intended to protect non-combatants from those that regulate hostile parties.[350] Thus, to avoid an underinclusive legal policy, bright-line prohibitions that regulate those issues found on the border between these two sub-categories of international humanitarian law should be used as sources for additional disobedience-rules. Soldiers should thus be instructed to disobey: (1) orders to physically harm a combatant who has surrendered, or who has been wounded to the extent that she cannot continue to participate in the fighting; as well as any other orders that would deny quarter from *a hors de combat* (2) orders to wear civilian clothes either during combat or in close proximity to an area where combat is expected to occur; (3) orders to wear the uniforms or the insignia of other protected persons; (4) orders to use signals of surrender when surrender is not intended; and (6) orders to poison food and water supplies.

In sum, the discussion made in the current subsection, when viewed in light of the conclusions reached previously, uncovers the main norms that should guide international law's policy regarding crimes of obedience. Certain illegal orders, mainly those that violate core prohibitions intended to safeguard civilians and other protected persons, should be disobeyed by all, even low-ranking, soldiers. But, as to orders that violate other legal norms, low-ranking soldiers should be allowed to obey those orders and be afforded a superior orders defense when they do. High-ranking subordinates, on the

---

[348] FRÉDÉRIC DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES 3–4 (1989).

[349] Wasserstrom, *supra* note 137, at 202–03; LESLIE C. GREEN, *What Is—Why Is There—the Law of War?*, *in* ESSAYS ON THE MODERN LAW OF WAR 1, 34 (2d ed. 1999).

[350] DE MULINEN, *supra* note 348, at 3–4.

other hand, should be obligated to disobey all illegal orders and should only enjoy a superior orders defense for acts of obedience committed due to reasonable mistakes. Moreover, if they are members of the "General Staff," they should never enjoy a superior orders defense. Such a policy affords extensive protection against crimes of obedience, while reducing inconsistency and uncertainty.

VI. CONCLUSION

The issue of obedience to illegal military orders has long been a core issue in international criminal law, due to the fact that many, if not most, war crimes are crimes of obedience. This issue is also a cardinal one for domestic legal systems because obedience to orders is the backbone of any military. Yet, despite the core importance of this issue in both domestic and international law, the law on the subject remains unclear and disputed. In light of the failure of both international and domestic legal systems to fairly and efficiently address this legal issue, this Article has used agency analysis to show that none of the currently supported approaches is appropriate when applied in every scenario. Accordingly, a combination of approaches should be adopted depending on the individual factors in any given situation. The law should apply different approaches depending on the rank of the subordinate and whether the order is given in an emergency situation.

Even though this policy will cause low-ranking subordinates to knowingly obey some illegal orders during emergencies, this result can be justified both by the severe harm that might be caused if low-ranking subordinates were forced to review the legality of all orders in times of emergency and also by the strong excusatory considerations that exist in such cases. Additionally, this policy still provides extensive protection against the harms that might be caused by crimes of obedience by: (1) vesting high-ranking subordinates with a duty to obey only legal orders, even in times of emergency; (2) encouraging low-ranking soldiers who obey illegal orders to implicate their superiors by affording them a superior orders defense; and (3) setting core disobedience-rules that are applicable even to low-ranking subordinates in emergencies.

The formulation of this model legal policy can thus serve as a resource for lawmakers who wish to reform the law of obedience to illegal orders. Moreover, this model legal policy shows that regulating the issue in a modular way can release lawmakers and soldiers from the harm inflicted by the archaic premise that the same approach should regulate the issue of obedience to orders at all times. Thus, in light of the debt owed to those who are ready to sacrifice their liberty and lives for their countries, as well as the need to maintain both military efficiency and crime prevention, the current

unattainable quest for a proper one-rule-fits-all policy must be abandoned in favor of a modular approach.