

RESUME

The defence of Superior Order in International Criminal Law

The theory of superior order as a defence to an international crime has been a subject of wide academic debates which often produced diametrically opposite opinions and reflected how this defence is presumably the most controversial one in international criminal law.

This essay examines different approaches within international community towards the aforementioned defence since the beginning of the 20th century and also takes into consideration difficult moral and legal questions arising in connection with this topic. The aim of this paper is also search for answer to a question whether there may be identified an international custom governing treatment of the plea of superior order.

First chapter is concerned with reasons supporting different approaches to this defence and considers arguments why superior order should or should not be accepted as a defence to an international crime. Second part of chapter one introduces three relevant theories dealing with the defence of superior order, namely the theory of respondeat superior, the absolute liability principle and the principle of conditional liability.

Chapter two concentrates on relevant practice of international institutions, such as the Nuremberg International Military Tribunal, the International Tribunal for the former Yugoslavia and Rwanda. Practices of national judicial institutions are also under review. It is shown that through the history the plea of superior order has been treated by the judicial institutions in very different and inconsistent ways. While some of them treated the plea as a complete defence to a crime, others imposed some conditions on the subordinate state of mind and the illegality of superior order and other courts denied the superior order an effect of defence at all.

The following chapter outlines codification of the superior order defence, recently included in the Statute of International Criminal Court (ICC). The conditions and certain shortcomings of the relevant provision in the Statute are considered as well.

The concluding chapter, chapter four, evaluates the uneasy history of the superior order defence and attempts to discover whether an international custom on this controversial justification has crystallized. It is the main interest of the essay to prove that this has not happened yet and therefore drafters of the ICC Statute were not restricted by international customary law treating the superior order defence.