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Chapter 1 : ACLU wants to help defend alleged Sept. 11 mastermind | The Seattle Times

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Superior orders and the International Criminal Court: The views expressed in this article are those of the author and do not necessarily reflect the views of the Ministry of Defence or the United Kingdom Government. 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: For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful. The following commentary will argue that, far from being a withdrawal, this article in fact reflects both the traditional understanding of the law and is entirely consistent with the intentions of the drafters of the Nuremberg Charter. It reflects the conflict between the requirements of military discipline that orders be obeyed and the requirements of justice that crimes should not go unpunished. Oppenheim, in the first edition of his standard work on international law published in , stated: It is certainly to be urged in favour of the military subordinates that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including the accused, to be without any doubt whatever against the law. As early as , consideration was already being given to trials at the conclusion of hostilities. When those trials came to fruition at Nuremberg, Article 8 of the Charter of the International Military Tribunal stated: Yet an examination of the negotiating history of the Charter reveals a slightly different picture. In , a committee had been established to draft rules of procedure for future war crimes trials. A subcommittee was formed to look at the issue of superior orders. The conclusion reached was that each case must be considered on its own merits, but that the plea is not an automatic defence. This point was made in the discussions on superior orders at the London Conference when General Nikitchenko, representing the Soviet Union, asked: This not a question of principle really, but I wonder if that is necessary when speaking of major criminals. Article 8 was approved with all mention of superior orders as a defence, absolute or otherwise, deleted. Nuremberg and after At Nuremberg itself, the crimes alleged were of such a magnitude that the absolute nature of the denial of the superior orders defence made little or no difference. However, subsequent tribunals had greater difficulty. They sought to resolve the matter by treating it as an issue of intent. For example, in the Hostage Case United States v. Wilhelm List et al. But the general rule is that members of the armed forces are bound to obey only the 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. Otto Ohlendorf et al. Wilhelm von Leeb et al. Different solutions have been examined. The International Committee of the Red Cross put forward a draft text to the Diplomatic Conference which produced the Geneva Conventions, but it was rejected with the comment: Bodies far more competent than we are have tried to do it for years. The final draft text had an Article 77 which read: It may, however, be taken into account in mitigation of punishment. Academic opinion divided into two main schools. The first rejected any suggestion of superior orders as a defence and the second allowed the defence if the orders were not manifestly illegal [18]. The poisoned chalice of resolving this issue thus passed to the Diplomatic Conference on the Establishment of an International Criminal Court. The Rome Conference could not seek to duck the issue as in nor, as a result of the structure of the Statute, could they seek to restrict any pro vision to grave breaches. Furthermore, they were not looking back to crimes already committed but forward to conflicts not yet envisaged. Many at the Conference wanted to retain the Nuremberg standard [19]. They cited the Statutes of the two ad hoc Tribunals for former Yugoslavia and Rwanda and argued that the sort of crimes that would be dealt with by the ICC would be such that any question of superior orders would be irrelevant. Others were more cautious [20]. The structure of the Conference meant that the general principles were being drafted at the same time as the crimes themselves were being elaborated. The tension was in some ways similar to that to

be found between the jurisprudence of the Nuremberg Tribunal itself and that of the Tribunals established under Allied Control Council Law No. The decision that was taken to adopt Article 33 represented, in the view of most, a sensible and practical solution which could be applied in all cases. In particular, it was limited to war crimes, as it was recognized that conduct that amounted to genocide or crimes against humanity would be so manifestly illegal that the defence should be denied altogether in consistency with the Nuremberg standard. It would, of course, not prevent superior orders being raised as part of another defence such as duress. Since the conclusion of the Rome Conference, it is possible to examine Article 33 against the list of crimes and also against the other provisions in the Statute dealing with the mental element Article 30 and mistakes of fact and law Article It contains a high standard. The three requirements in Article 33, paragraph 1, are cumulative not disjunctive. For a start, the accus ed must be under a legal obligation to obey orders -- a moral duty is not enough. Superior orders mean just that -- orders. Thus the government official who carries out instructions which amount to war crimes is not protected unless he is subject to some legal compulsion. The fact that he might lose his job if he refused is, it is suggested, not sufficient. Even if this first hurdle is overcome, the defence is made out only if the accused did not know that the order was unlawful AND the order was not manifestly unlawful. There is an uncertainty here in where the burden of proof lies. This may become clearer when the Rules of Procedure have been drafted. A study of the list of crimes contained in Article 8 reveals that this defence, if it is such, will be extremely limited in scope. The majority of crimes are so manifestly illegal that the issue would never arise. However, this may not necessarily be the case for all crimes and for all ranks. An example may suffice: At present, it is unclear what mental element is required for this offence. Intent is defined as where: What that might lead to remains to be seen, but it would seem that the gravamen of this offence, taken of course from the Hague Declaration concerning Expanding Bullets, is in the issuing of such bullets rather than in the activities of the individual soldier who acts in good faith with ammunition issued to him. It may come down to an issue of intent, but to impose a strict liability test would seem to be somewhat harsh. However, that is not yet clear and it is suggested that the text laid down in that article provides a satisfactory balance between the interests of justice and the obligations of a soldier. It does not provide, in itself, an escape to impunity but may, in those rare cases when it is likely to be invoked, provide justice to a soldier who finds himself carrying the responsibility for decisions made in good faith on the basis of orders given by others who had information, denied to the accused himself, which rendered the order illegal. Conclusion Justice is a two-way street. Soldiers are often as much victims of the decisions of their superiors as civilians. In the circumstances of Nuremberg, it was right to exclude any reference to superior orders as a defence. However, as General Nikitchenko realized, that was a decision based on specific circumstances. A Treatise , Vol. A Treatise , Vo l. Report of Robert H. Trials of War Criminals , Vol. This text is still under discussion in the Preparatory Commission.

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Chapter 2 : IHFFC International Humanitarian Fact-Finding Commission - Publications of our members

Fellow Professor Charles Garraway. he was a Member of the International Humanitarian Fact Finding Commission under Article 90 of Additional Protocol I to the.

Supreme Court let die a U. Yemeni citizen al-Adahi, who has been detained in Guantanamo Bay prison since January without charges, was ordered set free by a district court, but an appeals court reversed the order. When the Supreme Court refused to hear the case, it allowed the appeals court decision to continue the detention without trial to stand. So al-Adahi will continue to be detained without charges "legally. A military commission is a special court system outside the ordinary civil court and the Uniform Code of Military Justice that is set up to try individuals accused of war crimes. Nowhere is it mentioned in the U. Supreme Court in the case Boumediene v. The neo-conservative gospel during the Bush administration was that the President has the power to set up whatever courts it wants in order to convict "war criminals. Eisentrager case, where the New Deal-packed Supreme Court allowed a military commission to convict several Nazi spies and saboteurs shortly after World War Two. The court ruled that "a nonresident enemy alien has no access to our courts in wartime. One would think that a so-called "conservative" would look askance at a Roosevelt-influenced Supreme Court that strays from the text of the Constitution. Remember, this is the same Supreme Court that declared that innocent Japanese-Americans could be removed from their homes and put into concentration camps for the duration of the war. It is entirely clear that, at English common law, the writ of habeas corpus did not extend beyond the sovereign territory of the Crown. Only with "interpretation" by the courts that undoes the plain language of the Constitution and the Bill of Rights can one twist the U. Constitution to say that the federal government may lock a man up without trial for life or create a kangaroo court trial for him legally. In the case of the right of habeas corpus the right not to be imprisoned without trial or charges , the Constitution states that the "privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. The Fifth Amendment asserts, "No person shall be held to answer for a capital, or otherwise infamous crime In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. Nobody would contest that Presidents can create these military commission kangaroo courts under Supreme Court precedents. We value our readers and encourage their participation, but in order to ensure a positive experience for our readership, we have a few guidelines for commenting on articles. If your post does not follow our policy, it will be deleted. No profanity, racial slurs, direct threats, or threatening language. Please post comments in English. Please keep your comments on topic with the article. If you wish to comment on another subject, you may search for a relevant article and join or start a discussion there.

Chapter 3 : Obama to Pursue Unconstitutional Military Commissions

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Chapter 4 : Content Posted in | International Law Studies

IHFFC International Humanitarian Fact-Finding Commission - In order to secure the guarantees afforded to the victims of armed conflicts, Article 90 of the First Additional Protocol to the Geneva Conventions of provides for the establishment of an International Fact-Finding Commission.

Her main areas of interests are in international criminal law and international humanitarian law. Selected Publications Book review: She was recently awarded an iBsc in International Health. International Humanitarian Law was a core component of her degree. She thereafter undertook her articles of pupillage with a law firm in Nairobi, before sitting her bar exams in December Linda has interned with various international bodies, most recently with the International Criminal Tribunal for Rwanda, where she worked on the Renzaho and Bagosora et al cases. Kirsten holds degrees in law, sociology, and political science from the universities of Melbourne, Macquarie and Oxford, and is admitted as a barrister and solicitor in Victoria, Australia. Journal of Women in Culture and Society Her research interests include International Humanitarian Law and Criminal Law and natural resources in conflict. Alejandro is also a Member of the Bar in Buenos Aires. She is also a practising barrister and tenant at Doughty Street Chambers where she specialises in refugee and international law. Prior to joining Doughty Street, Seema was a researcher at Matrix Chambers where she carried out extensive research on a number of landmark cases at the House of Lords, including the recent torture case, R v Jones and R on the application of Al Jedda. Seema is also a consultant with Peacerights. More recently, he has worked for the Foreign Office on transitional justice issues in both Iraq and Afghanistan. His current research interests include IHL and international criminal justice. Justice Delivered or Justice Denied? The International Criminal Court, , Heintschel von Heinegg, C. Changes and Challenges International Conflict and Security Law: Mariana was a trainer on the IBA Human Rights training programme for Iraqi Judges and has undertook consultancy work on transitional justice issues.

Chapter 5 : Superior orders and the International Criminal Court: Justice delivered or justice denied - ICRC

In addition, this official predicts, if and when military commissions are used, the rules will require a presumption of innocence and proof of guilt beyond a reasonable doubt, even for terrorists.

Chapter 6 : No Right Turn: America's kangaroo court

Military Commissions: Constitutional, Jurisdictional, and Due Process Requirements, Jordan J. Paust PDF Military Commissions - Kangaroo Courts?, Charles H.B. Garraway.

Chapter 7 : Table of contents for International law challenges

After Supreme Court ruling against military commissions White House, Congress seek to legalize kangaroo courts, torture By Patrick Martin 14 July