Federal Court  Cour fédérale

MEMORANDUM

Comments

TO: Justice Michel M.J. Shore

FROM: Robert Smith (613) 943-0355

DATE : **March 25, 2010**

RE: **Obedience to Superior Orders**

With the assistance of Robert Smith, Law Clerk:

Introduction

I am going to speak to you about a topic that is vitally important to humanity and bewildering to legal scholars. It concerns the conduct of soldiers during wartime and to what extent they can be held liable for their actions when obeying the orders of their superiors. I chose this topic in order to get you interested in it because you are the people who must turn your attention to it to craft enduring solutions to this age-old problem.

Imagine yourself as an enlisted soldier of any nation who has been on the front lines in Afghanistan for a little too long. See the civilian population who you must be wary of, due to the fact that they are indistinguishable from your

enemies. Feel the sun beating down on your heavily-encumbered frame. Taste the dust of the high desert in your mouth.

Now place yourself in the following situations. First, your unit has captured a Taliban fighter and he is disarmed. Your commanding officer states that he has heard reports of Taliban prisoners concealing weapons and shooting soldiers in the back. He is not going to let that happen here and orders you to kill the prisoner which you do. Second, as an officer in the artillery you are ordered to destroy a bridge that you are told is a Taliban military installation. After your mission is complete, you learn that the intelligence was flawed and that Afghan civilians on that bridge were killed by your salvoes.

The concept is simple: <u>if a soldier follows orders to commit a war crime, should that soldier be held personally responsible for that crime?</u> The question we must grapple with is where to draw the line between military discipline and prosecution of persons who commit war crimes in accordance with their orders. <u>When should soldiers, who are trained to follow orders, question their commanders and refuse to obey them?</u>

Before we begin, I would like to point out that this area of the law is a veritable labyrinth of blind alleys and dead ends. Taking into account the limited human attention span, I will speak of the tenets and developments of the superior orders defence in broad terms, but you should be aware that these

general principles have been the subject of a number of varying interpretations and inconsistent applications.

The Underlying Policies

If you study law you will quickly learn that you must understand the policy to make sense of the rules. The superior orders defence is littered with competing policies. On the one hand military organizations are based on a hierarchy of obedience. Obedience is necessary to complete missions and save lives. A military cannot function if soldiers would have to question every order given to them. Also, common soldiers may not be in a position, due to a lack of training and information, to determine the legality of orders. Against these important considerations we must remember the atrocities of the past and how they could have been avoided if obedience had been replaced by disobedience in appropriate situations.

In addition, consider the following: (1) if only the senior will be held responsible the military hierarchy will be maintained while giving officers a disincentive to issue bad orders; (2) however, as has often been the case, the senior who gave the order cannot be brought to trial and the subordinates must answer. (3) Always remember that unfair application of the law should be avoided. (4) Perhaps this area of the law should be harsh in order to prevent future atrocities. (5) If a soldier is found guilty what is the appropriate penalty, taking into account the horrific, dehumanizing nature of war? Courts

and lawmakers have struggled with these competing policies for over one hundred years.

The Law as it Stands: Article 33 of the *Rome Statute of the International Criminal Court*

I will discuss the international law rules applied by international courts as well as domestic rules applied by domestic courts. I do this because both bodies of law influence each other (but neither are binding on the other) and we must discuss both in order to get a full picture of the development of and policies behind the superior orders defence.

A modern international forum for dealing with these types of cases is the International Criminal Court at The Hague. Article 33 of the Rome Statute, the international instrument creating the ICC states:

> **Article 33**
> **Superior orders and prescription of law**
>
> 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>
> (b) The person did not know that the order was unlawful; and
>
> (c) The order was not manifestly unlawful.
>
> 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Let's take apart Article 33 to see how it works. It is clear that Article 33 provides a defence only in exceptional circumstances. A subordinate is presumed to be responsible for carrying out orders that violate international law unless he or she can meet all three of those requirements. Subsection (a) is clear; the subordinate must be under a legal obligation to follow orders. Simply holding an organization in high esteem or feeling that you should follow the orders of someone does not count. Subsection (b) states that the person must not subjectively know that the order was unlawful; for example, our artillery officer must not know that the bridge he was ordered to shell was used by civilian traffic. Subsection (c) gets to the heart of the history of this area of the law. "The order was not manifestly unlawful" means that the order was not clearly illegal on its face. For example, as section 2 states, orders to commit genocide or crimes against humanity are manifestly illegal. Jeanne Bakker stated that under the manifest illegality principle, enshrined in Article 33, "it is the *nature* of the order [that] determines the culpability of the offender" (Jeanne L. Bakker, "The Defense of Obedience to Superior Orders: The Mens Rea Requirement, 17 American J. Criminal Law 55 1989-1990, 66).

History is full of examples of extreme views on the defence of superior orders. They range from bright-line rules that a subordinate is never criminally responsible for following orders to the opposite extreme that following orders

is no defence. Article 33 is in the middle of these extremes as a sort of Goldilocks Rule.

When Article 33 was enacted in 1998 several human rights groups opposed the inclusion of the superior orders defence because they saw it as going against the standard that has prevailed since the Second World War (Lachlan Harris, "The International Criminal Court and the Superior Orders Defence" 22 University of Tasmania L. R. 200 2004 at pages 203-204). Lachlan Harris argues that these criticisms did not take into account the fact that the defence of superior orders has always been full of "uncertainty, inconsistency and contradiction".

First World War

Scholarly opinion before the First World War was strongly in favour of obedience to orders being a total defence to charges of war crimes, with the responsibility falling entirely on the officers who issued the commands. At the beginning of the First World War scholars, as well as the field manuals for the American and British armies, stated that a soldier who followed orders to commit an illegal act, for example killing a prisoner of war, would not be guilty of a war crime (Gary Solis, "Obedience of Orders and the Law of War: Judicial Application in American Forums", 15 American University Int'l L. R. 481 1999-2000 at page 496).

In 1906, Mr. Lassa Oppenheim, a prominent British international law scholar wrote

> "If members of the armed forces commit violations *by order* of their Government, they are not war criminals and cannot be punished by the enemy…. In case members of forces commit violations ordered by their commanders, the members cannot be punished, for the commanders are alone responsible…" (Solis at page 494).

We can see from this quote that in those days the general opinion was, as Tennyson wrote in *The Charge of the Light Brigade*, "Theirs not to reason why, Theirs but to do and die".

Oppenheim's view was rejected after the end of the War when the world witnessed the first wave of war crimes prosecutions.

There are three events which show the uncertain, circumstantial nature of this area of law after the First World War. The first is a decision of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, a commission set up during the Paris Peace Conference. The Commission could not reach a consensus about whether the defence of superior orders would exonerate subordinates from responsibility. Instead, the Commission decided to leave it up to the courts to decide, based on the circumstances of each case, whether to acquit a person on the grounds of superior orders (Dr. Matthew Lippman, "Humanitarian Law: The Development and Scope of the Superior Orders Defence" 20 Penn. St. International L. R. 153 2001-2002 at page 164).

The next two events are decisions of a court charged with carrying out the Paris Peace Conference mandate, namely, the Penal Senate of the German Supreme Court. Some of you may think it is odd to allow a German court to judge Germans accused of war crimes, but this is just another circumstance of the times. As those of you who study modern European history know, Imperial Germany collapsed in 1918 was replaced by the Weimar Republic (which was abolished by Hitler in 1933). The victorious Allied powers had an interest in having a democratic Germany and allowed 45 alleged war criminals to be tried in Germany, rather than at an international tribunal, in order to respect Weimar sovereignty (Lippman at page 166).

In the *Dover Castle* case, submarine commander Karl Neumann was tried for sinking a hospital ship filled with sick and wounded men. Neumann pled that he was following orders from the German Admiralty stating that British hospital ships were legitimate targets, because they were allegedly being used for military purposes.

The Penal Chamber acquitted Neumann on the grounds that international law dictated it is a defence for subordinates to follow orders and they should only be criminally responsible when they go beyond those orders or when they follow an order that they know is illegal. In the circumstances, Neumann did not fit within one of those exceptions, as he viewed the orders as legally justified (Lippman at page 166).

The second case involves a similar situation to the *Dover Castle*, but has far darker details. In the case of *Llandovery Castle*, the submarine commander Helmut Patzig presumed, without proof, that the Canadian hospital ship *Llandovery Castle* was carrying munitions. Patzig then ordered Lieutenants Lugwig Dithmar and John Boldt to machine-gun the survivors. Dithmar and Boldt were tried for war crimes (Lippman at page 168).

The Penal Chamber stated that an officer who issued an order violating international law was solely responsible and the subordinates were only to be held responsible if they knew that the order was illegal or if they order was so illegal on its face that anyone would know it was wrong (Lippman at pages 168-169). Although the court stressed that Patzig was primarily responsible, Dithmar and Boldt were found guilty because the order was contrary to basic ethical principles and should not have been followed.

Although the *Llandovery Castle* case ended with convictions it introduces us to another theme in war crimes prosecutions, namely, the unwillingness of states to punish their own soldiers. Dithmar and Boldt were sentenced to only four years in prison and their convictions were annulled in 1928 (Lippman at page 170).

I ask you to place yourself in the shoes of Neumann, the U-Boat commander from the *Dover Castle* case. You have received a memorandum from an admiral telling you to disregard the protected status of a hospital ship on the

basis of unconfirmed intelligence stating that these ships are really munitions ships in disguise. What do you do? Do you follow your orders in spite of the fact that if they are wrong you will be sending sick and wounded men, as well as their caregivers and doctors, to watery graves or do you follow them because they are your orders?

Second World War: Absolute Liability for Some

The horrors of the Second World War are universally known. It is also universally known that Nazi Germany was a totalitarian state where all commands eventually originated from Adolf Hitler and that he was the madman responsible for those horrors. The victorious Allied powers captured a large number of senior Nazi officials and tried them before the International Military Tribunal (IMT) at Nuremberg. The question was whether these men could defend themselves by stating that they were only following Hitler's orders and fulfilling their patriotic duty to Germany.

Article 8 of the IMT's Charter broke with the idea that orders must be obeyed unless they are clearly illegal, as found in *Llandovery Castle*, by stating that "[t]he fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment" (Solis at page 515). The IMT had individually responsibility on its mind when it stated "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing

individuals who commit such crimes can the provisions of international law be enforced" (Solis at page 515).

Due to the fame of the Nuremberg trials, Article 8 is sometimes seen as a pinnacle of war crimes law; the Gold Standard of individual responsibility, if you will. That being said, I argue that it is better to view Article 8 as heavily based on the particular circumstances of the time and of the trials for which it was designed.

The men in the dock at Nuremberg were high-level government officials; they were Hitler's core cadre and accomplices who ran the Nazi state and the armed forces. They included men such as Hermann Goering, head of the Luftwaffe and number two man of Nazi Germany and Alfred Jodl, Chief of the Operations Staff of the High Command of the Wehrmacht, essentially the chief operational planner for the army (Lippman at pages 184-185).

Although the defendants raised superior orders as a defence, the IMT rejected such claims on the grounds of Article 8 and almost always refused to take orders into consideration in mitigation due to the particularly terrible nature of the crimes in question (Lippman at page 184).

Hilaire McCoubrey argues that Article 8 unnecessary due to the facts of these cases (From Nuremberg to Rome: Restoring the Defence of Superior Orders, 50 International and Comparative L. Q. 386 2001, 389). The evidence against

these men was overwhelming and the orders they carried out (and in some instances helped draft) were the most monstrous, most manifestly illegal instructions the human brain has ever invented.

The tenacity of the defence can be seen by the way war crimes tribunals got around the strict prohibition when prosecuting lower level German officers, men who, in theory, could have just been following orders and, if Article 8 were strictly applied, would have been left defenceless.

Although the Nuremberg statute appeared to remove superior orders as a defence, it is interesting to look at the prosecutions of lower-level commanders tried under the American Control Council Law No. 10, which ostensibly removed the defence of superior orders through a provision similar to Article 8 (Lippman at page 185). I will continue to refer to Article 8, not Control Council Rule No. 10 for simplicity's sake, as both provisions purported to remove the defence of superior orders.

In the *Hostage* case the American Tribunal tried Wilhelm List, Franz Boehme and Walter Kuntze for ordering the deaths of hundreds of thousands of people in the Balkans in an attempt to end resistance to Nazi rule (Lippman at page 193). Specifically, List was commander of all the military forces in the Balkans and received an order from Field Marshall Wilhelm Keitel, Chief of the High Command of the Armed Forces that fifty to one hundred civilians were to be executed in reprisal for every German soldier killed. Boehme,

commander of German forces in Serbia directly his troops to act as "avengers" of dead Germans and issued an order which led to the execution of 2,100 Serbians who were suspected of aiding partisans. Kuntze replaced List in 1941 and drafted an order calling for reprisals against the civilian population, as well as threatening any soldier who did not obey commands (Lippman at page 193).

The Tribunal broke with the strict language of Article 8 by stating:

> We are of the view … that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice (Harris at page 210).

I'll show you again Article 8 of the Nuremberg Charter. How does one read this ironclad language to include an exception? This quote shows that the Tribunal has interpreted its statute in a certain way, presumably to stop potential unfair applications of the law. Now let us look at Article 33 of the *Rome Statute*. It is clear that this modern defence was alive and well in the immediate postwar years; even in the apparent certainty of the Second World War tribunals, deserving cases were allowed to benefit from this defence.

We will do some brief legal analysis on what this "manifest illegality" standard, which the *Hostage* tribunal was alluding to, means. In criminal law there are typically two elements to an offence; first, the *actus reus* or "guilty

act." What this means is that the person actually did the evil action in question. In this case it would be met if an artillery officer shelled a hospital that was full of sick civilians. The second element is the *mens rea* or "guilty mind." This means that the person intended to do the act or was reckless of the consequences or she ought to have known that what she was doing violated international law and the laws of war. I will show you again the quote from the *Hostage* case:

> We are of the view … that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice (Harris at page 210) (emphasis added).

The logic behind this is that the soldier in question did not know and could not have reasonably known that what he was doing was illegal. The rule in Article 33 and *Hostage* says that soldiers should always follow orders, unless they know the orders are illegal or the orders are clearly illegal such that anybody would recognize them to be illegal. The *Hostage* case and Article 33 do not so much recognize the superior orders defence as interpret war crimes and crimes against humanity as having both a physical component and a mental component. The logic dictates that when the mental component is lacking, no liability can fairly be attached.

In spite of this departure from the strict wording of Article 8, the three defendants were found guilty of their crimes.

In the *High Command* case the American Tribunal tried a number of high ranking staff officers, the planners of military operations, and field commanders for issuing or passing along orders which violated international law. These included the Commando Order of October 1942 which called for the execution of Allied commandoes and partisans operating behind German lines. The Tribunal found that this order was "criminal on its face" as it called for the execution of prisoners of war (Lippman at page 197).

The Tribunal held that obedience to a clearly illegal order is no defence and an individual was criminally liable when he obeyed an order which he knew or ought to have known was in violation of international law and the laws of war (Lippman at page 203).

Postwar Cases in Domestic Courts

We are now going to leave the realm of international law and look at several prosecutions by countries against their own soldiers. These cases are not binding international law and the international cases and statutes I have spoken of previously do not directly apply to domestic prosecutions. That being said, these cases are useful because they deal with the defence of superior orders.

In *United States v. Griffen*, 39 C.M.R. 586, Sergeant Walter Griffen overheard a radio conversation between his company commander and his platoon commander ordering the killing of a Vietnamese prisoner. Griffen was ordered to carry out the killing and he believed that it was necessary to protect the platoon. The Army Board of Review held that the superior orders defence could not be invoked because the command was "obviously beyond the scope of authority of the superior officer and so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding." That being said, the Board of Review reduced his sentence from ten to seven years because Griffen had acted in a rapidly moving sequence of events "without reflection and in honest obedience of a superior's orders." Dr. Lippman writes that the mitigation was undoubtedly influenced by the rank differential between Griffen and his company commander (Lippman at page 220).

Let us look at the case of *Griffen* from a policy perspective. The case has several features which, correctly or incorrectly, mitigated Griffen's sentence. First, Griffen was in combat at the time. Courts, especially domestic courts, have been known to take the fog of war and the extreme stress of combat into cognizance when determining penalties and guilt. Second, Griffen reacted quickly to an unforeseen order that did not give him sufficient time to reflect on the legality. Third, Griffen was an enlisted man and this order came from his company commander. These considerations led the court to try to balance the demands of military obedience, the confusing, brutal nature of combat

with the fact that the order to kill the prisoner was clearly illegal. I am certain that some of you think that seven years imprisonment for following a grossly illegal order and killing a defenceless prisoner is unduly lenient, but it goes to show the difficulties involved in trying to do justice when working in this area of the law.

One more case from a domestic court illustrates what is meant by a "manifestly illegal" order and how courts try to avoid unfair applications of the law. In the Israeli case of *Chief Military Prosecutor v. Malinki* (Military Court of Appeal, 1959), II Palestine Y.B. Int'l 69, 77 (1985) Major Shmuel Malinki was ordered by his commander to shoot anyone violating a curfew that had been placed on several villages (Lippman at page 224). Malinki complied with the order and explained to his subordinates that using force would show that the Israeli security forces were to be treated with respect (Lippman at page 225). Eight policemen were charged with killing 43 persons in nine separate incidents.

The Israeli Court of Appeals held that an order to shoot unarmed civilians who may not have been aware of the curfew was manifestly illegal. The court also held that it was a defence for a soldier to plead that he was just following orders, except when those orders are manifestly illegal. The court explained the term "manifestly illegal" by stating that manifestly illegal commands "wave like a black flag" so that <u>any reasonable human being</u> would perceive them as being wrong. The application of this standard is based on what a

reasonable combatant should have known. In order to avoid unfair application of this law, the court held that evidence regarding the circumstances of the order, the knowledge, beliefs and mistakes surrounding the accused's behaviour should be taken into account (Lippman at page 226).

Canadian Commentary: *R. v. Finta*

The Supreme Court of Canada wrote about the superior orders defence in the case of *R. v. Finta*. Hungary was allied to Nazi Germany from 1941 until 1944. In 1944 Hungary seriously questioned its commitment and the country was invaded and a puppet government was put in place. During this time Imre Finta was a Hungarian police officer in the Royal Hungarian Gendarmerie. This organization was placed under the control of the SS and it became involved in plans deport Jews to the death camps. Finta participated in the roundup of Jews and the internment of thousands in an open-air brickyard. He also participated in forcing these people into boxcars and deporting them to their deaths. In the 1990s Finta was charged in Canada under the Criminal Code provision dealing with war crimes and crimes against humanity.

In that case Justice Cory wrote that it is a:

> … well-recognized principle that in both the armed forces and police forces commands from superior officers must be obeyed. It follows that it is not fair to punish members of the military or police officers for obeying and carrying out orders unless the orders were manifestly unlawful (*Finta* at para. 220) (emphasis added).

What is a manifestly unlawful order according to the Supreme Court of Canada? Justice Cory described it in the following terms:

> When is an order from a superior manifestly unlawful? It must be one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong (*Finta* at para. 239) (emphasis added).

The objective standard for manifest illegality was described in the following terms:

> … it is sufficient if it is established that the accused was aware of the factual qualities of his or her actions, provided that the jury finds that those actions come within the definition of crimes against humanity or war crimes and that a reasonable person in his or her position would know that orders to perform such actions would be manifestly unlawful (*Finta* at para. 266) (emphasis added).

Duress: *Finta* and *Erdemovic*

I have yet to deal with the question that I am sure is on your minds: what happens if someone holds a gun to my head and forces me to commit a war crime? Should it be an absolute defense or should it only be taken into account in sentencing?

In the case of *Prosecutor v. Drazen Erdemovic*, the ICC ruled on the defence of superior orders and the availability of duress as a defence. In 1994, Erdemovic was ordered by his commander to engage in the systematic execution of Muslim men. Erdemovic refused to take part, but his commander said "[i]f you don't wish to do it, stand in the line with the rest of

them and give others your rifle so that they can shoot you" (Major Stephen Newman, "Duress as a Defense to War crimes and Crimes Against Humanity – *Prosecutor v. Drazen Erdemovic*", 166 Military L. R. 158 2000 at page 160). He killed between ten and one hundred men that day. Later that day, his unit was ordered to kill a further 500 prisoners. This time three members of the unit refused and the orders were rescinded (Newman at page 161)

The sentencing judgment took note of the "[e]xtreme necessity arising from duress and other orders from a superior" as a mitigating circumstance and sentenced him to ten years imprisonment (Newman at page 161).

On appeal, the court was split 3-2 on whether duress is a defense or a mitigating factor. Major Newman notes that the majority's judgment is based largely on policy grounds. The majority noted:

> There must be legal limits as to the conduct of combatants and their commanders in armed conflict. In accordance with the spirit of international humanitarian law, we deny the availability of duress as a complete defence to combatants who have killed innocent persons. In so doing we give notice in no uncertain terms that those who kill innocent persons will not be able to take advantage of duress as a defence and thus get away with impunity for their criminal acts in the taking of innocent lives (Newman at page 163).

In contrast, the minority found there was no specific rule relating to duress as a complete defense. The minority laid out four elements which must be met before duress can be accepted as a defense. First, the illegal act must be done

under an immediate threat of severe harm to life or limb. This threat cannot be speculative or trivial. Second, there must be no adequate way of avoiding the illegal act. Third, the potential harm to the accused must be greater than the harm he was forced to inflict on others (the lesser of two evils must be chosen). This aspect is difficult to understand, but you should think of it this way: the punishment must be equal to or greater than the harm that the orders would cause. Jeanne Bakker wrote that "threats of demotion in rank … for not carrying out an illegal order … would not be a defense where the soldier was ordered to kill innocent persons" because the harm caused by the orders is the greater evil (Bakker at page 74). Fourth, the situations leading to duress must not have been voluntarily brought about by the person coerced (an example of this would be to have voluntarily joined the secret police or an *einsatzgruppen* during the Second World War) (Newman at page 166).

What can we learn from *Erdemovic*? It is clear from the 3-2 split that duress is a contentious issue. Both sides based their approach on policy. Neither side states that duress is irrelevant when trying persons accused of war crimes, but the majority judgment would put it off until sentencing, while the minority judgment makes it a factor in whether or not the accused is guilty. Also, take note of the narrowness of the minority's formulation of duress. It is clear that both sides want individual responsibility to be the rule and any defences to be exceptional.

In the case of *Finta*, the Supreme Court of Canada stated that a person under duress lacks the "moral choice" necessary to impose criminal responsibility (*Finta* at para. 246). The court also added this interesting commentary:

> The lower the rank of the recipient of an order the greater will be the sense of compulsion that will exist and the less will be the likelihood that the individual will experience any real moral choice. It cannot be forgotten that the whole concept of the military is to a certain extent coercive. Orders must be obeyed. The question of moral choice will arise far less in the case of a private accused of a war crime or a crime against humanity than in the case of a general or other high ranking officer (*Finta* at para. 247).

Conclusion

Okay. What I have tried to show you is that the development of the superior orders defence has been anything but linear. It has been heavily based on the circumstances of the time and on competing policy considerations. It is also clear that you cannot make everybody happy when it comes to prosecutions for crimes such as these. I am sure some of you are not happy about the outcome of the *Dover Castle* case, or the lenient sentence handed out in *Llandovery Castle*. As I mentioned at the beginning of this talk, human rights groups were upset by the inclusion of the defence in Article 33 of the *Rome Statute*, thinking that the standard from Article 8 of the Nuremberg tribunal is more appropriate.

I have hope for the future. If the rule in Article 33 is hammered home to every soldier in the world, then we may yet see the day when the ICC's docket

is empty, not because there are no more evil people in the world, but because their subordinates will do their duty to humanity by refusing to obey illegal orders. An example of what could happen can be seen from *Erdemovic* where three members of the unit refused to kill anymore and the illegal order was withdrawn.

In the end, these cases all come down to the facts. In real estate, the most important factor is "location, location, location" and in law, especially in this area of the law, it's "the story, the story, the story." We can recall that the *Hostage* case broke from the absolute liability laid out in Article 8 of the Nuremberg Tribunal but, because of the horrible, manifestly illegal nature of the orders in question, still convicted the accused and sentenced them accordingly. If any of you decide to go into law you should endeavour to step out of the way of the facts and let the evidence do the talking.

Some of you may agree with the pre-First World War standard that obedience to orders is a complete defence. Perhaps it is only fair to impose liability on the evil mind who issued the orders. Some may think that, but I contend that these laws must be <u>prospective</u> in outlook; they must build a better world by fixing the mistakes of the past. Hitler would have been nothing more than a ranting ex-corporal had it not been for the people who were willing to follow his orders. If we want to build a better future for ourselves then we, the human community, must recognize the power of the individual's mind and instil in ourselves a responsibility to stand up to abuses of power.

Application

I would now like to show you the application of these laws in the prosecution for war crimes and crimes against the galaxy of the Lord of the Sith Darth Vader. Let us assume that Darth Vader is transported through time sometime between *The Empire Strikes Back* and *Return of the Jedi* and is brought to the ICC to stand trial for many grievous crimes for instance, ordering the destruction of Princess Leia's home planet of Alderan in *Star Wars Episode IV: A New Hope* and the torture of Han Solo in *Star Wars Episode V: The Empire Strikes Back.* The killing of civilians, genocide and torture are all prohibited under international law.

Darth Vader raises two arguments in his defence. First, he argues that he fits under the exception laid out in Article 33 of the *Rome Statute* because he was simply following orders. Second, he claims he was under duress from the Emperor.

Darth Vader's arguments regarding obedience to orders could be quickly dealt with. Although Vader owed allegiance to the Emperor (he knelt before him and referred to him as "Master"; also, Anakin Skywalker's life was saved by the Emperor at the end of *Star Wars Episode III: Revenge of the Sith* when he was renamed to Darth Vader by the Emperor himself) and was doubtlessly charged by him with destroying the Rebellion, there is no evidence to suggest

that detailed orders to commit acts such as these came from anyone other than Vader. Even if the Emperor had issued the specific orders to destroy Alderan and torture Han Solo, those orders are both manifestly illegal and should not have been obeyed. To use the metaphor from *Malinki*, the illegality of these orders would have "waved like a black flag" and should not have been obeyed.

Duress would not be a defence under the rule laid down by the ICC in *Erdemovic*, but would the result be different if we followed Justice Cory's formulation from *R. v. Finta*? Was there such an atmosphere of compulsion and duress that Darth Vader had no real moral choice (taking into account the Emperor's ability to shoot lightning bolts from his fingertips)? I don't think so. This is a case where the story and the evidence are overwhelming. Individual stormtroopers or officers on Star Destroyers may have access to the superior orders defence or claim they were under duress (remember Darth Vader's ability to strangle people using the Force), but surely Darth Vader was at the highest echelons of power in the Galactic Empire and exercised significant discretion in carrying out the Emperor's directives.