

Critical Criminological Perspectives

Killing on Command

The Defence of Superior Orders in Modern Combat

Carmel O'Sullivan



Critical Criminological Perspectives

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List of Abbreviations

BPM	beats per minute
CSF	Comprehensive Soldier Fitness
DVA	Department of Veterans Affairs
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IED	improvised explosive devices
Nuremberg Charter	<i>Charter of the International Military Tribunal</i>
POW	prisoner of war
PTSD	post-traumatic stress disorder
ROEs	Rules of Engagement
Rome Statute	<i>Rome Statute of the International Criminal Court</i>
STRIVE	Stress Resilience in Virtual Environments
Tits	terrorists in training
TRADOC	Training and Doctrine Command
TRiM	Trauma Risk Incident Management
UN	United Nations
USA	United States of America

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Introduction

Crimes are committed by people, not abstract entities (Trial of the Major War Criminals 1947, 223). When violations of the laws of war occur, those responsible should be prosecuted in order to ensure justice for the victims and the community. However, a fair trial is also a key component of justice. This means that all relevant evidence and circumstances must be put before the court prior to judgment. War and the military are unique environments. These environments create a divergence between the soldier's perceptions, behaviour and standards and the civilian's perceptions, behaviour and standards as military training is purposefully designed to break down individuals and rebuild them as soldiers and the combat environment exposes soldiers to high levels of stress and exceptional conditions and experiences. This book argues that these environments and experiences should be taken into consideration when determining the criminal liability of soldiers that obey the illegal orders of their superiors. A just and appropriate standard for determining the soldier's liability for obeying illegal orders is whether the 'reasonable soldier under the circumstances' would have known that the order was illegal. The standard should not be whether the 'reasonable person' informed from a civilian

perspective, the ‘reasonable civilian’, would have known that the order was illegal. This is an important distinction. Recognising this distinction is especially pertinent as the soldier’s experiences and the effects of these experiences are not readily knowable to those who have not engaged in combat or been immersed in a military institution. If we do not understand the experiences and their effects, how can we understand how the reasonable person would behave when faced with these experiences?

With conflicts in Iraq, Syria, Ukraine, Afghanistan, South Sudan, Israel/Gaza and many more nations, violations of the laws of war and the ensuing potential criminal liability of soldiers is a pressing issue. For example, the Iraq Historic Allegations Team is investigating British soldiers who fought in the Iraq war over alleged abuses and these soldiers may face prosecution for war crimes (BBC News 2016). Accordingly, an examination of what is a just and appropriate legal standard to hold soldiers accountable to is not an academic exercise but has real and immediate implications. Understanding the soldiers’ experiences and the combat environment is crucial in creating and implementing this standard. In the past, some courts have sought to incorporate the soldiers’ experiences, such as their military training and the stress of combat, into the determination of either their guilt or the punishment to be imposed (see, for example, *R v Blackman* 2014; *R v Finta* 1994). However, there are variances between courts on whether and what experiences and circumstances are included in these determinations (e.g., cf *US v Griffen* 1968; *US v Keenan* 1969; *US v Calley* 1973). The judgments of the courts that consider these experiences can lack a detailed and in-depth discussion and understanding of the full effects of these experiences. The necessity of understanding the soldiers’ experiences is even more crucial when the soldiers’ liability is being determined by a civilian court or court martials where the military judges and counsel have limited front-line combat experience. To gain an in-depth understanding, more research, especially more empirical research with those who have first-hand experience of war, is needed. To be most effective, this research needs to be an interdisciplinary exploration across a spectrum of disciplines including criminology, law, psychology, sociology and behavioural science.

This book argues that to be just, the courts must understand and take into account the soldiers’ experiences and their effects on the soldiers’

perceptions, standards and behaviour when implementing the law. This is not to say that soldiers should not be held accountable for crimes that they commit or that a lower level of legal liability should be applied to soldiers. This book does not maintain that a lower standard should be set for soldiers in light of the military and combat environments but that the standard should be reflective of the military and combat environments. That is, the legal standard needs to be tailored to represent the 'reasonable soldier' and not the 'reasonable civilian'. A 'reasonable soldier' standard would set a high standard to encourage ethical behaviour while acknowledging the inherent difficulties and limitations of the soldiers' environment. Aligning the law to the soldiers' environment has the very important benefit of enhancing the law's ability to guide the soldiers' behaviour and actions in the complex war context. A law that is too far removed from the environment within which it will operate and that does not reflect the inherent realities of that environment risks creating a culture of lip-service to the law as opposed to genuine respect and adherence to the law.

It is the nation-state's policy that sends soldiers to war; military training techniques are state-sanctioned techniques, and when the state encourages, either overtly or tacitly, policies and ideologies that encourage excessive 'othering' or even dehumanisation of the enemy, then the role and responsibility of the state becomes apparent. Recognising the social production element of violations of the laws of war challenges the rhetoric of 'exceptionalism' or 'bad apples' and brings to the fore the potential responsibility of the state in such cases. Understanding the social production of crime in war through appreciating the effects of the combat and military environments also provides a stronger opportunity to lower the occurrence of these crimes. A better understanding facilitates implementing legal and policy changes that more effectively tackle the environmental factors that enable breaches of the law. It also highlights the consequences and severity of the decision to engage in war. States may be obligated to provide stronger and clearer justifications to their own civilian population before deciding to go to war when the effects of war on their soldiers are fully known. Moreover, understanding the combat and military environments and the soldiers' experiences exposes the limits of the law. While the law obviously has a key role to play in the regulation of

conduct in war and the liability of those who breach the laws of war, the law alone is not enough to prevent these breaches. The creation of new offences and the threat of sanctions alone are not enough. Instead, the much thornier issues of military culture, group pressures, and attitudes of leaders must be addressed.

A Study of War

War is an underexplored area of criminology (see Jamieson 1998; Ruggiero 2005; Walklate and McGarry 2015). Yet, many characteristics of war—crime, mass violence, violations of basic human rights, victimisation, deprivation of civil rights—fall within the domain of criminology (see Jamieson 1998). Despite the fact that war has remained at the outer perimeter of the criminological lens, there have been some notable and important developments in the study of war including in criminology. Bonger (1916) highlights that war, militarism and capitalism are connected. A hegemonic capitalist economy uses the army not only to control the state's own working-class population but also to repeal or attack the forces of other countries in order to ward off competitors and to allow the 'surplus-value' of the 'moneyed class' to be invested in new markets. Park (1941, 551) believes that war is a 'political institution in process' and the primary purpose of the state is to prepare for and conduct war. The function of war is to extend territories, build nations and gain resources. Glover (1947) contends that unconscious primitive aggressive urges can lead to war and other violent actions while Bramson and Goethals (1964) argue that the disorganising effect of liberal society on traditional social orders in the West creates an appeal for war. This is because war can produce strong integration, unity and collective identities .

As well as the function of war, there have been important insights into the effects of war. Bonger (1936) points out that war stimulates social, moral and economic conditions that facilitate crime. The family unit is disintegrated, children are neglected, poverty and sexual demoralisation have spread, the shortage of goods breeds stealing and black markets, and the killing, maiming and destruction encourage violence. Mannheim (1941) argues that war creates an environment where criminal behaviour

is learnt and mimicked. Archer and Gartner (1984) and Hamon (1918) consider whether war creates a public and legitimate object for and release of violence that might otherwise be released amongst the civilian population. Durkheim (1992) and Sorokin (1944) maintain that war produces social disorganisation and normlessness or anomie in society.

Jamieson's work (1998, 2014) has made key and eminent contributions to the criminology of war. She calls for criminology to broaden its scope and to 'problematize the relationship between moral and immoral acts and social order in conditions of peace and war' (Jamieson 1998, 488). Jamieson (1998) argues that criminology must explore and theoretically and empirically analyse issues, such as masculinity and the 'gender order', social conditions leading to the generation of new crimes, crossover between features of wartime contingencies and life during peacetime, and the moral reasoning for violence. She also highlights that criminologists must engage with the ethical issues surrounding war crimes and 'crimes of obedience', particularly as these crimes are often committed by ordinary people who are 'acting under the authority of the state' (Jamieson 1998, 487). Jamieson (1998, 492–3) challenges the rhetoric of the 'individuation' or 'exceptionalism' of genocide, war crimes or human rights violations in war and instead calls for an examination of the social production of immorality and the role of state action as well as individual action in the commission of these crimes.

A body of literature has examined the criminality of war and crimes committed within war or by soldiers or veterans. Kramer and Michalowski (2005) maintain that the 2003 invasion and occupation of Iraq was a state crime and violated international law, and Enemark and Michaelsen (2005) state that it breached the Just War doctrine. Mannheim (1941) maintains that war that is conducted without just cause is a crime while Ruggiero (2006) contends that war itself is a crime. Ruggiero (2006) uses criminological theory to examine political violence. He concludes that war is a 'cancer' and a crime of the powerful and the idea that war has value is unmerited. He believes that there should be a general ceasefire on war and that it should be criminalised. Morrison (2006) analyses 9/11 and genocide. Through this analysis and a study of criminology's history, he highlights that criminology is inappropriately focused on issues within the 'civilised space' and the territorial limits of the state. Yet, the global

and local are interconnected. He calls for a global criminology where the terms of this interconnection are adequately pursued and emphasises that justice must transcend territorial limits.

Within war, some have looked at the particular crimes committed during armed conflict, for example, genocide (see Morrison 2006; Hagan and Raymond-Richmond 2009; Rafter and Walklate 2012), sexual violence (Mullins 2009; Wood 2006), government-sanctioned torture of detainees (Hamm 2007), organised crime groups within war zones (Nikolic-Ristanovic 1998) and white-collar criminality where corporations violate war regulations and profiteer from the war (Sutherland 1949). Others are studying the criminality of former armed service personnel in the domestic prison system (see, for example, Pritchard 2010). In Walklate and McGarry's (2015) edited collection, the connection between war, crime and criminology is examined, including corporate crimes, crimes of the powerful and crimes of sexual violence in war. McGarry and Walklate (2011) explore how soldiers who fought in the Iraq war can be seen as victimological 'others', and McGarry et al. (2012) highlight how soldiers' human rights are potentially being violated by the British state. Another study of note is Alvarez's (1997) examination of participation in mass murder. Using Sykes and Matza's (1957) techniques of neutralisation—denial of responsibility, denial of injury, denial of victim, condemning the condemners and appeal to higher loyalties—Alvarez explains how ordinary people were able to participate in the Holocaust.

The military institution and the profession of soldiering have also been analysed. In Caforio's (2006) edited collection on the sociology of the military, military culture is examined as well as the civil–military relationship, issues surrounding minorities within the armed forces, professional training and the new duties and functions of armed forces. Wadham (2004) also studies military culture. He argues that abuse and violence by soldiers are a result of the military culture and are a concern for wider society. Acts of military misconduct should be a stimulus for organisational reform (Wadham and Connor 2014). Brown (2015) explains that the 'total institution' of the military and exposure to the combat environment affect the reintegration of veterans into society. Using ethnographic material and sociology of the body literature, Hockey (2002) discusses the soldier's bodily experience. He describes how the soldier's body is

disciplined and acquires the abilities needed to survive, the process of exposing the body to danger and deprivation and the release from this danger and deprivation, and how soldiers rationalise risking their bodies.

The study of war has included consideration of the functions and effects of war, war as a crime, the criminogenic nature of war, the crimes committed, the military institution and the profession of soldiering. However, there are still many features, aspects and interconnections of these features of war that need to be explored, especially from a criminological perspective. Jamieson (1998) emphasises the importance of analysing the social production of immorality and the role of state action in the commission of crimes. She questions the belief in the 'individuation' or 'exceptionalism' of serious violations of the law in war and notes the need for criminologists to study war crimes and 'crimes of obedience'. This book examines the social production of 'crimes of obedience' in modern warfare. It is concerned with soldiers who obey illegal orders to commit war crimes. It is an interdisciplinary exploration of the social production of violence and crime and the environmental factors that facilitate soldiers in violating the laws of war. Through this analysis, the interaction of the state and the individual and the role and the responsibility of the state are highlighted. Aligned with some of the literature discussed above, this book covers crimes committed by soldiers in war, the military institution and the effects of the 'total institution', the profession of soldiering, exposure to combat and techniques that enable soldiers to participate in crimes. Incorporating this perspective and analysis into our knowledge and the study of war will enhance our understanding of the commission of crimes within armed conflict and the policies and steps that could help to lower the occurrence of violations of the laws of war.

A Study of the Legal Liability of the Obedient Front-line Soldier in Modern Combat

This book is concerned with front-line soldiers in contemporary warfare who obey the illegal orders of their commanders. It examines the social production of crimes by soldiers in war by analysing the soldiers' experiences and the military and combat environments. Whether the

soldier will be criminally liable for these crimes is fundamentally a legal question. This means that a legal analysis must be incorporated into the overall examination of the defence. The defence of superior orders is a legal defence that can be raised by soldiers when they commit illegal acts under the orders of their commanders. This defence means that, in certain circumstances, the soldier is not criminally liable for the illegal act. A key benefit of exploring the law is that it provides an understanding of the strengths and weaknesses of the law and, therefore, how the law should be developed.

There are a variety of sources, both international and national, that address the defence of superior orders. This book adopts a predominately international perspective. It focuses on the defence of superior orders as articulated in the *Rome Statute of the International Criminal Court* (Rome Statute). However, while the Rome Statute and international law are the focus, the book also refers to individual states and domestic laws to gain a richer understanding of the defence, to inform undefined terms and for illustrative purposes. This book has chosen to concentrate on the Rome Statute as it offers a contemporary international definition of the defence of superior orders, and a large number of states are bound to apply this standard to their soldiers.

The Rome Statute is the constituting convention for the International Criminal Court (ICC). The ICC focuses on the most serious crimes and is more concerned with commanders that have senior responsibility than with the individual low-ranking soldier. However, the ICC still has jurisdiction over the low-ranking soldier. Moreover, the standard adopted by the ICC is very likely to shape the domestic law where most soldiers will be tried, and the judicial decisions of the ICC are likely to influence the domestic courts when interpreting and applying their national law. In this way, the international position sets the standard and affects the liability of the individual soldier. The Rome Statute also acts as a focus point to discuss the standard, which has been accepted by many nations, rather than an examination of one nation or a comparative approach of a few nations.

To accurately and justly apply the law, the environment to which the law will be applied must also be understood. For the defence of superior orders, this means understanding the military and combat environments.

Within the military and combat environments, this book principally concentrates on ‘Western’ militaries, although the practices and positions of other states are noted at certain points. While an analysis of the militaries in ‘developing’ countries or in armed opposition forces, such as ISIS, is clearly important and would contribute valuable insights to the study of war, this book centres on developed Western militaries. Many of these Western states have declared a commitment to uphold the laws of war and often have a greater ability to ensure that the law is upheld and to punish their soldiers who breach it. Focusing on Western states also allows the book to concentrate on some of the world’s most powerful militaries.

It is important to note that the USA is not currently a party to the Rome Statute. Nevertheless, given that the USA is a strong force within Western militaries, has significant influence on international relations and politics and is engaged in a number of conflicts, it is included in the analysis. To exclude the US military training processes, laws and the experiences of American soldiers would substantially weaken the contribution of this book as a key actor in modern warfare would be ignored. Moreover, gaining an appreciation of the strengths and weaknesses of the defence of superior orders under the Rome Statute or an understanding of the military and combat environments does not require the analysis to be limited to state parties. Not being a party to the Rome Statute simply means that the USA is not bound by the Rome Statute. It does not mean that the USA cannot shed light on modern militaries and combat or whether the current law is an effective law. In addition, the Rome Statute (1998, art. 12(2)(a)) provides that the ICC may exercise jurisdiction over crimes committed within the territory of a state that is a party to the Statute. Nationals of a non-party state that commit crimes in the territory of a party state may, thus, be within the Court’s jurisdiction. Afghanistan, for example, is party to the Rome Statute. This means that theoretically nationals of the USA could still be prosecuted in the ICC.¹

¹ However, the possibility of the US nationals being prosecuted in the ICC is significantly curtailed by the fact that the USA has signed numerous bilateral agreements with other states that stipulate that no national can be surrendered or transferred to the ICC for any reason; see Shaw (2008, 414).

Militaries are complex organisations. They are made up of not just the fighting forces but also personnel in training, education, clerical administration, communication, logistics and so forth. This book is concerned with the front-line ‘on the ground’ soldier. It does not address military personnel that, while providing key services to the military, do not operate at the front-line of combat. It also seeks to provide an overview of the front-line soldier’s experience rather than an in-depth analysis of one rank. The defence of superior orders for front-line forces has a wider scope than just the infantry. For example, pilots, drone operators and the navy may be ordered to fire on unlawful targets, such as civilians and civilian objects. While at certain points the role of these forces and the impact of the combat environment on these forces are noted, the book primarily centres on the infantry soldier. The purview of the book is also curtailed to orders to perform actions that, in certain circumstances, would be the legitimate duty of soldiers and lawful, for example, orders to kill a person. While the book examines environmental factors that may help to explain crimes that are never acts of military service, for example, rape and sexual violence in war, the legal standard that should be imposed for such crimes is not within the scope of the book. The legal standard for soldiers who obey illegal orders to perform actions that can be part of their military service is the sole concern. It is also important to note that there are significant legal distinctions between various conflict situations, such as armed conflicts, internal conflicts, peace enforcement missions and post-conflict reconstruction missions. Unfortunately, an analysis of these legal distinctions and the corresponding duties and liabilities of the soldier in each situation is outside the confines of this book. For simplicity, it is assumed that the laws of armed conflict apply whenever soldiers are armed on operations.

Human behaviour is complex. To attempt to ‘explain’ the behaviour of any individual is very difficult, and these innate difficulties are immensely intensified when trying to ‘explain’ the behaviour of a group of people, especially a group that is very diverse and spanning different nations and cultures. Human behaviour and responsibility is ultimately individualistic (see Browning 1998, 188). However, even generalised attempts to understand the factors that influence human behaviour, although they will not be applicable in every case, are important for devising and implementing

policies and actions to prevent or lower the occurrence of harmful human behaviour. Understanding the factors that facilitate crimes is a crucial step in preventing those crimes. This book examines environmental factors that are very likely to affect the soldier's perceptions, standards and behaviour and create a divergence between the reasonable soldier and the reasonable civilian. It focuses on environmental factors or experiences that are generally not encountered in civilian society, such as military training and combat, and environmental factors that may be significantly heightened for a soldier, such as group pressure, obedience to superiors and the effects of stress. This book uses the personal accounts of soldiers and academic literature on military training and war to build an understanding of the environmental factors that affect a soldier's behaviour. It is acknowledged that the use of personal accounts may be subject to bias and these soldiers' experiences may not be generalisable to all soldiers. Despite this limitation, the accounts of soldiers offer a unique, first-hand and personal insight into military training, the military culture, the 'fog of war' and the realities of modern combat. For this reason, it is an important resource and is useful in garnering an appreciation of the basic conditions and realities of military training and modern combat. This knowledge is then enhanced and developed through empirical, psychological and physiological research on the effects of these conditions.

Exploring these environmental factors provides a deeper and more thorough understanding of the military and the combat environments. These environmental factors are meant to provide an overview and are not intended to cover all potentially relevant factors or experiences. In addition, not every experience analysed will be relevant in every case. When determining the liability of an individual soldier, the courts will need to tailor their understanding to the particular case. Liability should be determined on a case-by-case basis. That is, this book is not establishing a 'one size fits all' standard and instead provides a rich overall understanding of the soldier's experience by examining common, yet often overlooked, environmental factors that affect the reasonable soldier's perceptions, standards and behaviour.

With armed conflict being waged in numerous countries and with Western militaries being involved in many recent conflicts, it is crucial to examine the legal standard that soldiers are being held accountable to in

contemporary conflicts. This book is concerned with the legal liability of front-line soldiers in modern combat when they obey the illegal orders of their commanders. It not only examines the defence of superior orders as set out in the Rome Statute in order to determine its strengths and weaknesses but also analyses the social production of crime by exploring the environmental factors that facilitate crimes by soldiers. By studying the environmental factors in military institutions and combat, this book shows that the military and combat environments create a divergence between the reasonable soldier and the reasonable civilian and argues that the legal standard should be that of the 'reasonable soldier'. This would create a more realistic and practical standard and better align the law to the environment in which it will be applied. A law that is reflective of the environment has a greater ability to guide the person's behaviour. Examining the military and combat environments—and the environmental influences within these settings—highlights not only the role and responsibility of the state in the commission of certain crimes in combat but also the limits of the law. While the law has a key role to play in preventing and punishing violations of the laws of war, the law alone is not enough. The complexities surrounding issues of military culture, group loyalties and pressure and the attitudes of leaders need to be addressed before we can hope to succeed in preventing or lowering the commission of war crimes and mitigate the harsh and often brutal effects of war on the individual.

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2

The Development of the Defence of Superior Orders

The defence of superior orders has long been a subject of strong debate and controversy. Understanding the tumultuous history of the defence serves many purposes and has numerous benefits. It gives a much more comprehensive and nuanced appreciation of both the defence of superior orders generally and the defence of superior orders as set out in the Rome Statute. The history of the defence also highlights that at various stages the international community and individual nations have adopted different standards or approaches with respect to the defence. The legal standard adopted can be the product of its environment. Environmental factors such as politics, international relations, historical events and the dominance of particular academic or philosophical thought have influenced what legal standard is accepted. The law evolves and changes. However, a very important prerequisite to understanding whether the current standard is the most appropriate and just and whether and how the law should develop or evolve is to understand why the law adopts a particular standard and the rationale for other standards. The history of the defence of superior orders sets this foundational knowledge.

The contentious nature of the defence of superior orders lies in the fact that it represents a bulwark between conflicting interests and perspectives. Obedience to orders is a key component of military discipline and success in war but justice requires that crimes do not go unpunished (Garraway 1999). There are three dominant scholarly doctrines that address these competing interests: the ‘*respondeat superior*’ doctrine, the ‘absolute liability’ doctrine and the ‘conditional liability’ doctrine. The ‘*respondeat superior*’ doctrine states that soldiers are not liable for any act committed under the orders of their superior. The superior is solely responsible. The basic reasoning behind this doctrine is the need to uphold military discipline and efficiency in combat. Many also argue that soldiers on the ground are unlikely to know all of the relevant circumstances required to determine whether an order is lawful or not and that it would be practically impossible for soldiers to disobey as they are merely ‘tools in the hands’ of those in power. Others argue that if subordinates are immune to liability under the defence of superior orders and heads of state are immune to liability for ‘acts of state’, then everyone may avoid accountability for war crimes or serious violations of international law (see Triffterer 2008, 918; Eser 1994, 206–7; Johnson 1980, 292; Gaeta 1999, FN 4; Dinstein 2012, 38–67; Bassiouni 1999, 449–50; Keijzer 1978a, 80–4, for an overview of this doctrine and arguments).¹

On the opposite side of the spectrum, the ‘absolute liability’ doctrine states that soldiers are bound to obey lawful orders only and they are liable for obedience to all unlawful orders. Responsibility rests with both the commander for issuing the order and the soldier for obeying the order irrespective of the circumstances, apparent legality or the minor nature of the crime. The basic reasoning behind this doctrine is the belief that soldiers are not automatons but reasoning agents with the ability to identify and disobey illegal orders. This doctrine is also necessary to ensure that international law is effective and enforceable and to uphold the supremacy of the law. Others, however, contend that this doctrine

¹ The ‘acts of state’ doctrine provides that states do not have jurisdiction over the actions of other states. Accordingly, foreign or international courts cannot litigate the actions of another state—or an individual acting as an organ of the state—without the consent of that state; see, for example, Dinstein (2012, 58) and Kelsen (1943). This doctrine has declined in use, see Solis (1999–2000, 504).

could weaken the effectiveness and the safety of soldiers and that it violates a fundamental principle of justice. This legal principle is based on the premise that a person cannot be convicted of a serious crime without the establishment of *mens rea* or wrongful intent (see Triffterer 2008, 918; Eser 1994, 208; Gaeta 1999, 178–9; Osiel 1998, 962; Dinstein 2012, 68–75; Keijzer 1978a, 84–94; Sadat 2002, 218, for an overview of this doctrine and arguments).²

In between these two opposing and extreme doctrines is a collection of intermediate positions. Intermediate positions of particular note include the ‘manifestly unlawful’ doctrine, the *mens rea* doctrine and the ‘mitigating circumstance’ doctrine. The ‘manifestly unlawful’ doctrine states that soldiers are not liable for obedience to orders as long as the order is not manifestly unlawful (see Triffterer 2008, 918; Vogler 1973, 634; Dinstein 2012, 26–37). The *mens rea* doctrine provides that soldiers do not have the requisite mental element if they honestly and mistakenly believe that the illegal order is lawful (Dinstein 2012, 76–92; see also Triffterer 2008, 918). These two doctrines represent a compromise between the ‘respondeat superior’ doctrine and the ‘absolute liability’ doctrine as they allow the soldier to avail of the defence of superior orders as long as particular conditions are fulfilled. For this reason, these intermediate positions are regarded as ‘conditional liability’ doctrines. The ‘mitigating circumstance’ doctrine stipulates that obedience to superior orders is not a defence but in certain circumstances it may reduce the soldier’s punishment (see Triffterer 2008, 918). This intermediate position is not part of the ‘conditional liability’ doctrine because it is not a factor in determining whether the soldier is liable but instead determines whether a reduction in penalty is warranted after liability is established.

This chapter outlines key developments in the defence of superior orders on both a national and international basis. It chronologically highlights when, where and under what circumstances the various doctrines of respondeat superior, absolute liability or an intermediate position have been favoured. Following the national and international evolution of the

² *Mens rea* is the person’s knowledge that the action is criminal or wrong. It is generally a requisite mental element before criminal liability can be imposed. It is important to note though that relatively rare cases of strict liability, that is liability without the establishment of *mens rea*, are also accepted in common law and legislation; see, for example, Johnson (1980, 304).

defence and the work of key academics affords a deeper and richer understanding of the defence and a better appreciation of the contributing factors and the academic and philosophical arguments that affect what legal standard is adopted. This provides the foundational knowledge necessary for determining whether and how the defence of superior orders should be developed.

Pre–World War I

The individual responsibility of soldiers for obeying their superior's orders can be traced back to 113 BC and the military laws of ancient Rome. Indeed, the Roman approach correlates strongly to the current legal approach as the Romans permitted a defence of due obedience unless the act was one of 'heinous enormity' (see Osiel 1998, 946; Mommsen and Krueger 1985), and the Rome Statute (1998, art. 33) holds that the soldier can avail of the defence unless the order is 'manifestly unlawful'. Despite this symmetry, the international community and individual states have adopted various and sometimes contradictory approaches to the defence of superior orders throughout its history.

Saint Augustine maintained that an illegal order may result in liability or guilt for the King but the conditions of the soldiers' service mean that they should be excused for obeying illegal orders (Saint Augustin 1998 see also Zimmermann 2002, 958; Green 1976b, 5–6). The first tribunal that is believed to have addressed the defence of superior orders took an opposing stance though. In 1474, Sir Peter von Hagenbach pleaded obedience to orders in defence of murder, rape, arson and other crimes against the laws of God and man. The Tribunal rejected his plea and this case is regarded as an important precedent for individual responsibility (see Bassiouni 1999, 463; Solis 1999–2000; 485; McCormack 1997, 37–9; Garraway 1999; Marschik 1997, 65; Schwarzenberger 1968). The defence of superior orders was again rejected in 1660. Captain Axtell was the guard commander at the execution of Charles I, and the English Court held that he could not avail of the defence because 'where the command is traitorous, there the obedience to that command is also traitorous' (*Axtell's Case* 1661, 1060). These cases illustrate that there have been limitations on the defence of superior orders for hundreds of years and

that the defence does not absolve completely the individual responsibility of subordinates. In the seventeenth century, Hugo Grotius argued that subordinates should disobey orders that are contrary to the 'law of nature or to the commandments of God' (Grotius 1925, 138). However, the British Military Code of 1715 stated that a refusal to obey a military order is a capital offence irrespective of the legality of the order (see Lauterpacht 1944, 71; see also Solis 1999–2000, 486). Accordingly, the soldier was left in the predicament of facing potential punishment for both obeying and disobeying the unlawful order.

In 1804, Chief Justice Marshall (*Little v Barreme* 1804, 176–9) held that although obedience is necessary for every military system, orders do not change the nature of an illegal act, and if subordinates obey an illegal order, they do so at their own risk (see also Keijzer 1978b, 155). Aligned with this standard, the Court in *US v Bright* (1809, 1237–8) stated that while 'great indulgences' should be given to subordinates that obey superior orders in war, this leeway did not extend to orders of murder or trespass. In *US v Jones* (1813, 654, 657–8), the Court stated:

This doctrine ... alarming and unfounded, is repugnant to reason, and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify the act ... the participation of the inferior officer, in an act that he knows, or ought to know to be illegal, will not be excused by the order of his superior.

This set a standard that has been seen in many subsequent cases: obedience to a superior's order would not excuse or justify an illegal act where the individual 'knows, or ought to know' that the act is unlawful (Solis 1999–2000, 487). Throughout the nineteenth century, the UK adopted a similar approach to the American position (Solis 1999–2000, 490). During the Napoleonic Wars, Ensign Maxwell of the Royal Navy raised obedience to superior orders in defence of killing a French prisoner. In rejecting his plea of superior orders, the Scottish Court held that

[i]f an officer were to command a soldier to go out to the street and to kill you or me, he would not be bound to obey. It must be a legal order given with reference to the circumstances in which he is placed; and thus every

officer has a discretion to disobey orders against the known laws of the land. (Buchanan 1813, 58, quoted in Bassiouni 1999, 465 and Solis 1999–2000, 490–1)

In this regard, the American and the UK's courts did not consider soldiers to be automatons but rather reasoning agents capable of discerning and disobeying illegal orders.

However, in 1849, the US Supreme Court upheld a punishment of 24 lashes and confinement for disobedience of a superior's orders. The Court stated that a superior officer had wide discretionary power, and once they acted within the scope of their authority and did not act from malice, then they were not liable. The Court also emphasised the role of 'prompt and unhesitating obedience to orders' and noted that the delay caused by soldiers questioning their superiors could undermine the mission and grant victory to the enemy (*Wilkes v Dinsman* 1849, 91–2, 129–30). In 1851, the US Supreme Court reached a different conclusion and held that a person cannot justify 'an unlawful act by producing the order of his superior' and that obedience may 'palliate, but it cannot justify' (*Mitchell v Harmony* 1851, 137). After the American Civil War, the Judge Advocate at the *Wirz* trial (1865, 773) stipulated that a 'superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey[s] such an order and disastrous consequences result, both the superior and the subordinate must answer for it'.

In *Riggs v State* (1866, 273), the Court held that while a person would generally be protected by an order from a superior, there would be no protection and the person would be liable where the order is 'clearly illegal so that a man of ordinary sense and understanding would know ... that such [an] order was illegal'. In 1867, the standard of 'clearly illegal' was again upheld by the Federal District Court in *McCall v McDowell*, where the Court declared that superior orders was a defence '[e]xcept in a plain case ... where at first blush it is apparent and palpable to the commonest understanding that the order is illegal' (see Keijzer 1978b, 160; Solis 1999–2000, 490). In the same year, the Court in *Clark v State* (1867) was addressing the obedience of a soldier to an order to set fire to a house and stipulated a different standard. The Court stated that the

act was ordered by an officer in command, and the private could not but obey.... He cannot stop to question the authority of his superior. Obedience or death are the alternatives ... his acts are the acts of others, for which in the clear light of common sense he cannot be held answerable. (See also Keijzer 1978b, 158)

Factors such as the individual defendant's rank, discretionary power to act and intent and knowledge are likely to have influenced the different standards expressed by the courts. The reasoning of the various courts also reflects the rationales underpinning the three doctrines: the maintenance of military discipline, military efficiency and success, the supremacy of the law and the soldier as a reasoning agent. The result was a variety of standards. Soldiers could be liable for obeying illegal orders—especially clearly illegal orders—or obedience could 'palliate' or mitigate their punishment or obedience could be a complete defence and soldiers were discouraged from questioning orders and liable for failing to carry out their superiors' orders. The burden of determining when to obey or disobey orders fell on the soldier.

In *R v Smith*, in 1900, the South African Court advocated an intermediate position and set out a two-tiered standard. Soldiers were afforded the defence of superior orders as long as two main criteria were fulfilled: (1) the soldiers honestly believed that their duty required them to follow the order and (2) the order was not so manifestly unlawful that they knew or should have known that it was unlawful (*R v Smith* 1900, 567–8). This articulation of the 'manifestly unlawful' standard is an important precursor to the current international legal stance. This standard remained constant in America and Britain during the mid-nineteenth century (Solis 1999–2000, 493). Soldiers could avail of the defence of superior orders as long as the order was not clearly illegal. However, the precise meaning of 'clearly illegal' was ironically unclear. Some civilian appellate cases attempted to clarify the term. In *Re Fair* (1900, 155) the Court held that an illegal order would be 'apparent and palpable to the commonest understanding' and in *Commonwealth ex rel. Wadsworth v Shortall* (1903, 956) the Court held that it would be 'so plain as not to admit of a reasonable doubt' (see also Solis 1999–2000, 493). Despite this, confusion

still prevailed over the parameters and meaning of ‘clearly illegal’ (Solis 1999–2000, 493).

As the Hague Conventions of 1899 and 1907 set out the basic rules of land warfare, dramatic developments on the defence of superior orders also took place. In 1906, Lassa Oppenheim stated:

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. (Oppenheim 1906, 264–5)

Oppenheim regarded obedience to superior orders as a complete and absolute defence, and it was the superior issuing the order that bore all responsibility. Oppenheim’s position was adopted in Great Britain’s *Handbook on the Rules of Land Warfare* in 1912 (see Solis 1999–2000, 494). Similarly, the USA stated in its 1914 Rules of Land Warfare:

Individuals of the armed forces will not be punished for these offences in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts ... may be punished by the belligerent into whose hands they may fall. (See Solis 1999–2000, 495; Wells 1992, 118)³

This represented a dramatic change as both Britain and America set aside previous military and civilian case law and the seemingly emerging ‘clearly illegal’ standard in favour of an ‘absolute and complete defence’ or the ‘respondeat superior’ doctrine.

³ Although military manual cannot be the basis of court-martial charges, they nevertheless are official documents and representative of government policy and are an important source; see Solis (1999–2000, 495).

World War I

The tension between obedience and military effectiveness and the punishment of crimes and justice was again apparent after World War I. Commander Sir Graham Bower of the Royal Navy contended that superior orders should represent a complete defence, as ‘the blame does not rest with them, but with their superiors’. Bower also argued that the military could not function and wars could not be fought and won if every soldier was required to ‘judge ... the legality or morality of the orders received from his superiors’. To hold soldiers accountable in such circumstances would undermine the basis of every military’s discipline (Bower 1916, 24–5). On the contrary, Hugo Bellot maintained that the defence of superior orders would be used to continually shift responsibility up the chain of command so that only heads of states could be politically and legally liable (Bellot 1917, 46, 49).

At the end of the War, the Allied Powers created the *Treaty of Versailles*, which stipulated that those accused of violations of the laws and customs of war would be brought before military tribunals (see Solis 1999–2000, 497). The Treaty was silent on the defence of superior orders (Green 1976b, 265). Nevertheless, the Allies’ intention to enforce individual responsibility for crimes committed during World War I was apparent. Yet, the prosecution of soldiers for adherence to a superior’s order was inconsistent with the then military manuals of the USA and Great Britain. Germany did not wish to have their nationals tried by foreign courts, and due to the prevailing politics of the time, the Allies agreed for Germany to prosecute its own nationals before its Supreme Court at Leipzig (see Battle 1921, 1–5). These trials are known as the Leipzig Trials.

In the *Dover Castle* case (1921, 705–8), Lieutenant Captain Neumann pleaded the defence of superior orders in response to charges of sinking the hospital ship, *Dover Castle*. Neumann argued that he relied on the German Admiralty’s memorandum, which stated that hospital ships were being used for military purposes and, therefore, he regarded the sinking as a lawful reprisal. In upholding Neumann’s reliance on the memorandum, the Leipzig Court noted the significance of obedience as a military

principle and, applying the *German Military Penal Code*, held that subordinates would not be liable unless they knew that the order constituted an illegal act or they acted beyond the purview of the order given. As Neumann believed the act was a legitimate reprisal and had not exceeded the order given, he was acquitted. In the *Llandovery Castle* case (1921, 716–23), Lieutenants Dithmar and Boldt raised the defence of superior orders against charges of sinking the hospital ship, the *Llandovery Castle*. Captain Patzig ordered the ship to be torpedoed and the survivors to be killed in order to conceal their actions. The Leipzig Court accepted the defence of superior orders in relation to the sinking of the ship but refused the defence for assisting in the killing of survivors. The Court stated that although soldiers are under no obligation to question the orders of their superiors and may rely upon their legality, obedience is not a defence if the order is universally known, beyond doubt, to be against the law or the accused knew the order infringes civil or military law. The Court held that Dithmar and Boldt knew or should have known that machine-gunning unarmed survivors was against the laws of war but allowed obedience to be taken into account for mitigation of punishment.

After examining the Leipzig trials, Professor Dinstein (2012) concluded that the Court's position was that generally a subordinate would not be responsible for criminal acts committed under superior orders unless the subordinate knew the order was criminal. In determining whether a subordinate knew that the order was criminal, the auxiliary test of manifestly unlawful could be used. The Court also held that the defence would not be available if the subordinate exceeded the scope of the order given. However, the Court was applying German national law and not international law (Dinstein 2012). For this reason, the Leipzig trials' decisions cannot be regarded as a true reflection of international law.

World War II

Despite the findings of the Leipzig trials, after World War I the position regarding the defence of superior orders was still unsettled. The Leipzig trials held that soldiers could be liable for obeying illegal orders

but several nations' military manuals still regarded superior orders as a complete defence. The 1929 edition of the British *Land Warfare Manual* followed its preceding manual and held that military subordinates obeying superior orders are 'not war criminals and cannot therefore be punished by the enemy' (Edmonds and Oppenheim 1929, 95). Similarly, the US *Rules of Land Warfare* in 1934 and 1940 simply repeated their 1914 position and stated that soldiers obeying superior orders remained fully exempted from prosecution for war crimes (see Solis 1999–2000, 505–6; Wells 1992, 8). These manuals did not restrict the defence by stipulating that the defence would not be available if the subordinate knew the order was illegal or the order was manifestly unlawful.

As the defeat of Germany became increasingly likely, the Allied Powers began to revise their approach to the defence of superior orders. The influential jurist Professor Lauterpacht stated that superior orders do not change the character of a war crime or, in principle, grant immunity to the subordinate (Lauterpacht 1940, 453–4; see also Solis 1999–2000, 507). In strong alignment with Lauterpacht's position, the USA and Britain revised their military manuals to remove superior orders as a complete defence. The 1944 British *Manual of Military Law* stipulated that superior orders do 'not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment' and soldiers are liable for obeying orders that 'violate unchallenged rules of warfare and outrage the general sentiment of humanity' (quoted in *Peleus Trial* 1945, 18). The US *Department of the Army Field Manual* stated that superior orders may be considered in 'defence or in mitigation of punishment' (United States Army 1944, § 345(1); see also Solis 1999–2000, 510; Wells 1992, 67).

Accordingly, in the face of pending Nazi defeat or perhaps in light of the severe and widespread crimes committed in accordance to orders in Germany, the British and American military manuals reverted from the respondeat superior position to the position that obedience to superior orders was neither a defence to clearly illegal orders nor an automatic defence but may be considered in mitigation of punishment. Despite the apparent consensus by these powerful nations, the United Nations War Commission in 1944 could not reach an agreement on the defence of superior orders and advocated that national courts decide whether the

defence was available in accordance with ‘their own views of the merits and limits of the plea’ (United Nations War Crimes Commission 1948, 278; see also Solis 1999–2000, 509–10). The international community had yet to offer a united and concrete stance on the defence of superior orders. At the conclusion of the War, the international community began to voice its position in the Nuremberg Trials, the Tokyo Trials and the various Allied Powers’ Trials.

Nuremberg Trials, Tokyo Trials and Subsequent Proceedings

The *Charter of the International Military Tribunal* (Nuremberg Charter 1945) emphasised the importance of individual responsibility and set out the rules for the trial of World War II offenders. The Tribunal highlighted that crimes are committed by people and not ‘abstract entities’. The prosecution of such offenders is necessary for the provisions of international law to be enforced (Trial of the Major War Criminals 1947, 223). Article 8 of the Nuremberg Charter (1945), in line with the arguments of Professor Lauterpacht and the revised military manuals of the USA and Britain, took a firm stance on the defence of superior orders. It states that

[t]he fact that the defendant acted pursuant to the order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Obedience to the orders of one’s superiors could not provide a valid defence and the individual soldier was liable for following such orders. At best, superior orders may be considered in order to reduce the punishment imposed. However, this was at the discretion of the Tribunal. The Charter was the first document to expressly address the defence of superior orders from an international perspective (see Triffterer 2008, 916). It adopted a standard that was the polar opposite of the standard previously advocated by some of the Allied Powers. That is, whereas the defence of superior orders represented a complete defence until 1944, it was now

regarded as an invalid defence and could only potentially serve as a mitigating factor.

Despite the Charter's strict stance, many of the defendants raised the defence of superior orders (Trial of the Major War Criminals 1947, 223). The Tribunal regularly rejected this plea and asserted that a soldier 'cannot ... shield himself behind a mythical requirement of soldierly obedience at all costs' to excuse the commission of serious violations of the law (Trial of the Major War Criminals 1947, 325). The Tribunal, however, moderated the high standard stipulated by the Charter in its interpretation of Article 8. The Tribunal held that the 'true test' of whether the defence of superior orders was available was not 'the existence of the order, but whether moral choice was in fact possible' (Trial of the Major War Criminals 1947, 224). While 'moral choice' is likely to be removed by threats of serious bodily harm or death, the test was ambiguous and conflicted with a strict literal interpretation of Article 8 (see Solis 1999–2000, 516; Greenspan 1959, 493, FN 343). It is important to note that some academics, for example, Professor Dinstein (2012), maintain that the 'moral choice' test is meant to complement and not undermine Article 8 and that obedience did not constitute a defence.

The Tokyo Trials followed in the footsteps of the Nuremberg Trials. The *Charter of the International Military Tribunal for the Far East* (1946, art. 6) provides that obedience to superior orders by itself is not sufficient to amount to a defence but, at the discretion of the Tribunal, it could mitigate punishment. The Tokyo Tribunal also emphasised its agreement with the decisions and reasoning of the Nuremberg Tribunal (see Röling and Ruter 1977, 28). In the aftermath of the Nuremberg Tribunal, the USA, Britain, France and Russia also initiated war trials in their respective sectors of Berlin. The trials are known as the 'Subsequent Proceedings', and their rules and procedures corresponded to those of the Nuremberg Tribunal. *Control Council Law Number 10* (art. II.4(b)) stated that obedience to superior orders does not free a person from responsibility for a crime but may be considered in mitigation of punishment. The decisions of the Tribunals also lend important insights into the defence of superior orders.

In the *Einsatzgruppen* trial (1949, 412–16; 470–1, 473), the Einsatzgruppen group was charged for summarily putting to death more

than a million people. When addressing the plea of obedience to superior orders, the American Tribunal held that a soldier is a reasoning agent, not an automaton, and is only required to obey lawful commands. The Tribunal also held that the soldier bears the burden of proving 'excusable ignorance' of the order's unlawfulness, and if the order is 'manifestly beyond the scope of the superior's authority', then the soldier cannot claim ignorance. Moreover, the Tribunal formulated a test for examining the plea of obedience to superior orders:

Did he agree with the order or not? If he did not and thus was compelled by chain of command and fear of drastic consequences to kill innocent human beings, the avenue of mitigation is open for consideration. If, however, he agreed with the order, he may not ... plead superior orders. (*Einsatzgruppen* trial 1949, 517–8)

This appears to incorporate a duress or 'moral choice' element into the test for whether obedience to orders would mitigate punishment.

In the *Hostages* trial, the defendants pleaded superior orders in response to charges of seizure and execution of hostages and suspected partisans (1948 1233–4, 1236). While the American Tribunal recognised the importance of obedience in the military, it again stated that this obedience was restricted to lawful orders. The Tribunal also adopted a conditional liability approach when it stipulated that when the soldier did not know, and could not reasonably have been expected to know, of the order's unlawfulness, then the required wrongful intent was missing and the soldier would be protected. In the *High Command* trial (1947–1948, 3–4), the defendants were charged with numerous offences, including summary executions, forced labour and the destruction of cities, towns and villages. The American Tribunal held that field commanders can presume that orders issued by their superiors are in line with international law. The Tribunal noted that the soldier may rely on the presumption that a superior's order is legal when the law governing the conduct is uncertain. Given uncertainties in international law, the Tribunal found that forcing prisoners of war (POWs) to labour in non-dangerous areas was not manifestly illegal. The field commanders were able to presume the legality of their superior's order and were acquitted of this offence.

This presumption does not extend to an order which is ‘criminal upon its face’ or which the commander knew was criminal. Field commanders would be responsible for obeying or transmitting such orders. Fear of discipline or disadvantage did not excuse obedience to manifestly illegal orders (*High Command* 1947–1948, 72–4, 88–9).

In the *Stalag Luft III* trial (1947, 32, 46–7), the defendants raised the defence of superior orders in response to charges of executing 50 recaptured POWs who had escaped. The British Military Tribunal rejected the defendants’ plea and the Judge Advocate noted that an individual cannot avoid responsibility when the orders breach both the unchallenged rules of warfare and general sentiments of humanity. In the *Peleus* trial (1945, 2, 12), the defendants pleaded obedience to superior orders against charges of sinking the Greek Freighter *Peleus* and firing upon its survivors. The Judge Advocate of the British Military Tribunal reinforced that soldiers are bound to follow lawful orders only and stated that soldiers cannot rely on superior orders where it is ‘obvious to the most rudimentary intelligence that [the order] was not a lawful command’. In the *Almelo* trial (1945, 35–6, 40–1), the defendants claimed that they were merely following orders when they executed a POW. The Judge Advocate of the British Military Tribunal stated that obedience to orders would operate as a defence if the defendants ‘honestly believed’ that the order was lawful and a ‘reasonable man’ under the circumstances would have believed that the order was lawful.

These trials indicate that obedience to orders would not be considered if the order violated ‘unchallenged rules’ or was ‘criminal upon its face’ or ‘obviously unlawful to the most rudimentary intelligence’ or a ‘reasonable person would have known it was unlawful’. In this way, they appear to be advocating two standards: ‘manifestly unlawful’ and the ‘reasonable person’ would know the order was unlawful. Actual knowledge that the order was illegal would also prevent reliance on obedience. Once these standards are satisfied though, if obedience acts as a complete defence—as opposed to only mitigating punishment—then the trials appear to have softened the approach taken in *Control Council Law Number 10*, which provided that obedience could only reduce punishment. Professor Dinstein aligns with the argument that superior orders are not a defence. He maintains that obedience should not be a defence *per se*. Instead,

obedience is just one factual circumstance that can be taken into account to establish a defence that the subordinate lacked the requisite *mens rea* or wrongful intent due to mistake of fact or law or compulsion (Dinstein 2012, 88–90). For example, they lacked *mens rea* because they mistakenly believed the order was lawful or they were compelled to comply.

These Charters and trials represent the first express international treatment of the defence of superior orders and, therefore, are important insights into the international community's stance on a soldier's liability in war. The international community's stance was reinforced when the UN General Assembly unanimously endorsed the Nuremberg Charter and the Tribunal's judgments (United Nations General Assembly 1946; see also Shaw 2008, 400). Despite the international community's apparent commitment to the Nuremberg stance, there was little international development or acceptance of the defence for several decades. Out of the many notable conventions relating to war, only the *Torture Convention* (1984, art. 2) made explicit reference to the defence and stipulated that superior orders did not constitute a defence (see Bassiouni 1999, 477–8, 482). The lack of reference to or codification of the defence in significant international conventions indicated a lack of international consensus on the general application of the defence to all nations. International agreement appeared to be limited to the application of the defence to specific nations or incidents.

Notable Post-Nuremberg National Cases

After the trials of Nuremberg, Tokyo and Subsequent Proceedings, some national courts addressed the defence of superior orders, and these decisions are regarded as providing important statements of law on the defence. In response to the Nazi regime, Israel enacted the *Nazi and Nazi Collaborators (Punishment) Law* (1950, ss 8, 11), which stated that obedience to superior orders was not a defence but could be considered in mitigation of punishment (see also Johnson 1980, FN 13). This approach aligned with the Nuremberg standard. In *Attorney General of Israel v Eichmann* (1962), Eichmann pleaded obedience to orders against charges of crimes against humanity, war crimes and crimes against the

Jewish people during World War II. The District Court—and, on appeal, the Supreme Court—rejected Eichmann’s plea of superior orders even though they acknowledged that he acted pursuant to the orders of his superiors. The Court held that instead of being a mere ‘puppet in the hands of others’, Eichmann had wide discretionary powers and often acted on his own initiative. Moreover, the Court offered an important insight into the ‘manifestly unlawful’ standard associated with the defence of superior orders. The Court stated:

The distinguishing mark of a “manifestly unlawful order” should fly like a black flag above the order given, as a warning saying “Prohibited.” Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only to the eyes of legal experts, is important here, but a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart not stony and corrupt, that is the measure of “manifest unlawfulness” required to release a soldier from the duty of obedience upon him and make him criminally responsible for his acts. (1962, 277, quoting an earlier case, *Kafr Kassen* case (1958, 362); see also Osiel 1998, 973–4)

This statement is strongly associated with the defence of superior orders and appears to favour the soldier’s position as the only orders which the soldier is bound to disobey are orders where the illegality is flagrantly and manifestly apparent upon its face. No legal training or in-depth knowledge of the law is necessary, only the intelligence, morality and understanding of a reasonable person. Yet, except for stipulating that one will automatically and innately know, this statement offers no concrete guidance on how to identify a manifestly illegal order.

In *US v Calley* (1973, 536, 539), Lieutenant Calley raised the defence of superior orders in response to charges of killing civilians in the village of My Lai in Vietnam. Unlike the Nuremberg Trials, the US Military Court of Appeals held that ‘[a] determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order’ (*US v Calley* 1973, 541). While the Court noted that military

effectiveness depends on obedience to orders and therefore soldiers are trained to follow orders, it held that a soldier is a 'reasoning agent' and not a machine (*US v Calley* 1973, 541). In order to balance the 'trained soldier' and the 'reasoning agent', the Court advocated a 'man of ordinary sense and understanding under the circumstances' standard. That is, the Court held that the defence of superior orders would not be available if the soldier knew or 'a man of *ordinary sense and understanding* would, under the circumstances, know [the order was] unlawful' (*US v Calley* 1973, 542). This is more lenient than the standard stated in the Nuremberg Charter.

In *R v Finta* (1994), Finta raised the defence of superior orders in response to charges of unlawful confinement, robbery, kidnapping and manslaughter. The Canadian Supreme Court recognised obedience to superior orders as a possible defence for both war crimes and crimes against humanity. However, the Court stated that the defence was

subject to the manifest illegality test ... the [defence] will not be available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence ... will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. That is to say, there was such an air of compulsion and threat to the accused that the accused had no alternative but to obey the orders.

The Court adopted both the 'manifestly unlawful' doctrine and the 'moral choice' test. Soldiers could avail of the defence of superior orders unless the order was manifestly illegal. If the soldier had no moral choice in obeying the manifestly illegal order, the defence would remain. In this way, the Court mingled concepts of superior orders, moral choice and duress.

These cases and legislation show that a range of approaches and standards have been adopted. Obedience has been held to not be a defence or to be a defence in certain circumstances. Such circumstances ranged from the order was not 'manifestly unlawful' to the 'man of ordinary sense and understanding' would not have known that the order was unlawful or the person had no 'moral choice' but to obey. This range of standards

correlates with the range of standards that have previously been adopted throughout the history of the defence.

Ad hoc Tribunals

The lull in international codification and development of the defence of superior orders after World War II came to an end in the 1990s with the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and their respective statutes. The ICTY Statute (1993, art. 7(4)) and the ICTR Statute (1994, art. 6(4)) specify the Tribunals' position in regards to the defence, and both Statutes are virtually identical. In essence, the Statutes state that

[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires. (ICTY 1993, art. 7(4))⁴

In this way, the ICTY Statute and the ICTR Statute mirror the Nuremberg and Tokyo Charters and *Control Council Law Number 10* and exclude obedience to superior orders as a possible defence but permit it as a possible mitigating circumstance. Unfortunately, few cases have principally-raised the defence of superior orders before the ICTY and ICTR and, therefore, the Tribunals have had limited opportunity to clarify and develop the doctrine.⁵ Nevertheless, the Tribunals have provided important insights into the contemporary application of the defence of superior orders in international law.

⁴ICTR Statute (1994, art. 6(4)) provides that[t]he fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

⁵Shaw notes that the Tribunals have focused on the prosecution of the most senior leaders and have referred intermediate- and lower-rank individuals to domestic courts; see Shaw (2008, 407, 409). It is the intermediate- and lower-rank individuals who are more likely to plead superior orders and, as such, this sheds light on the Tribunals' limited dealing with the defence.

In *Prosecutor v Erdemović* (1996, [2]), Drazen Erdemović raised obedience to superior orders in response to charges of ‘crimes against humanity’ for his participation in the execution of unarmed Bosnian Muslims. The Trial Chamber held that obedience to superior orders cannot constitute a defence or justification but may constitute valid grounds for a reduction in penalty. The Chamber held that such leniency was more likely to be shown to defendants who held a low rank in the military hierarchy. Nevertheless, regardless of rank, a mitigated sentence would only be possible if the commander’s order had effectively reduced the defendant’s degree of guilt. The *Erdemović* case cannot be regarded as a pure superior orders case. Erdemović raised duress in conjunction with superior orders and also pleaded guilty in order to reduce his sentence (*Prosecutor v Erdemović* 1996, [10], [47]–[53]). In *Prosecutor v Jelisić* (1999, [3], [12]), Jelisić was charged with genocide, violations of the laws or customs of war and crimes against humanity. Amongst his defences, Jelisić raised obedience to superior orders and hierarchical duress. The Trial Chamber held that there was no clear evidence establishing a chain of command in which Jelisić operated and ‘the relentless character and cruelty of his acts’ would preclude him from benefitting from superior orders as a mitigating circumstance (*Prosecutor v Jelisić* 1999, [96], [126]). In this way, the Chamber regarded the absence of a ‘relentless character’ or ‘cruelty in the act’ as a necessary condition in successfully raising obedience to superior orders as a mitigating circumstance. However, there is no reference to such conditions in the ICTY Statute.

In *Prosecutor v Češić* (2004, [3]–[4], [95]), Češić was charged with and pleaded guilty to violations of the laws or customs of war and crimes against humanity. Češić claimed that he was ‘acting pursuant to orders and that he would have been killed if he had failed to execute them’. He maintained that he ‘was at the lowest possible level in the hierarchy and had no superior or public authority’. The Trial Chamber rejected Češić’s claim of superior orders as a mitigating circumstance (*Prosecutor v Češić* 2004, [95], [109]). In doing so, the Chamber illustrated that although the ICTY Statute acknowledges superior orders as a mitigating circumstance, it is at the Chamber’s discretion whether a plea of superior orders will actually mitigate punishment in an individual case. The Chamber also did not automatically equate the defendant’s low rank with

a mitigated penalty due to superior orders. While low rank may be evidence of grounds for a mitigated punishment under superior orders, it is not by itself sufficient.

In *Prosecutor v Mrđja* (2004, [1], [10]), Mrđja was charged with violations of the laws or customs of war and crimes against humanity for personally and directly participating in the unloading, guarding, escorting, shooting and killing of over 200 unarmed men of military age. Amongst his defences, Mrđja pleaded obedience to superior orders as a mitigating circumstance. While the Trial Chamber acknowledged that Mrđja's actions were in furtherance of orders received from his superior, the Chamber reaffirmed that adherence to superior orders is merely a discretionary mitigating circumstance. The Chamber regarded orders to kill unarmed civilians as 'manifestly unlawful' and, therefore, held that he must have known that such orders violated the 'most elementary laws of war and the basic dictates of humanity'. Obedience to such orders does not merit mitigation of punishment (*Prosecutor v Mrđja* 2004, [67]). Thus, the Chamber regarded the absence of a manifestly unlawful order as a condition to the successful plea of obedience to superior orders as a mitigating circumstance. The Chamber also incorporated concepts of presumed or inferred knowledge and the dictates of humanity into the 'manifestly unlawful' doctrine. There is nothing in the ICTY Statute to indicate that 'manifestly unlawful' is an element of 'superior orders'. Moreover, the 'manifestly unlawful' doctrine has often been associated with superior orders as a complete defence as opposed to superior orders as a mitigating circumstance. In this way, the Chamber was holding defendants accountable to a standard required for a 'complete defence' in order to establish the much lower standard of 'mitigating circumstance'.

In *Prosecutor v Bralo* (2005, [5]), Bralo was charged with and pleaded guilty to violations of the laws or customs of war, crimes against humanity and a grave breach of the Geneva Conventions of 1949. Although Bralo did not officially plead superior orders as a mitigating circumstance, he claimed, amongst other factors, that he was used as a 'weapon of war' by his superiors. The Trial Chamber again invoked the 'manifestly unlawful' doctrine with respect to superior orders as a discretionary mitigating circumstance. The Chamber held that while Bralo may have been used as a 'weapon of war' by his superiors, orders to kill civilians and destroy

homes were manifestly unlawful and, as such, could not serve as a mitigating factor (*Prosecutor v Bralo* 2005, [50]–[56]). Thus, even though the ICTY Statute does not make any reference to the ‘manifestly unlawful’ doctrine, the Trial Chamber reinforced that manifestly unlawful orders prevented superior orders from constituting a mitigating factor.

The ICTY Statute, and the Tribunal’s application of the Statute to individual cases, clearly shows that obedience to superior orders does not constitute a defence but at the Tribunal’s discretion it may constitute a mitigating circumstance. The Tribunal’s judgments offer important clarifications on the defence of superior orders. Such clarifications include that a defendant’s low rank may be evidence of, but will not by itself establish, superior orders as a mitigating factor; a relentless character or the cruelty of the acts may prevent superior orders from constituting a mitigating factor; and a ‘manifestly unlawful’ order may not qualify as a mitigating factor. While these decisions represent valuable insights into the parameters and meaning of superior orders under the ICTY Statute, they also constitute a fragmented and piecemeal interpretation. In addition, none of these principles were set out in the Statute itself. Instead, they are the Tribunal’s construction of the Statute in response to individual cases.

The ICTR Statute and judgments are closely aligned to the ICTY Statute and judgments. In *Prosecutor v Bagosora et al.* (2008, [2]), the defendants were charged with conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II. One defendant was also accused of direct and public incitement to commit genocide. The Prosecution argued that the four defendants were liable either through their direct participation or, under the command responsibility doctrine, as the superiors of the perpetrators. Nevertheless, the Trial Chamber acknowledged that at certain times some defendants were obeying the orders of their superiors when carrying out the offences. The Chamber held that their senior status in the army, the repeated execution of the crimes and the manifestly unlawful nature of the orders showed that they had acquiesced in the commission of the crimes and prevented superior orders from constituting a mitigating circumstance (*Prosecutor v Bagosora et al.* 2008, [2274]). In line with the ICTY Tribunal, the ICTR Tribunal

looked to criteria such as the defendant's rank and the nature of the order and the act when determining whether superior orders would amount to a mitigating factor.

The ICTY and ICTR Statutes and judgments correspond with, and therefore reinforce, the Nuremberg and Tokyo Charters and *Control Council Law Number 10*. By the 1990s, the international community's stance on superior orders appeared to be settled. It took the restrictive position that obedience to superior orders would never amount to a defence but could potentially be a relevant factor for the reduction of punishment. Yet, this consensus was of limited scope. This restrictive position on superior orders had only been applied to the defeated World War II states and the territories of Rwanda and the Former Yugoslavia.

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3

The Law Surrounding Obedience

The defence of superior orders determines the legal liability of soldiers who obey the illegal orders of their commanders. The availability of this defence has implications for not only the soldiers' criminal culpability but also whether they will be labelled 'war criminals'. Understanding the law is an essential prerequisite to understanding how the law should be applied to its environment. The criminal liability of soldiers for obeying the illegal orders of their commanders is fundamentally a legal question. For this reason, it is important to analyse the law itself. Examining the law independently allows us to determine the strengths and weaknesses of the law and to provide insights into how the law should be developed. To accurately apply the law, we need to understand the environment to which the law will be applied. This chapter examines the law to determine whether it is an effective law. Chapters 4–6 address the environmental contexts. An effective law has certain characteristics. For example, it needs to be clear, sufficiently constant and adequately consistent with other laws and it should be known and understood by those who are

bound to obey it (Fuller 1969, 184–7).¹ If the law lacks these characteristics, then it is weakened. This chapter highlights that there are notable inconsistencies and ambiguities within the defence of superior orders. These inconsistencies and ambiguities include that key concepts are not defined, various and inconsistent standards are adopted across jurisdictions and courts, the complexity of the laws of war affect the clarity of the law and even seemingly clear rules of law can be obscured when applied to the complicated and dynamic context of war.

Before examining the defence of superior orders in greater detail, it is important to note two key points. Firstly, as discussed in chapter 1, this book is concerned with illegal acts of soldiers conducted under the orders of their superior when those actions could be lawful under certain circumstances, for example, obeying an order to kill a person. It is not focused on illegal actions that would never fall within the soldier's duty, for example, rape. This book addresses actions that have a legitimate military character in at least certain situations. Secondly, while this book is principally concerned with the defence of superior orders under the Rome Statute, it also examines the defence in a number of other jurisdictions and statutes. There are several reasons for this wide examination. The ICC is yet to provide detailed guidance on the defence of superior orders and, therefore, it is necessary to look at sources outside of the Rome Statute in order to provide a legal analysis. The Rome Statute (1998, art. 21) also acknowledges 'applicable treaties and the principles and rules of international law' and the 'general principles of law derived by the Court from national laws' as applicable law, after the Statute itself, in governing the ICC. This means that the ICC can look at sources outside of the Rome Statute. Accordingly, a thorough analysis of the defence under the Rome Statute would include these external sources. Importantly, not all members of the international community are party to the Rome Statute

¹ Lon Fuller maintains that an effective law contains the following eight principles: rules must be clear, rules must be consistent with each other, rules must be known to those who must obey them, rules must not be abusively retrospective, rules must be understood, rules must remain sufficiently constant, rules must only demand what is possible and there must be sufficient congruence between the rules as announced and their actual administration.

and, therefore, cannot be subjected to the jurisdiction of the ICC.² This includes notable ‘developed’ Western nations such as the United States. In such cases, other international conventions, customary international law and the national law of the relevant state determine the soldier’s liability for obedience to an illegal order. Finally, while subordinates have raised the defence of superior orders for centuries, there is no universally accepted supreme source or position. Instead, there are numerous pertinent sources that provide varied positions (see Osiel 1998, 963). The lack of a supreme source means that a comprehensive analysis needs to consider a wide range of sources. Therefore, while the Rome Statute is the focus of the book, a variety of sources are examined. Examining the Rome Statute in a wider context provides a more comprehensive understanding of both the Rome Statute itself and the defence of superior orders more generally.

Ambiguous Laws in a Complex Environment

The laws of war are a complex and growing body of law that contains many uncertainties and ambiguities. The complexity of the laws of war is compounded by its need to be applied in a combat environment. War is a pressurised, dynamic and complicated environment and it can be difficult to apply even seemingly clear rules of law in this context. These uncertainties and difficulties can affect the soldiers’ ability to determine their legal obligations or whether the order of their superior is unlawful or even manifestly unlawful. The use of a wide range of standards to determine whether and when the defence of superior orders is available and the lack of a clear definition or judicial consideration of ‘manifestly unlawful’ in a variety of situations further compounds the uncertainty surrounding this defence and the soldiers’ knowledge of when they should obey or disobey the order of their superior.

²In general, the Rome Statute (1998) does not govern these states or their soldiers. However, the Rome Statute (1998, art. 12(2)) provides that a national of a state not party to the Statute may still come within the ICC’s jurisdiction if the national commits the alleged offence on the territory of a state party to the Statute.

Multiple and Varying Legal Standards

The law needs to be relatively consistent and constant. This does not prohibit change in the law though. As society and society's values change and evolve, the law too should change and evolve. However, the law needs to be sufficiently constant and there needs to be enough consistency between the different sources of law to enable a person to determine with confidence that their behaviour is or is not compliant with the law.

The defence of superior orders has long been a source of controversy and debate. As seen in chapter 2, throughout the historical development of the defence, courts and scholars have advocated varying, and even contradictory, positions and standards on the defence. There has even been disagreement on whether obedience to superior orders is a defence at all. The Nuremberg Charter (1945, art. 8), *Control Council Law Number 10* (1945, art. II.4(b)), the ICTY Statute (1993, art. 7(4)) and the ICTR Statute (1994, art. 6(4)) adopted an absolute liability approach to the defence of superior orders. This approach means that obedience to superior orders could never constitute a defence. At most, these conventions regarded obedience to superior orders as a possible mitigating factor. However, the Rome Statute (1998, art. 33) adopts a conditional liability approach to superior orders for war crimes. This approach means that obedience to superior orders constitutes a defence to war crimes as long as certain conditions are met. The three conditions set out in the Rome Statute are as follows: the soldier had a legal duty to obey, the soldier did not know the order was unlawful and the order was not manifestly unlawful. Unlike the other conventions, the Rome Statute also makes no reference to a 'mitigation' clause with respect to the defence of superior orders. In this way, the Rome Statute departs from previous international conventions by acknowledging superior orders as a potential defence and not merely a mitigating factor in sentencing (see Gaeta 1999, 174; Zimmermann 2002, 967).

Many post-Rome Statute international conventions revert back to the absolute liability approach to the defence of superior orders. For example, *Regulation No 2000/15* (2000, sect. 21), adopted by the United Nations (UN) Transitional Administration in East Timor, and the *Statute of the*

Special Court for Sierra Leone (2002, art. 6(4)) follow the previous stance taken by international law and provide that obedience to superior orders is never a defence but may be considered as a mitigating factor when determining punishment (see also Zimmermann 2002, 972–3). Yet, the domestic law of many nations aligns with the Rome Statute’s position. The decisions of domestic courts and the military manuals of a number of nations—including the USA, Canada, Germany, Denmark, the Netherlands, Spain, Israel, Switzerland, Norway, Brazil, Greece, Finland and Italy—adopt the conditional liability approach to the defence of superior orders and provide that the soldier is not liable as long as certain conditions are fulfilled (see Gaeta 1999, 175–9, 182; Dinstein 2012, 190–214; Zimmermann 2002, 965–6). The soldier’s position is even more inconsistent when the scope is widened beyond ‘developed’ Western states. Third World states have tended to regard superior orders as a complete defence in order to help ensure compliance with orders (Osiel 1998, 950; Solis 1999–2000, 522).

Thus, there is inconsistency in the availability of the defence of superior orders.³ Obedience to superior orders has been considered an absolute defence, a conditional defence or not a defence at all. There appears to be three main groupings on the defence of superior orders though: the Rome Statute and the domestic law of a number of ‘developed’ nations,

³Some scholars argue that the inconsistencies between international conventions, such as the Nuremberg Charter, the ICTY Statute and the ICTR Statute and the domestic law of many nations, on the defence of superior orders are not as diverse as it might first appear. Most developed nations’ military manuals and national courts exclude manifestly unlawful orders or its equivalent from the defence (see Bassiouni 1999, FN 17, 452, 476; Gaeta 1999, 176–7, 183; Green 1976b, 71; Osiel 1998, 981–2). The Nuremberg, the ICTY and the ICTR trials predominantly dealt with crimes that would have fallen within the manifestly unlawful exemption to the defence. Thus, even if they had recognised the defence, the results should have been the same (Osiel 1998 982). Indeed, at the Nuremberg Trials, the French, British and Russian prosecutors interpreted the Charter (1945, art. 8) to mean that the defence of superior orders was not available because of the palpable unlawfulness of the Nazi orders as opposed to excluding the defence categorically (Gaeta 1999, 180). Furthermore, national law on the defence of superior orders pertains to a much wider range of potential offences than international law. International law is generally focused on war crimes whereas national law is concerned with everything from minor disciplinary offences to grave violations of international law. This explains the adoption of the conditional liability approach in national systems and the absolute liability approach by the Nuremberg Charter and the ICTY Statute and the ICTR Statute (Gaeta 1999, 183). In this way, the inconsistencies between international and national law in respect to the defence of superior orders may not be as considerable as they initially seem.

other international instruments and the domestic law of a number of 'developing' nations.⁴ The ability of soldiers to avail of the defence of superior orders, and their ensuing criminal liability, would vary depending on which court tried them. If the law is to be effectively observed, there needs to be agreement between states on the extent to which soldiers are protected from liability for the commission of illegal acts done in obedience to a superior's order (see Johnson 1980, 312).

Even when there is agreement on which approach should be taken, there are inconsistencies on the standard to be adopted within the approach. That is, while the availability of the defence may be agreed upon, the conditions for accessing that defence may still differ. These inconsistencies are much more than semantic as they signify a significant difference in legal duty and liability for the soldier. The international courts and domestic courts of different nations have advocated an array of standards for the defence of superior orders. In line with the Rome Statute, many courts support a low threshold standard of manifestly unlawful orders before the soldier can avail of the defence. For example, in *McCall v McDowell* (1867) the US Court held that the appropriate standard was that the defence was available unless the order was 'so palpably atrocious as well as illegal, that one must instinctively feel that it ought not to be obeyed' and that its illegality would be 'at first blush ... apparent and palpable to the commonest' understanding (see also Solis 1999–2000, 490; Osiel 1998, 994). In *Keighley v Bell* (1886), the English Court adopted the standard that 'an officer or soldier, acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders' (see also Johnson 1980, 307). In the *Wirz* trial (1865, 773), the Judge Advocate in the American Military Tribunal stated that a 'superior officer cannot order a subordinate to do an illegal act, and if a subordinate obeys such an order and disastrous consequences result, both the superior and the subordinate must answer for it' (see also Johnson 1980, 307; Bassiouni 1999, 465–6; Keijzer 1978b, 157). These judicial

⁴Gaeta maintains that national legislation and case law and, therefore, customary international law actually supports the absolute liability approach for the prosecution of war crimes. The Rome Statute's adoption of the conditional liability approach therefore conflicts with customary international law and previous international conventions. However, there is no well-grounded rationale for this divergence; see Gaeta (1999, 172, 183–6).

determinations offer a general consensus on the appropriate standard but there are nuanced differences between ‘palpably atrocious’, ‘manifestly illegal’ and ‘disastrous consequences’ that have legal ramifications for the soldier.

In line with these decisions, Judge Solomon of the South African Court in *R v Smith* (1900, 567–8) held ‘it is monstrous to suppose that a soldier would be protected where the order is grossly illegal’. However, he also recognised that it would be unacceptable to view a soldier as responsible simply because he obeys an order ‘not strictly legal’. As a balance, Judge Solomon maintained that ‘[e]specially in time of war immediate obedience ... is required ... I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying ... and the orders are not so manifestly illegal that he ... ought to have known they were unlawful, [he] will be protected by the orders’ (see also Johnson 1980, FN 27; Bassiouni 1999, 466; Solis 1999–2000, 492–3). Thus, in addition to the manifestly unlawful standard, Judge Solomon included a requirement of ‘honest belief’ on the behalf of the soldier. This increases the standard that the soldier needs to satisfy before the defence is available. The US Army Board of Review held in *US v Keenan* (1969) that acts committed in good faith obedience to a superior’s order and without malice would be justifiable ‘unless such acts are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know them to be illegal’ (see also Johnson 1980, 309). In this case, the standard was altered to require good faith obedience, the omission of malice, ordinary sense and understanding and an order that was not manifestly outside the scope of the superior’s authority. This is a notably higher standard than merely requiring that the orders are manifestly or palpably illegal.⁵

In the *Llandovery Castle* trial (1921, 722), the Leipzig Court held that the defence would be denied where the order was ‘universally known to everybody’, beyond any doubt, to be against the law or it was known to the accused that the order was an infringement of the law. Accordingly, the standard imposed was actual knowledge or universal

⁵ The Court in *US v Keenan* (1969) also makes reference to a ‘palpably illegal upon their face’ standard; see also Keijzer (1978b, 163).

knowledge. The military tribunals of the Allied powers in the Subsequent Proceedings at Nuremberg also advanced particular standards in relation to the defence of superior orders despite *Control Council Law Number 10* (1945, art II.4(b)) stating that obedience to superior orders did not constitute a defence. Obedience could only be considered as a mitigating factor. The *High Command* trial (1947–1948, 73–4) adopted the standard of ‘obviously criminal’ or of orders that the person knew to be criminal. The Tribunal also held that the order must not be ‘in evident contradiction to all human morality and every international usage of warfare’ (quoting Goebbels; see also Osiel 1998, 952). In this way, the Tribunal not only required actual knowledge or clear illegality but it also inserted a sense of morality into the standard. In the *Hostage* trial (1948, 1236), the American Military Tribunal advocated a standard of ‘not known’ or ‘could not reasonably have been expected to know’ of the order’s illegality. As opposed to an actual knowledge or clear illegality standard, the Tribunal adopted an actual knowledge or reasonableness standard.

The *Calley* judgment of the American Military Court offered an in-depth analysis of the defence of superior orders and the differing opinions of the judges reflect some of the variances in the standards adopted by both national and international courts. In *US v Calley* (1973, 542), the Military Court held that a soldier may avail of the defence of superior orders and will incur no criminal liability ‘unless the superior’s order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful’. The defence counsel for Calley disagreed with this standard and instead advocated that a ‘manifestly illegal’ to a person of ‘the commonest understanding’ standard was more just (*US v Calley* 1973, 542). In making this argument, counsel relied on Colonel William Winthrop, a principal critic on the laws of war. Colonel Winthrop maintained that the soldier had a duty to obey orders unless they are so manifestly beyond the superior’s legal power or discretion that they admit ‘no rational doubt of their lawfulness’ (Winthrop 1920, 296–7). While the defence counsel failed to persuade the majority of the Court, Judge Darden agreed and held that the correct standard was one of ‘palpable illegality to the commonest understanding’ (*US v Calley* 1973, 547; see also Johnson 1980, 298–300;

Levie 1979, 804–11, for a summary of the *Calley* case). The majority of the Court supported the standard of actual knowledge or ‘ordinary sense and understanding’ before the defence was available. However, in strong dissent, Judge Darden argued that this standard was too strict for a combat environment and maintained that ‘palpable illegality to the commonest understanding’ was a more just standard.

A variety of standards have been adopted by different states and the international community. These standards have varied from simply requiring that the order is manifestly or palpably illegal to requiring that the soldier has actual knowledge of the order’s illegality, that a person of ordinary sense and understanding under the circumstances would have known that the order was illegal and/or that the order was manifestly beyond the superior’s power or discretion. Each standard imposes a different degree of liability on the soldier who obeys illegal orders. For example, a ‘manifestly or palpably unlawful’ standard means that the defence of superior orders is available unless the soldier knew the order was unlawful or the order was manifestly unlawful. A ‘reasonable person under the circumstances’ standard means that the defence of superior orders is available if the soldier reasonably believed that the order was lawful. The manifestly unlawful standard is less stringent because the reasonable person under the circumstances standard considers the soldier’s circumstances in determining the soldier’s liability whereas the manifestly unlawful standard only looks to whether the order was clearly illegal in any circumstance. An order may not be manifestly unlawful, as it may be lawful in some circumstances, but a reasonable person under the circumstances would have known of its illegality. Yet, by the same regard, a manifestly unlawful order may under certain, and generally extreme, circumstances appear justified to a reasonable person (Osiel 1998, 971–2, FN 114).⁶ The manifestly unlawful standard also requires the illegality to be immediately obvious to the soldier, but the reasonable person standard may require the soldier, where possible and necessary, to consult with

⁶An example of where a manifestly illegal order may appear justified to a reasonable soldier is the use of torture. While torture is widely regarded as illegal, some argue that its use in extreme and exigent circumstances may be justifiable to obtain information that will save many lives; see Osiel (1998, FN 114). The use of torture to extract information in even extreme situations has been criticised by many though.

fellow comrades and superiors to determine the illegality even if it is not immediately obvious (Osiel 1998, 972). These variances, and the ensuing lowering or raising of the standard required before the defence is available, has a significant impact on the soldier's liability.

The law does not require complete consistency or constancy. However, there is notable disagreement on whether obedience to superior orders is a defence and diversity in the standards adopted even when obedience is recognised as a defence. This directly dictates the soldiers' ability to invoke the defence and their corresponding legal obligations. To ensure that soldiers have a clear understanding of their legal obligations and to ensure effective implementation of the law, there should be more sustained agreement on the appropriate standard for the defence of superior orders.

Inconsistent Definitions of Manifestly Unlawful

While there are inconsistencies in the international community on whether obedience to superior orders constitutes a defence and the standard to be adopted when the defence is available, if the scope of analysis is confined to the Rome Statute, then the position appears more certain and clear. The Rome Statute explicitly adopts the conditional liability approach and the standard of actual knowledge and manifest unlawfulness. The defence of superior orders is available as long as a cumulative three-tiered test is satisfied. The soldier was under a legal duty to comply with the order, the soldier did not know the order was illegal and the order was not manifestly so. With respect to the 'actual knowledge' requirement, the Statute (1998, art. 30(3)) provides that 'knowledge' means 'awareness that a circumstance exists or a consequence will occur in the ordinary course of event'. However, except for classing crimes against humanity and acts of genocide as manifestly unlawful—which means that the defence of superior orders is only potentially available for war crimes and not all crimes that could be committed in war—the Statute fails to provide a definition of 'manifestly unlawful'. The meaning of 'manifestly unlawful' is left open to interpretation.

There are indications that the standard of the 'reasonable soldier' would be used to determine whether an order is manifestly unlawful under the Rome Statute (see, for example, Assembly of States Parties 2009, 6). However, since the ICC has not yet had occasion to interpret the parameters of 'manifestly unlawful', it is necessary to look at external sources such as international and national case law to define this standard. At this point, the uncertainty, ambiguity and the potential for varying interpretations become apparent. There has been limited judicial exploration of the meaning and parameters of 'manifestly unlawful'. When the courts have examined this doctrine, the same as there are an array of standards adopted for the defence of superior orders, there are a variety of standards adopted for determining what is 'manifestly unlawful'.

The majority of cases where obedience to superior orders was prosecuted involved clear examples of atrocities, which means that the judiciary has had limited opportunity to identify the boundaries of the manifestly unlawful standard. This failure to examine the manifestly unlawful standard in a variety of environments and circumstances creates uncertainty around the doctrine (Osiel 1998, 969–70). This is reinforced by the lack of scholarly recognition of the uncertainty and ambiguity surrounding the meaning of 'manifestly unlawful'. Generally, academic and scholarly research fails to clarify or adequately examine the parameters of the standard while at the same time readily invoking it (Osiel 1998, 944–5, 969). Nevertheless, as international law develops and becomes clearer, the manifestly unlawful doctrine should also expand while the superior orders defence should accordingly contract. However, the 'paucity of litigation makes it virtually impossible to say, *ex ante*, where the line between the two lies at any moment' (Osiel 1998, 970). This leaves the present law on the manifestly unlawful standard uncertain and unpredictable.

When the courts have examined the 'manifestly unlawful' standard, their decisions can provide insights into its meaning and boundaries and the various standards that have been used to determine whether an order is manifestly unlawful or not. In *US v Kinder* (1954, 776), the Board of Review applied the standard of 'so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding'. This uses the standard of a 'man of ordinary sense and understanding' to determine whether or not an order is manifestly

unlawful. This is distinct from the standard discussed above for whether the defence of superior orders would be available. The above standard related to whether a 'man of ordinary sense and understanding' would know that the order was *unlawful*. This standard relates to whether a 'man of ordinary sense and understanding' would know that the order was *manifestly unlawful*, which would be a notably easier standard for the soldier to fulfil. However, in *US v Calley* (1973), Judge Darden in his dissent maintained that manifestly illegal orders should be known to 'the commonest understanding' or to persons 'at the lowest end of the scale of intelligence and experience in the services' (see also Johnson 1980, 309) and not the 'man of ordinary sense and understanding' or the 'reasonable man'. In *R v Finta* (1994, 834), the Court held that a manifestly illegal order 'offends the conscience of every reasonable, right-thinking person' and is 'obviously and flagrantly wrong'. The Court also stated that soldiers can raise the defence of superior orders to manifestly illegal orders if they were coerced and had 'no moral choice but to obey' (*R v Finta* 1994, 778; see also Lippman 1996–1997, 51).

The requirement for the manifestly unlawful nature of the order to be 'obvious' means that the soldier should need no legal training to identify the order as unlawful. In the *Peleus* case (1945, 12), the Judge Advocate of the British Military Tribunal noted this when he stated that 'no sailor and no soldier can carry with him a library on international law or have immediate access to a professor in that subject who can tell him whether or not a particular command is lawful' (see also Sassòli et al. 1999, 659). Consequently, the order should contravene 'a "simple" and "universally-known" rule of international law' (Lippman 1996–1997, 12). The Supreme Court of Israel in the *Eichmann* case (1962, 277) held that a manifestly unlawful order is 'not unlawfulness discernible only to the eyes of legal experts ... but ... unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart not stony and corrupt' (see also Osiel 1998, 973). This implies a sense of morality or human instinctiveness that the order is illegal and wrong. However, while these definitions expand upon the term 'manifestly unlawful', they fail to give any objectively assessable guidance on the actual meaning of 'manifestly unlawful'. Instead, one is simply told that one should automatically know.

Thus, in the limited judicial consideration of the ‘manifestly unlawful’ standard, a variety of definitions and standards have been adopted. These standards range from concluding that the illegality will be ‘obvious’ or pierce ‘the eye and [revolt] the heart’ to an order is manifestly unlawful if a person of ‘ordinary sense and understanding’ would have recognised it as so to a person of the ‘commonest understanding’ would have recognised it as so to it would offend the ‘conscience of every reasonable, right-thinking person’. These variances impose different levels of liability on the soldier and create uncertainty regarding the soldier’s legal obligations under the defence of superior orders. The uncertainty and difficulties inherent in these different standards become even more apparent with closer inspection. To highlight this, two different standards will be considered in greater detail. These standards are as follows: ‘pierces the eye and revolts the heart’ with its implications of innate and immediate knowledge that the order is illegal and immoral and the higher threshold a ‘reasonable, right-thinking person’, which denotes ordinary reasoned thought.

Morality as a Guide of Manifestly Unlawful

The definition of manifestly unlawful orders as one where the ‘unlawfulness [pierces] the eye and [revolts] the heart’ (*Eichmann* 1962, 277) focuses on the person being able to identify a manifestly unlawful order by its heinous nature. The illegality of the order should be immediately and innately clear to the soldier. The requirement that an effective law is a clear law would apparently be satisfied as manifestly illegal orders can be readily and clearly identified due to our innate repulsion to the orders and their consequences. However, many lawful acts in war are repulsive and have severe consequences. A superior order to attack enemy combatants at rest is lawful but may invoke feelings of disgust and horror in the soldier. On the other hand, a superior order to clean the commander’s car is clearly illegal as it is outside the superior’s scope of authority, breaches procedure and serves no military purpose but it is unlikely to invoke feelings of disgust and horror in the soldier. Indeed, soldiers’ accounts of war often reveal that they responded to atrocities ‘more with fascination

than disgust' (Osiel 1998, 996–7; see also Hynes 1997, 20).⁷ History also casts doubt on the belief that there is a fundamental humanistic element, which allows one to recognise the illegality of an action. Until the sixteenth century, society accepted and sought actions, which caused acute suffering to others and to animals in a manner that would be repulsive in modern society (Osiel 1998, 1011; see also Elias 1982, 193–204). Therefore, innate repulsion is an unsatisfactory and unreliable indicator of whether a superior's order is manifestly unlawful.

The unreliability of our innate sense of disgust is enhanced in modern combat. Technological advancements in weapons help to distance soldiers from their actions. This facilitates the commission of atrocities without feelings of horror or disgust; although soldiers may have strong feelings of remorse later when they comprehend the consequences (Osiel 1998, 997; see also Watson 1978, 244 for the psychiatric suffering of Vietnam veterans following the commission of war crimes). The clarity of unlawful or 'manifestly unlawful' orders may also be blurred by the arbitrariness of the laws of war. It is illegal for a soldier to demolish a village with phosphorus grenades, but acceptable for a fighter pilot to annihilate the village with napalm (Bourke 1999, 203).⁸ It is lawful to lay siege to a city but not to firebomb it (Osiel 1998, 996; see also Fenrick 1995, 109). A soldier may be expected to shell a military objective even if it is close to a village where innocent civilians live, yet the same soldier is bound to disobey an order to steal valuables from dead bodies or prisoners (United States Military Lesson Plan quoted in Green 1976b, 251). The difference may be explained by the principle of military necessity but it is an absurdity from the perspective of humanity. Feelings of horror or disgust do not explain why some conduct is lawful and other conduct is not, and there is not always a logical reason why some actions or weapons are seen as so horrendous while others are not.

The definition of manifestly unlawful as unlawfulness that pierces 'the eye and [revolts] the heart' is premised on the notion that the unlawfulness of the order will be immediately obvious as it will invoke strong

⁷ See Osiel (1998, 997–9) for an account of breaches of established procedure as manifestly unlawful and Osiel (1998, 1003–8) for an account of acts outside of military service as manifestly unlawful.

⁸ Bourke is referring to Marine Lieutenant Philip Caputo's account of the Vietnam War.

feelings of revulsion and offend one's sense of humanity. It relies on the soldier's innate sense of humanity and horror. However, history shows that our innate revulsion is a poor mechanism for preventing atrocities or determining whether an order is illegal or even manifestly illegal. This means that although initially this definition of manifestly unlawful appears clear, there is considerable uncertainty with closer analysis.

Reasonableness as a Guide of Manifestly Unlawful

As well as the unlawfulness that pierces 'the eye and [revolts] the heart' definition, the courts have adopted the 'offends the conscience of every reasonable, right-thinking person' (see *R v Finta* 1994, 834) definition of manifestly unlawful. As opposed to innate revulsion, this standard relies on how the reasonable person would behave and respond. This is a common standard within many legal systems and there is evidence that this will be the standard adopted by the ICC (see, for example, Assembly of States Parties 2009, 6). This means that the soldier would be able to raise the defence of superior orders as long as a reasonable person would not have known that the order was manifestly unlawful. Again, this definition initially appears clear even though the meaning of 'reasonable' would be determined by the courts and many could argue that it would depend on the circumstances. It is at this point that inconsistency and ambiguity again arises.

Different courts have reached different conclusions on whether the surrounding circumstances or environmental factors should be considered when determining whether an order is manifestly unlawful or not. In *US v Griffen* (1968), the surrounding circumstances and factors were excluded and the jury merely had to determine whether there was actually an order to kill defenceless civilians. If so, the order was manifestly unlawful as a matter of law (see also Osiel 1998, FN 244). However, in *US v Kinder* (1954), the Board highlighted relevant factors in ascertaining whether an order is palpably illegal. These factors included the age, military experience and education of the accused and the distance from the battle line where the offence was committed (see also Johnson 1980, 309). In *US v Keenan* (1969), the court held that the accused's age and military experience should be considered when determining if

he honestly believed the order was legal (see also Keijzer 1978b, 163). In *US v Calley* (1973), the US Military Court directed the jury to look at factors such as Calley's age, rank, educational background, military training, experience in prior operations and any other evidence that would prove or disprove whether Calley knew the order was illegal. This relates to Calley's *actual knowledge*. When determining if a 'man of ordinary sense and understanding' would have known the order was unlawful under the circumstances, the jury was instructed to consider surrounding circumstances, such as, information Calley would have received in briefings, conversations with his superior and what he would have heard and observed up to the point of committing the offence (Daniel III 1972–1973, 508–9; see also Osiel 1998, FN 244).

The various circumstances and factors that have been accepted in these cases help to cast light on the standard used in establishing whether or not an order is manifestly unlawful. However, there are inconsistencies between these cases as well. These inconsistencies relate not only to whether surrounding circumstances or environmental factors should be included at all but also to the circumstances and factors that should be accepted as relevant. While there is overlap in some of these circumstances and factors, for example, age and military experience, some courts appear to be more inclusive than others and consider a broader range of potentially relevant circumstances and factors. In chapters 4–6, this book aligns with the more inclusive approach of the courts and argues that all relevant circumstances and factors should be included when determining the legal liability of the soldier. These chapters also argue that a full appreciation of these circumstances and factors requires an in-depth understanding of the soldier's experiences and the effects of these experiences on the soldier's perceptions and behaviour. For the courts to gain this in-depth understanding, more interdisciplinary research is needed.

The requirement for the law to be clear does not mean that there can be no ambiguity in the law. Indeed, many international statutes and domestic legislation deliberately set out legal rules that require judicial analysis in order to define the rules' parameters and every legal system adopts some standards that are flexible and open to interpretation. This allows the law to respond to the particulars of an individual case and can often result in greater justice. However, the differences in how the

ambiguities within the defence of superior orders and the definition of manifestly unlawful are settled have significant consequences for soldiers, including whether or not they are found guilty of a war crime. The same action could be held to be a war crime in one court but not in another. This highlights the importance of greater consistency and agreement on the standard to be applied and the circumstances and factors that will be considered when determining if that standard has been satisfied. It is also crucial that when the ICC is interpreting and applying the standard and the relevant circumstances and factors that the Court has all the requisite information on the soldier's experiences and imposes a just and practical standard.

Complex Laws

Professor Hans Kelsen, an important legal scholar of the twentieth century, points out that while everyone knows or is in a position to know what is forbidden under the general criminal law of their country, it may be unreasonable to assume that every soldier knows what international law forbids (Kelsen 1944, 107; see also Johnson 1980, 305). To help offset this, the four Geneva Conventions of 1949—which form the core of the laws of war—provide that contracting states must disseminate the text of the Conventions as widely as possible, in times of war and peace, and include the study of the Conventions in their military programmes, thus making them available to the entire population (*Geneva Convention I* (1949), art. 47; *Geneva Convention II* (1949), art. 48; *Geneva Convention III* (1949), art. 127; *Geneva Convention IV* (1949), art. 144; see also Johnson 1980, 305). Accordingly, nation-states have international obligations to inform and teach their militaries about the laws of war. Dissemination of the text alone, however, is unlikely to be sufficient as international law and the laws of war are complex areas of law that contain many uncertainties and ambiguities.

The laws of war and the principles of humanitarian law are 'highly technical and the terms of the treaties are often ambiguous, if not actually obtuse' (Green 1999, 243). The laws of war are also a dynamic area of law that is constantly evolving and growing. This is evidenced in the considerable increase in the creation and categorisation of new crimes.

The definition of these crimes, and the defences available to soldiers, are often vague and open to interpretation though (Osiel 1998, 970, 979–80). In addition, despite the growth in international law, there are numerous practices in modern warfare where there is no rule of law or the law is in dispute (Dunbar 1951, 261; see also Johnson 1980, 305). These uncertainties and ambiguities are compounded by the fact that international law and the domestic law of individual nation-states may impose inconsistent and competing obligations. Unless the soldier's national law concedes to international law, the soldier is bound to both laws and cannot act without breaching one (Osiel 1998, 981). Inconsistency between international and national law can extend from the more minor crimes to serious crimes. When international law and national law vary on what constitutes a crime or what conduct is lawful, soldiers face a dilemma. If they obey an order to commit the act, they may be prosecuted under international law. If they disobey, they risk national prosecution, court martial and, in very extreme cases, the firing squad (Gaeta 1999, 173, and see Williamson 2008, 313, referring to the soldier's choices when faced with an illegal order).⁹ When this conflict occurs, it is not entirely clear which law the soldier is bound to follow. The predominant view, and the one that represents the international legal position, is that the soldiers' international obligations transcend their national obligations (see *Hostage trial* (1948); *High Command trial* (1947–1948); Lippman 1996–1997, 18). Others, however, believe that national law trumps international law (see von Knieriem 1959, 47; see also Lewy 1970, 121). There are also practical influences that affect which law the soldier chooses to obey. International law may be unable to protect soldiers who disobey an order, which is lawful in their state but contravenes international law. It is perhaps unrealistic to expect an individual to expose themselves to such a risk even if they believe that the order is a violation of international law (von Knieriem 1959, 47; see also Lewy 1970, 121).

The potential for conflicting international and national laws is enhanced in multilateral or joint operations. For example, in UN peace enforcement operations, troops are regularly under the command control of

⁹In cases of severe punishment, the defence of superior orders interconnects with the plea of duress; see Gaeta (1999, 173).

their UN commanders, who apply international law. They are also under the operational control of their national superiors, who apply national law, domestic military manuals and Rules of Engagement (ROEs) (Osiel 1998, 984). In general, the national commanders decide whether to obey the order of the UN commander, and, in turn, the national commanders will order their subordinates to obey or disobey the UN commander's order (Rowe 2010, 73; see also Dannenbaum 2010).¹⁰ When there are inconsistencies between international law and the national law of the commander and soldier, they face competing duties.¹¹ The various national ROEs and the different national interpretations of communal laws or ROEs increase the opportunity for inconsistencies and uncertainty in multilateral operations. The function of ROEs is to condense international law into clear rules for a given mission. However, ROEs also reflect 'national policy, strategic and even diplomatic' objectives (Osiel 1998, 985). Since the different states involved in a multilateral operation are unlikely to have identical policy aims, the municipal troops of different states can interpret the common rules differently. This was seen in Somalia where the municipal troops of two nations applied the communal ROEs differently (Osiel 1998, 985, FN 168). The intricacies inherent in multilateral operations, including competing interpretations of common rules and conflicting international and national laws, can affect what would be considered to be manifestly unlawful to a soldier.

The laws of war are not only a complex body of law that contain ambiguities but soldiers can be bound by conflicting duties under

¹⁰ Professor Peter Rowe is examining the attribution of responsibility between the UN and states providing military support to UN missions. He notes that the UN commanders do not have the same control that a commander generally does and cannot enforce their orders through the national contingent's chain of command. He also points out that many states have placed caveats on their military's participation in certain missions; see Rowe (2010, 73–4).

¹¹ An example of conflicting laws is seen in the national law of the USA and international law on the defence of superior orders. International law allows the defence of superior orders unless the order was manifestly unlawful, whereas the USA's law upholds the defence unless a reasonable person would have known that the order was illegal. In this regard, international law requires a lower knowledge standard and is more favourable to the soldier than the USA's law. Therefore, American soldiers could be liable under the USA's law for obeying an order from their UN commander where the order's illegality, although not manifestly unlawful, would have been known to a reasonable soldier under the circumstances. Situations like these arose in Bosnia, where UN commanders ordered American soldiers to assault civilian objectives where the civilian nature of the target was reasonably apparent; see Osiel (1998, 971–2, 984) and see also de Waal (1995, 10).

international law and their national law. In multilateral operations, different commanders, laws, ROEs and interpretations of the law can govern the soldier. These inconsistencies, ambiguities and contradictory obligations may affect a soldier's ability to identify a manifestly unlawful order or even which law to follow. They can impact on a soldier's knowledge of the lawfulness of a superior's order and their ability to ascertain their potential duty and liability. In principle, uncertainty and ambiguities in international law and the principles of humanitarian law would lower the soldier's liability when they obey illegal orders because unclear, ill-established or uncertain laws cannot be manifestly illegal (see Osiel 1998, 978, 1013; Dinstein 2012, 33). The Rome Statute (1998, art. 33) adopts this high knowledge threshold that favours the soldier. That is, soldiers are only liable if they possessed actual knowledge of the illegality or if the order was 'manifestly unlawful'. This high threshold should mitigate any uncertainty created by the complexities or ambiguities in international law. However, if 'manifestly unlawful' only applies to orders that are illegal beyond any dispute, then the doctrine would apply to a large number of illegal orders, given the complexity of the law and the nature of modern combat, and it would be the rule as opposed to the intended exception. Instead, it is the courts that decide whether a particular order is manifestly unlawful. Since there is no clear definition of manifestly unlawful, the courts have greater discretion and considerable scope in determining whether a particular rule was sufficiently clear that any order to violate it was manifestly illegal (see Osiel 1998, 970). The court's discretion corresponds to legal uncertainty for the soldier. The lack of definitional clarity of 'manifestly unlawful' and the uncertainties in the laws of war mean that it is difficult for soldiers to know *ex ante* their liability and the standard that they will be held accountable to for obedience or disobedience.

Complex Laws in Complex Environments

The clarity of an unlawful or manifestly unlawful order is further obscured by the application of a complex law to a combat environment. In the midst of war, there is a significant 'grey area' between a clearly lawful

order and a clearly unlawful order. The legality of the order is generally dependent on the prevailing circumstances (*McCall v McDowell* 1867, 218; see also Osiel 1998, 969). The difficulty in applying complex laws in war is even more apparent in modern warfare. Modern warfare is often asymmetrical warfare, which may have more complexities and challenges than traditional warfare.¹² The line between combatant and civilian is often blurred, a multitude of parties are usually involved and the conduct of hostilities and control of weapons are directed from distant operational centres rather than in the field of combat (Williamson 2008, 316–7). The continued technological advancement in weaponry coupled with the legislative and judicial consideration of the legality of these new weapons add to the complexity. Modern technology is advancing and changing the weapons used in war at a rapid pace. Given this rapid pace, the legislature and the judiciary often do not have time to consider or determine the legality of the new weapons before they are used in combat. Accordingly, international law generally lags behind advancements in technology, and weapons and the law is often unclear in these areas (Osiel 1998, 992). This uncertainty is enhanced by the sheer mass of potential weapons and each weapon's corresponding question of legality, the often arbitrary nature in which weapons are regarded as lawful or not, the fact that the legality of a weapon's use can change over time and the fact that the legality of a weapon can depend on the circumstances, such as whether its use is proportionate (see Osiel 1998, 995–6, 1025). This makes it difficult for a soldier to predict the lawfulness of some weapons and means that without a comprehensive knowledge of the law governing the use of weapons, the soldier may employ a currently prohibited weapon. The gap between the law and technological advancements also means that there is a wide scope for doubt and ambiguity regarding whether or when to obey orders to employ weapons. This affects a soldier's ability to make a determination of whether an order is lawful or not.

The laws of war are complex, unsettled and constantly evolving, and the combat environment is complicated and dynamic. This impacts on the soldier's ability to understand the law and, therefore, to identify an

¹² Asymmetrical warfare is warfare where the opponents have substantially different military power, resources, strategies and tactics.

order as manifestly unlawful. It can be difficult to apply a complex and changeable law to a complex and changeable environment, especially quickly and in pressurised conditions. Again, theoretically, uncertainty regarding the illegality of an order should be settled in the soldier's favour but the soldier would have to await judicial determination before having certainty whether the legal ambiguity surrounding a particular rule prevents a finding of 'manifestly unlawful' or not.

Even when a rule of law is agreed upon and has been disseminated to the soldiers in accordance with the state's international obligations, the application of that rule in the combat environment can be difficult. There is an important distinction between the law being disseminated to the soldier and the soldier understanding and being able to apply that law accurately and effectively. While understanding and comprehension is an individual process, the complexity and ease of application of the law generally greatly impacts on the likelihood that an individual soldier will understand the particular rules or the laws of war in general. The ability to apply the laws of war in combat is a good indicator of whether the law is generally understood by the soldier in the field.

The difficulty of understanding and applying the laws of war, even manifestly clear rules, is best demonstrated through a selection of examples. A well-established and apparently clear rule of the laws of war is that it is illegal to execute a prisoner of war (POW) without a fair trial. The *Geneva Convention III* (1949, art. 85) even prohibits the execution of surrendering combatants 'on grounds of self-preservation' or for the reason that 'it appears certain that they will regain their liberty'. Any order to kill surrendering soldiers should be manifestly unlawful to a reasonable person. On the other hand, customary international law still appears to allow militaries to consider genuine 'military necessity', as opposed to minor tactical advantage, when deciding on their course of action in war (Osiel 1998, 1125). It is not difficult to conceive of situations where the illegality of an order to execute POWs would fall between these two legal rules and where the illegality would be shrouded by the combat environment. For instance, if enemy combatants are captured on a special mission in hostile territory, it may become a situation of 'our life or theirs'. There may not be adequate military personnel to guard them, and it may jeopardise the individual's safety, the safety of the group and the

military mission to take the enemy combatants with them. Yet, if they are released, or even tied up, they may still jeopardise the lives of the group and the mission as they can inform their forces, upon rescue, of the existence of the unit, its size and the direction it headed. The above scenario is in line with Telford Taylor's famous hypothetical where he set out how military necessity may permit the killing of surrendering combatants if taking prisoners would jeopardise the operation or the safety of the unit (Taylor 1970, 35–6; see also Osiel 1998, 1004–5). The above scenario is far from hypothetical theory but is in fact a very real aspect of modern warfare. Indeed, the defendants in *United States v Griffen* (1968) faced a similar situation (see also Clapham et al. 2015, 989, FN 51).

In the above scenario, soldiers must balance the specific rule prohibiting the execution of prisoners against the general principle of military necessity. Soldiers must use situational and practical judgment in determining whether to adopt the specific rule or the general principle or whether an intermediate solution is possible based on the surrounding circumstances. In making this decision, soldiers need to balance the danger to their troops and the mission and the rights of the surrendering combatants (Osiel 1998, 1005). In applying and balancing the specific rule and the general principle, the complexity of the law and the level to which the individual soldier understands the law is revealed. The complexity of the law and the difficulty of application in war directly impacts on the likelihood that a soldier will truly understand the law or their liability under the defence of superior orders for obeying orders against that law. In such circumstances, the illegality of the apparently clear law against executing prisoners is less apparent upon its face and it is questionable whether an order in violation of the rule can always be classed as manifestly unlawful. Indeed, it is difficult to believe that an order to execute an enemy combatant in order to save one's own life and the life of one's unit and to achieve the military mission could be deemed to be *manifestly* unlawful. A rigid law that prohibits the execution of POWs in all circumstances, even in such life-threatening situations, may be unrealistic and unlikely to be followed by soldiers. The law should recognise that soldiers are still people who are susceptible to normal human emotions (Green 1976a, 172). If an ideological but impractical standard is

imposed, the result may not be to ensure respect for humanity in war but rather to cause soldiers to disrespect the law.

Another clear principle of international humanitarian law is that non-combatants are not to be the targets of attack and should be protected (see, for example, *Geneva Convention IV* 1949). It is presumable that a reasonable person would regard an order to kill innocent civilians as manifestly unlawful. However, the immunity granted to non-combatants is directly related to the concepts of 'military objective' and 'military necessity' (see Green 1976a, 152). Military objective and military necessity are complex legal principles and legal scholars regularly disagree and debate them. It may be unreasonable to expect the average soldier, in the midst of battle, to understand and decipher such intricate principles before deciding whether the order is a legal one. Unlike legal scholars and judges, soldiers must often make a decision in a fraction of a second, in dangerous and difficult times, and their safety and the safety of their platoon may depend upon their decision (*Korad Kalid v Paracommando Soldiers* in Sassòli et al. 1999, 1063). The disputed and complex nature of these principles affects a soldier's ability to understand and apply them, especially in a pressurised environment like war. Moreover, the soldiers' knowledge can be quite limited. The soldier on the ground often may not have the relevant operational or strategic knowledge to determine whether the principles of 'military objective' and 'military necessity' apply or not. They may be unaware of the overall objective of an attack or if the seemingly illegitimate target, such as a village, is legal due to military necessity, a vital military objective or the presence of the enemy (see Osiel 1998, 979–80; Green 1976 b, 252). An order to attack a seemingly illegitimate target or to breach a clear rule of the laws of war may also be justified as a reprisal and therefore lawful. The soldier on the ground may not know whether an apparently illegal order is lawful because it is in retaliation for the enemy's action elsewhere (Osiel 1998, 989; Kelsen 1944, 107). A seemingly blatant illegal order is not as palpably illegal when it is applied to the innate uncertainties of war. The actual legality of the order depends on complex legal concepts of military objective, military necessity, reprisals and knowledge of the surrounding circumstances; none of which may be known to the individual soldier. Instead,

the soldier is often reliant on the commander's superior knowledge.¹³ Accordingly, even when the rule is clear and well established, the soldier may struggle to determine whether the rule actually applies in the prevailing circumstances (see Osiel 1998, 988–9, FN 145; see also Christopher 1994). In this way, even if soldiers understand the law in principle, they may not understand the law in context.

To be effective, the law must be understood by those who are bound to obey it. The soldiers' ability to understand the law, and their ensuing liability under the defence of superior orders, is greatly impacted by the complex nature of the law and the requirement to balance competing and sometimes vague rules. Moreover, it is difficult to apply the law, even seemingly manifestly clear rules, to the changing and dynamic environment of combat. This combines with the soldiers' often-limited knowledge of the surrounding circumstances to mean that even if the soldiers understand the law in principle, they may not understand it in context.

Conclusion

While complete constancy and clarity is not necessary or even desirable in the law, a certain degree of constancy and clarity is necessary for the law to function. Changes in the law allow the law to evolve or develop in line with society's values and needs, and some flexibility allows the law to accommodate the circumstances of an individual case and can lead to greater justice. It is also common to have variances between laws across jurisdictions and time. However, if the law changes frequently, there are ambiguities and uncertainties regarding core aspects of the law, and if a person is bound by conflicting laws, then the ability of the person to organise their behaviour to comply with their legal obligations, or even to fully understand their legal obligations, is affected. The Geneva

¹³There appears to be a growing need in modern warfare for soldiers to have situational awareness and practical judgment and to exercise good reason. This move away from the traditional model means that the soldier on the ground may have greater knowledge of the surrounding circumstances and whether the target is a military objective or a military necessity. This is especially so as advances in technology allow soldiers to gather information more readily. Soldiers are accordingly in a better position to know whether an order is manifestly unlawful or indeed even unlawful. This would affect when and whether the defence of superior orders could be successfully raised.

Conventions (1949) provide that states have an international obligation to disseminate the text of the Conventions to their soldiers. The Rome Statute also sets a high threshold of legal knowledge for soldiers before they are liable. Soldiers are only liable if they knew the order was unlawful or the order was manifestly unlawful. Despite this high threshold, there is considerable ambiguity surrounding the defence of superior orders. There are inconsistencies between states and the international community on whether obedience to superior orders is a defence. This inconsistency is the full spectrum of obedience to superior orders is never a defence, to obedience is a defence under certain conditions, to obedience is always a defence. Even when obedience to superior orders is accepted as a defence, there are variances. The courts have adopted an array of standards, including that the defence is available as long as a reasonable person would not have known that the order was unlawful and that the defence is available as long as the order was not palpably or manifestly illegal. Each of these standards represents a notably different level of liability for the soldier.

The Rome Statute (1998, art. 33) adopts the standard that the defence is available unless the soldier knew the order was unlawful or the order was 'manifestly unlawful' but it fails to provide a clear definition of 'manifestly unlawful'. This ambiguity is enhanced by the variety of different definitions adopted in several jurisdictions and courts. These standards include that the order's illegality will 'pierce the eye and revolt the heart' or it is obviously illegal to the 'reasonable person'. Again, the soldiers' legal liability varies depending on which standard is implemented. These standards also contain their own ambiguities. The notion that one will immediately and innately recognise a manifestly unlawful order because it will 'revolt the heart' is questionable. Historical evidence and even what is prohibited or not under the rules of war show innate feelings of repulsion and disgust to be unreliable indicators of the illegality, or manifest illegality, of actions in combat. There is also uncertainty regarding whether and what surrounding circumstances or environmental factors can be considered when determining whether the 'reasonable person' would have known that the order was clearly illegal. The surrounding circumstances or factors that are accepted could have a significant impact

on whether a court would regard the soldier's decision to obey as lawful or not.

What is 'manifestly unlawful' is further complicated by the complexity of and the uncertainties within the laws of war and the existence of inconsistent rules that bind the soldier. The laws of war are complex and often ambiguous, and there is a large margin for error between orders that are plainly legal and orders that are patently not, especially in a pressurised environment like combat. Yet, if the law is unclear, then the soldiers' ability to determine, and their knowledge of, whether a particular order breaches the law is obviously affected. Even when the law is well established and clear, it can be difficult to apply these seemingly clear rules to the changing and dynamic environment of combat. The application of the apparently clear rule can be obscured by complex legal concepts, such as 'military necessity', and by the prevailing circumstances at the time. These uncertainties combine with the soldiers' often-limited knowledge of the surrounding circumstances to mean that even if soldiers understand the law in principle, they may not understand it in context. While the 'manifestly unlawful' standard should settle any uncertainty in the soldier's favour, the lack of a clear definition or judicial examination of the boundaries of the standard means that it is difficult to determine *ex ante* whether the court will find that a particular rule is sufficiently well established or not for its violation to be manifestly illegal.

Given the seriousness of the legal consequences for soldiers, it is important that the ambiguities within the defence of superior orders and the legal standard to which they are held accountable are clearly defined. While the law does not need to be completely consistent, constant or clear, the inconsistencies and uncertainties are sufficient that there is a need for clarification and reform. The international community and individual nation-states should set a more consistent standard so that soldiers are not bound by inconsistent and competing rules and standards. When the defence of superior orders is raised in the ICC, the Court should clarify the meaning and parameters of 'manifestly unlawful', the standard that soldiers will be held accountable to and whether and what surrounding circumstances or environmental factors will be considered when implementing this standard. This will provide soldiers with greater certainty and clarity on their legal obligations.

In chapters 4–6, this book argues that the standard that the ICC and the international community should adopt is the ‘reasonable soldier under the circumstances’. The ‘reasonable soldier’ is not a mythical figure and is not a figure that should be informed from the judge’s or a civilian perspective. The ‘reasonable soldier’ is the soldier in modern warfare. For that reason, it is important that the courts have a full understanding and appreciation of the modern soldier’s experiences. The full effects and impacts of the soldier’s experiences should be included as well as all relevant prevailing circumstances when determining if the reasonable soldier would have known that the order was manifestly unlawful. Although the Rome Statute has already adopted the ‘manifestly unlawful’ standard, the approach of understanding the soldier’s experiences and including all relevant circumstances and factors into the ‘reasonable soldier’ standard means that it would be just to hold the soldier accountable to the higher standard of a ‘reasonable soldier under the circumstances would have known that the order was *unlawful*’ as opposed to the standard of a ‘reasonable soldier would have known that the order was *manifestly unlawful*’ (see also Osiel 1998, 1128 advocating a ‘general standard of reasonableness under the circumstances’). A ‘reasonable soldier under the circumstances’ standard that is informed from a soldier’s perspective would better align the law to the soldier’s experience and the combat environment. This would create a higher but more realistic and practical standard.

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4

Military Training: The Creation of the Modern Soldier

We are all products of our environment. It shapes our perceptions and influences our behaviour (see, for example, Isen and Levin 1972; Darley and Batson 1973; Mathews and Cannon 1975; Haney et al. 1973; Overmier and Seligman 1967). Since the law is fundamentally a tool for the regulation of human behaviour, it is important that the law takes into account the individual's environment. Yet, the legal standard set for soldiers that obey the illegal orders of their commanders is often implemented in isolation from or with a limited understanding of the soldier's environment. Under the Rome Statute, soldiers are liable for obeying illegal orders if they knew the order was unlawful or the order was manifestly unlawful. In determining whether an order is manifestly unlawful, the courts can use the standard of whether a 'reasonable person' would have known that the order was manifestly unlawful.¹ The 'reasonable person' is often ascertained without sufficient in-depth understanding of the social, behavioural, psychological, biological and cultural effects generated by the unique military and combat environment.

¹ See chapter 3 for a discussion of the use of the 'reasonable person' standard.

This book argues that the appropriate standard should be the 'reasonable soldier' and not the 'reasonable person' from a civilian perspective. This does not mean that soldiers should be held accountable to a lower standard than civilians. Rather, it recognises that the military and combat are unique environments that vary significantly from civilian society. These unique environments alter the perceptions, standards and behaviour of the soldier, and the processes that lead to these changes are often state-sanctioned processes or policies. The legal standard needs to be tailored to these unique environments. A just legal standard needs to acknowledge the effects of these state-imposed or encouraged processes when determining the liability of the soldier. This, in turn, highlights the role and responsibility of the state in creating and implementing policies.

An understanding of the 'reasonable soldier' can be built from examining the unique military and combat environments. That is, there are certain environmental factors or experiences that soldiers commonly encounter that can affect their perceptions, standards and behaviour. Civilians are generally not exposed to these experiences or environmental factors or they are exposed to them to a much lesser extent. Through examining the soldier's experiences and the environmental factors present in military institutions and war, an understanding of the 'reasonable soldier' and the differences between the 'reasonable soldier' and the 'reasonable civilian' are uncovered. This understanding facilitates the legal standard to be a more accurate reflection of the environment in which it will be implemented. The common experiences or environmental factors explored in this book are not exhaustive of all the experiences and factors that would influence the perceptions, standards and behaviour of the 'reasonable soldier' and they are not universal. They would not be relevant in every case and the legal standard implemented would need to be tailored to the particular circumstances. However, they are experiences and factors that are common to most soldiers and can be very influential on the perceptions, standards and behaviour of soldiers and are not generally fully recognised or appreciated by the courts or society.

Jamieson et al. (1998, 26) acknowledged this lack of understanding when they queried if the existing literature on combat and the military is comprehended by civil society. Civilian knowledge of the military and war is generally founded on popular literature, the media or movies

(McGarry and Walklate 2011, 906; see also Mills 2008; Conroy 2008; Becsey et al. 2007). The courts have sometimes considered the effects of the soldier's experiences and environmental factors. For example, the courts have taken into account the effects of combat stress, the nature of an insurgency war and the belief that the enemy was committing atrocities (see, for example, *R v Blackman* 2014) and the accused's age, military experience and education (see, for example, *US v Kinder* 1954). However, not all courts have allowed environmental factors or the surrounding circumstances to be considered (see, for example, *US v Griffen* 1968). There are also inconsistencies between whether these factors are included to determine the accused's guilt (see, for example, *US v Calley* 1973) or are merely considered at the sentencing stage to mitigate punishment (see, for example, *R v Blackman* 2014). Even when the courts consider the surrounding circumstances and factors, the judgments often lack a comprehensive and in-depth understanding of the soldier's environment.

The ability of the court to understand the soldier's environment is hindered by insufficient research into the effects of the military and combat environments and the impact this should have on the law. As such, this book represents an initial stepping stone to a greater awareness of the military and combat landscape and how this should affect the legal liability of the soldier. However, there needs to be more research to provide a complete understanding of the soldier's experience, the diversity of experiences, the effects of these experiences and the extent to which these effects should be taken into consideration when implementing the law. In particular, we require additional research with those who have first-hand experience of the military and combat environments before we can fully appreciate the soldiers' experiences and develop the most appropriate legal standard.

This book analyses the social production of criminality in war by looking at the environmental factors and the soldiers' experiences that facilitate the commission of war crimes. The environmental factors and experiences examined in this book are military training, which is considered in this chapter, and the impact of the combat environment, which is explored in chapter 5. The influence of military culture, the soldier's group, military leaders and the physiological and psychological effects of high levels of stress are assessed in chapter 6. Military training and

combat are largely unique experiences that are limited to soldiers and those engaged in war. Everyone is exposed to the effects of groups, leaders, the broader culture and stress, but the effects of these environmental factors are significantly heightened for soldiers.

While each of these environmental factors by themselves strongly shapes the soldier's character, perception of reasonableness and the decision-making process on whether to follow orders, these environmental factors are also interrelated. They are complex and interconnected concepts. The environmental factors and the soldiers' experiences as well as the soldiers' responses to and the effects of these experiences and factors are generally not confined to distinct stages. Instead, they flow together but can be intensified or stronger at certain points. Accordingly, where appropriate, interconnections, overlaps and reoccurring themes are highlighted throughout these chapters. Moreover, the combined effect of the environmental factors means that when the 'complete' integrated experience of the soldier is understood, then the influence of the military and combat environments on the soldier is likely to be significantly stronger and the divergence between the 'reasonable soldier' and the 'reasonable civilian' greater than initially realised. That is, while each of these environmental factors and experiences impacts on the perceptions and behaviour of the soldier, when combined the collective impact is substantially more profound.

The Process of Building a Soldier

Military training is designed to change the individual. It is the first step in the process of shaping the soldier's perceptions, standards and behaviour and the corresponding divide between the soldier and the civilian. There is no generic military or military training process and there will be differences across nations and even between the different branches of the military such as the army, navy and the air force. That is, the nature and extent of military training and the degree to which the soldier is immersed into the military environment will vary. For example, student-officers in states like Germany, the Netherlands, Belgium, Sweden, Denmark and Norway gave a below-average rate of importance to most

facets of military discipline whereas in states such as Britain, France, Italy, Spain, Argentina and Brazil, student-officers gave an above-average rate of importance to many facets of military discipline (Soeters and Recht 1998; see also Soeters et al. 2006, 243). However, where military discipline is regarded as important, informal group norms are not regarded as particularly important whereas where little importance is attached to military discipline, informal group norms carry notable importance. This suggests that informal group norms take the place of formal military discipline (Soeters et al. 2006, 243). This, in turn, would raise the level of influence ‘the group’ has in shaping the soldier’s perceptions and behaviour in these states.² This also means that even though there is no universal military and there will be differences across nations, there are some general trends that can enhance our understanding of the military environment.

Even with these variances, there are certain practices that are seen across a number of nations and which shed light on the processes adopted by militaries to ‘build’ a soldier. In many ‘Western’ developed nations, military training is designed to break down the individual and rebuild them as an efficient soldier (see Bourne 1967, 187).³ The purpose of this breaking down and rebuilding process is to strip the individual of their past civilian beliefs and values, perception of self and entitled status in order to make them amenable to and integrated into the military system and to develop their proficiency in the skills of war (see Grossman 2009, 321; Shalit 1988, 148–50; Bourne 1967, 191). The military’s success in achieving this aim and in immersing the individual into the military culture so that they adopt the military’s rules, values and beliefs is greatly assisted by the recruitment of individuals at a psychologically malleable age—young adults (see Brown 2015, 123; Grossman 2009, 327). After recruitment and during training, the military continues to adopt a wide variety of processes and techniques to achieve their objective: the civilian becoming a soldier.

² See chapter 6 for a discussion of the influence of the group on the individual.

³ While chapter 4 examines military training in ‘Western’ developed armies, there is a particular emphasis on military training in the USA and Britain.

This chapter outlines the techniques and processes that can be utilised in military training to break down the individual and to build a soldier. The breaking-down process begins with the separation of the recruits from their civilian lives and their isolation in a 'total institution' which exercises strict control over the recruits' daily life, body and behaviour. The recruits are often stripped of their individuality, required to strictly adhere to the military codes and they can be hazed and humiliated. Failure to meet the military's standards can be met with punishment and degradation and complete and immediate obedience is often demanded. Rebuilding the broken-down civilian as a soldier involves training the recruit's body and mind. The recruits generally engage in extremely difficult physical training regimes and they develop tactical knowledge, situational awareness and resilience. They can train repetitively in realistic settings so that the required response is automatic and reflexive and they will be able to perform this action even in the high stress of war. The recruits often work in teams and are trained to think of the group. Their 'warrior spirit' can be fostered and they can be desensitised to aggression. Through these processes, the recruit is conditioned to obey, to fight and to work within the group and their identity is entrenched within the military.

Total Institution: Separation, Disorientation and Reorganisation in Accordance to Military Codes

Basic training is a 'total institution' (Goffman 1961; Wadham 2004; Brown 2015). In a number of militaries, the process begins with enlistment where the individual swears allegiance to the nation and is informed that upon completion they are now the property of the state (see Wadham 2004, 8). They are immersed in a completely unfamiliar environment, separated from society, surrounded by strangers and denied common civilian comforts. There is a clear division between the recruit and the leaders, and the leaders may regularly issue demands that the recruit must comply with even though they are not fully certain how to comply with them. Moreover, the recruits generally do not have the power to alter their environment. The result can be that the recruit is bewildered and scared and many recruits suffer anxiety to a previously

unknown level (see Bourne 1967, 188–9, 191, for disorientation in basic training, and Mullaney 2009, 4, for the severing of family ties on the first day of indoctrination).

Prior to starting basic training, each recruit naturally has a preconception of what is involved in basic training. While many of these fears and beliefs are incorrect, a number of militaries provide very little or false information on what is involved in basic training and this sustains the recruit's anxiety (see Bourne 1967, 189). Once training begins, the military can use techniques such as chaos and noise to indoctrinate the recruit. The recruit may be awoken at early hours with extremely loud music, blinded by overhead lights and given strict orders to be ready and on the field for training within minutes (Mullaney 2009, 11). This can increase the recruit's fear and confusion. Indeed, the level of psychological stress a new recruit undergoes is often comparable to a schizophrenic in incipient psychosis and far surpasses other environments that are classed as stressful (Bourne 1967, 189).

In this period of high stress, there is a direct correlation between the time that the recruits are introduced to a figure of authority who indicates a willingness to help them and the level of dependence on and the strength of the relationship with that figure. The sooner the recruits meet the figure, the stronger the dependence and the relationship. Recruits are often introduced early into the indoctrination process to a platoon sergeant that fulfils this role (Bourne 1967, 190). The recruit's dependency and strong bond with this leader means that the recruit is likely to trust and obey the decisions and orders of the leader to a much greater degree than an individual that has not undergone this disorientation period.

Military codes and procedures fill the void created by the disorientation process and the separation of the recruits from their previous civilian lives. In a process commonly called 'total control', a number of militaries regulate every aspect of the recruit's life. This practice removes the recruit's autonomy and individuality and encourages obedience and conformity. The process of total control begins with the reduction of all recruits to a common denominator. The individual's name may be taken away and they are instead assigned a number and called 'recruit'. Their heads are generally shaven, their personal items are removed and they are issued identical uniforms. In some militaries, if the recruit wears glasses,

they are even replaced with military-issued frames (see Wadham 2004, 8–9; Mullaney 2009, 5, 8, 10; Tietz 2006, 55). The recruits' individuality is stripped away and they become almost indistinguishable. The distance between the recruit and their former civilian life increases and their sense of self is eroded.

Many militaries also strictly control and regulate the recruits' behaviour and days. Military training is all-consuming. Nearly 24 hours of the recruits' day can be scheduled and predetermined by the military. Where, when and how a recruit can go somewhere is generally dictated by the military (see Hockey 2002, 150; Wadham 2004, 7; Bourne 1967, 191; Mullaney 2009, 51–2; Brown 2015, 122). The recruits often have to follow precise instructions on the layout and organisation of all items and clothing in their room. The precision of this detail of uniformity and obedience can extend as far as including the organisation of their locker shelves, how the drawstrings on their laundry bag should be tied, how their underwear should be folded, the degree to which the window can be opened, where toothbrushes and rifles are kept in the room and that they make their 'socks smile' and shirts 'stand up by themselves' (see Mullaney 2009, 23 and 38–9; Wadham 2004, 9; Tietz 2006, 55).

The recruit's body is another avenue for exercising control and instilling discipline, uniformity and obedience. A number of militaries dictate how the recruits cut their hair, shower, shave and brush their teeth. Not only do the recruits wear the issued uniform but their clothes may also have to be spotless, their bootlaces untwisted, all their buttons turned in a specified way and the badge on their beret in a particular spot and angle. Recruits are often required to march everywhere and there can be strict requirements for marching. In some militaries, recruits must stare straight ahead, their arms must come 9 inches to the front and 6 inches behind and their stride must be 30 inches long. Their feet may have to be in a particular position when 'standing at attention' and a different position when they are 'at ease' and all tasks 'carried out in a "smart and soldier-like manner"' (see Hockey 2002, 151, 150–1; Tietz 2006, 56). The military can even restrict the recruits' autonomy to choose their food or determine their own bathroom breaks. They may have to stop eating as soon as the instructor has finished their meal and may not be permitted to speak during meals (see Hockey 2002, 150; Tietz 2006, 55).

Any failure to conform and meet these stringent requirements is often met with punishment. After a short time, all recruits look, smell, speak, respond and act the same. This process of total control forces the recruits to comply with and adapt the military's rules, standards and values and works to entrench the recruit's identity within the military (see Brown 2015, 122; Tietz 2006, 55, 57). It also erodes the recruit's individuality and conditions obedience and conformity.

While total control subjects the recruits to strict regulation, the recruits often find ways to display acts of freedom and rebellion. For example, in response to a disliked instructor, the recruits may deliberately respond poorly to a drill command in front of the instructor's superiors or make a 'V' symbol at their side with their fingers while being reprimanded despite being required to remain completely still. These acts may seem very small but they represent important symbols of relative autonomy and control for the recruit (Hockey 2002, 152–3; see also Mullaney 2009, 39–41, for acts of rebellion). Nevertheless, the separation, disorientation and stripping processes adopted by a number of militaries to 'break down' the individual and the practice of total control are very effective in altering the perceptions, standards and behaviour of the recruit. They erode the recruit's individuality, condition obedience and conformity and entrench the recruit's identity in the military. The civilian is broken down to make way for the soldier.

Training to Obey

Obedience is the cornerstone of the military. The recruits' purpose is to obey and to be shaped in the image of their leaders (Mullaney 2009, 8). A number of militaries implement a strict hierarchical structure where any superior member of staff can punish any recruit. This ensures that punishment and privilege control the recruits' life and it belittles and degrades them (Bourne 1967, 191–2). The extreme precision required for the organisation of rooms, uniforms and the recruits' behaviour are important mechanisms for conditioning absolute obedience. These requirements, such as that the crease at the foot of the recruit's bed has to be at an angle of exactly 45 degrees, instil complete and unquestioning

obedience while eroding individuality and building group unity. This demand for complete obedience and discipline can permeate every aspect of the recruit's day. For example, during meals recruits may be required to know and cater to the specific tastes of everyone at the table, even to the extent that they must dispense the correct number of ice cubes favoured by each leader. They may not be permitted to eat until their duties are completed and they may have to comply with incredibly detailed and strict dinner etiquette. Mistakes or failures of etiquette may result in less time to eat. A substantial mistake, for example, failing to split the salad bowls into equally sized towers, can lead to more severe punishment (see Mullaney 2009, 20–3, for an account of the precise instructions for the organisation of rooms, beds and meals and the enforcement of obedience at meals). Any movement when standing at attention, such as wiping a snowflake from your nose, can result in the collective punishment of the entire platoon (Volkin 2015). The presence and strict enforcement of all these rules means that until absolute obedience is achieved, the recruits remain hungry, tired or in discomfort.

Obedience is also conditioned through the requirement to obey and complete orders that are extremely difficult or ridiculous. For example, recruits may be required to know and recount on demand every person's name in the company, to deliver dry-cleaning without a roster of where anyone lives, to recite immediately and correctly items of required knowledge and to salute a cardboard cut-out (Mullaney 2009, 34–5). After a short time, the recruits obey abnormal orders, such as, to march in trunks and boots into the shower and to pour ice-cold water on themselves. They obey these orders instantly and without challenging or questioning why. Failure to immediately and precisely comply with an order can lead to severe and harsh punishment (Mullaney 2009, 24–5, and see 62–3, for an example of the serious consequences and punishment for a minor infraction), which acts as a very strong mechanism for conditioning the recruits to obey.

This requirement for and conditioning in immediate, attentive and complete obedience serves very important military purposes. Strict regulation of the recruit's environment, the demand to automatically obey orders, even seemingly ridiculous orders, and the punishment for any failure to do so are tools to condition attentive and rigorous obedience,

to ensure discipline and to remind recruits of their lowly status. These training techniques can leave the recruits with an implicit faith in the power of obedience. They also reinforce the group bonds and cohesion as the recruits need to work together in order to successfully comply with all the requirements and they share the same experiences and punishments. Military training instils obedience, discipline and teamwork. The objective of these training techniques and the development of these skills and attributes are to ensure uniform and coordinated responses to orders (Weber et al. 1977; Hockey 2002, 149). This predictability of behaviour enhances success and survival. In combat, soldiers are much more likely to achieve the military objective and have a greater chance of survival when they function as a coordinated group that performs the requisite action than if they act individually and not in concert with their comrades (Hockey 2002, 149). Military training also ensures that soldiers obey orders, even dangerous orders. It is an inherent aspect of war that soldiers are ordered to undertake actions that endanger their lives and the lives of their comrades and to take the lives of others. In this environment, it is understandable that soldiers would seize past precedents to disobey unpalatable orders that are an innate and necessary aspect of war. Accordingly, an intrinsic element of military training is teaching soldiers unwavering obedience to the orders of their superiors (*McCall v McDowell* 1867, 1240). Obedience to serious and dangerous orders is simply fundamental to any military system.

Yet, training that promotes obedience without question or delay is incompatible with the doctrine of superior orders, which requires soldiers to question the legality of orders that manifestly appear to be unlawful. Most militaries aim to offset the incongruity between the soldiers' duty to obey immediately and their duty to question orders by providing that soldiers are obliged to obey lawful orders only. The oath that most recruits swear obliges them to obey only the lawful orders of their commanders, and they are told that as soldiers they have not acquired a moral licence to kill but have accepted a moral obligation to kill (Tietz 2006, 58; Mullaney 2009, 9). Following the atrocities committed at My Lai, the US Army implemented mandatory annual training in the Law of Land Warfare and the Geneva Conventions. This training is still required and is intended to teach soldiers which orders are illegal and how to

disobey them (Grossman 2009, 346). Soldiers are also trained on the lawful use of force and provided with specialised ROEs for each conflict. The soldiers, however, do not appear to be trained in disobedience and questioning orders in the same manner or with the same intensity as their training to obey.

As a result of their training in the laws of war and their ROEs, it is reasonable to expect the soldier to understand the lawful application of force and to confine its use to situations where it is necessary (Mackmin 2007, 69). However, the average US soldier's knowledge of their legal obligations, and thus their ability to identify an unlawful order, is discouraging. An innovative inquiry by a US Mental Health Advisory Team in 2006 revealed that well over a third of soldiers believed that torture should be permitted to save the life of a soldier or to obtain important information, 17 per cent of soldiers felt that all non-combatants should be regarded as insurgents and only 47 per cent of soldiers thought that civilians should be treated with dignity and respect (Mental Health Advisory Team IV 2006, 35).⁴ While a significant proportion of soldiers stated that they received training in the handling of non-combatants, over 25 per cent of soldiers reported that their commanders in the Iraq war never informed them that they should not mistreat civilians. The issue of adequate training on the laws of war is compounded by the fact that soldiers often receive training in the wrong aspect of the law. For example, soldiers may receive training on the handling of prisoners of war (POWs) when training on the handling of civilian detainees would have been more appropriate (Rowe 2008, 173). Around 10 per cent of soldiers and marines also admitted to personally mistreating non-combatants or unnecessarily damaging property and 28 per cent of soldiers stated that they encountered ethical circumstances where they were unsure on the correct response. Forty-five per cent of soldiers indicated that they would not report a comrade for killing or injuring an innocent non-combatant, and over 50 per cent stated that they would not report a comrade for

⁴The USA, through this report, was the first nation to systematically address ethical behaviour by the military in Iraq; see Mental Health Advisory Team IV (2006, 34) and see also Tirman (2011). Unfortunately, subsequent inquiries removed potentially incriminating items and, therefore, they did not research the ethical behaviour of the military; see Mogelson (2011).

needlessly destroying or damaging private property or for unethical behaviour (Mental Health Advisory Team 2006, 35–7; Tirman 2011).

These findings are in contradiction to the level of knowledge and behaviour expected of soldiers, given their apparent training. This lack of adequate knowledge is exacerbated by the military training that recruits receive and the stresses of combat. Military training ensures that soldiers are conditioned to obey superior orders and they are aware that failure to obey a lawful order results in court martial. As Tirman concludes: '[t]raining on the rules of war is clearly inadequate, while training to kill is intensive' (Tirman 2011). Even when soldiers know an order is illegal and are informed that they are criminally liable for obeying illegal orders, they still need to withstand their training to obey as well as group dynamics, their personal aggression and own feelings and responses to war (see Mackmin 2007, 81). The military's conditioning to obey combines with military's training to kill, inadequate training on the rules of war and the stresses of the combat environment to mean that soldiers are more likely than the average civilian to obey illegal superior orders.

Many militaries adopt a wide variety of techniques to train the recruit to immediately and unquestioningly obey. This training serves a multitude of military purposes. It ensures discipline and builds group cohesion, which increases the likelihood of soldiers achieving the military objective and surviving in combat as it facilitates soldiers obeying necessary but dangerous orders and performing the requisite actions in concert with the group even in the stresses of war. However, this training also means that the soldier is much more likely to obey orders, legal and illegal, than the average civilian.

Stress Inoculation: Hazing, Harsh Treatment and Aggression

Combat is a high-stress environment. For this reason, a number of militaries aim to inoculate soldiers to stress during its training process through practices such as hazing, meting out harsh treatment and enhancing the individual's innate aggression. The principle of exposing recruits to stressful and harsh conditions in training in order to influence their future

behaviour in combat is supported by Martin Seligman's research. While studying learning in dogs, Seligman exposed dogs to inescapable electric shocks in an irregular pattern under a variety of conditions. At first, the dogs jumped, yelped and tried to escape. After some time, they entered a state that Seligman called 'learned helplessness' where they were inactive and no longer tried to avoid or escape the shocks even when provided with a clear escape path. However, another group of dogs were provided with the escape path after receiving some shocks but prior to lapsing into a learned helplessness state. Even if only provided with an escape path once, these dogs would be inoculated against the learned helplessness state and would avail of the escape route even after receiving random shocks over a long period of time (Seligman and Maier 1967; Overmier and Seligman 1967). Exposing recruits to apparently inescapable stressful and harsh conditions that the recruits eventually 'escape' through graduation inoculates the recruits to the stressful and harsh conditions of war and assists in preventing them from slipping into a state of learned helplessness in combat (Grossman 2009, 80–1).

A first step in inoculating the recruits to the stress and aggression of combat can be their exposure to a generally previously unexperienced level of hazing and humiliation. In a programme known as the 'plebe' system in West Point and the 'degreening' programme in Europe, the recruit is broken down. As previously discussed, the stripping process can involve the removal of the recruits' personal clothing, the issuing of army attire and the shaving of their heads. This reaffirms for the recruits that the military has the power to do anything it wants to them. Autonomy and decision-making can be removed through the detailed organisation of the recruits' daily life and communication with civilian society may be restricted. Militaries can refuse to acknowledge or credit the recruits' past achievements, family or previous careers and reinforce that within the military the recruits must earn their place every day (see Soeters et al. 2006, 250; Bourne 1967, 191–2; Mullaney 2009, 13). Instead of recognition of previous achievements, the recruits are placed in a lowly and stigmatised status. Drill sergeants may scream directly into their faces, they may be verbally discredited and open marks of respect to those more senior are constantly required. In addition, the recruits often must engage in activities, such as, pugil-stick training and boxing matches (see

Grossman 2009, 81; Bourne 1967, 191). They may also be forced by senior cadets to participate in, for example, milk-drinking or condiment-drinking contests until they are sick or carry out 'life saving' procedures on fellow recruits if they are 'hit' with spaghetti sauce. If the recruits fail, they can be referred to as rejects and subjected to arbitrary or harsh punishment. In these situations, the recruits must also watch the humiliation and mortification of their fellow comrades (see Mullaney 2009, 39, 90; Bourne 1967, 191).

Superiors often intentionally subject the recruits to harsh treatment. One potential reason for this harsh treatment is to ensure that, as soldiers, they will turn their anger and aggression for their superiors towards their opponents in the field (Osiel 1998, 1041–2). The instructors generally push their recruits through a mixture of enthusiasm, ridicule, threats of sanctions and draconian military law. They may even strike, threaten, taunt, call indecent names and spit on the recruits. They may also force the recruits to do tiring exercise and falsely accuse them before an officer and silence them when they try to defend themselves. In some cases, the instructors use severe methods of training, such as 'smartening up the troops', which involves practices like firing shots at the rear foot of a lagging soldier (see Bourke 1999, 80; Frésard 2004, 53; Hockey 2002, 150; Wadham 2004, 9). This degradation and humiliation amplifies the recruits' level of stress while enhancing their physical abilities. It also instils the need for instantaneous reaction in stressful and critical situations, the requirement to control emotional influences and the importance of learning to follow before they learn how to lead—that is, obedience (see Brown 2015, 124; Mullaney 2009, 33).

This harsh treatment from superiors is compounded by harsh treatment from senior cadets. Hazing by senior cadets is not limited to humiliating practices. While the motives of the senior cadets may be multiple and not always altruistic, the practices that they can employ inoculate the recruits to stress and 'harden' them up. They may surround new recruits and simultaneously yell or issue orders and become angry when the new recruit cannot immediately focus and reply to each order. This hazing is directly relevant to firefights in combat where a soldier must deal with numerous important issues and threats at once. In military training, it is often emphasised that hesitation in the face of orders or a critical situation

can lead to death: theirs or their comrades'. Senior cadets also can engage in dangerous practices such as lighting aerosol spray in a room of recruits to create a 'flamethrower' (Mullaney 2009, 35–6, 40; Brown 2015, 124). These practices can inoculate the recruits against the tough environment that they will encounter in war and build their anger and aggression so that they can fight and kill. However, as a corollary, the 'hardening up' process can also train the recruits to suppress feelings of empathy and compassion and to view them as signs of weakness.

These 'initiation rites' can be seen across many branches of the military but they are particularly prevalent in elite units, for example, the special forces and the Marine Corps. The degrading and humiliating practices are endured by the recruits because the harshness and difficulty in obtaining full membership in these units makes full membership more appealing and worth attaining. It can also result in recruits being deeply embedded and committed to the military and the unit. This commitment, in turn, can lead to conformist and predictable behaviour as the recruits realise that behaviour that is inconsistent with the military's expectations is met with punishment (Soeters et al. 2006, 250). Indeed, veterans of contemporary conflict have credited these training practices with not only helping to prepare them for combat but with immersing the soldier into the group and the military (see, for example, Brown 2015, 125).

In war, soldiers enter a hostile environment where they are required to fight and even to kill. As a result, many military training programmes aim to release the individual's innate aggression while regulating the soldier's use of force. Aggression is a complicated and multifaceted concept. Many theorists believe that humans are inherently aggressive (e.g., Sigmund Freud, Konrad Lorenz and Robert Ardrey, see Shalit 1988, 57–69; Mackmin 2007, 70) and biologists have established that aggression is a natural human response and an integral part of the 'fight or flight' mechanism. Moreover, even a small stimulus can be enough to trigger an aggressive response (see Mackmin 2007, 70; Aron 1994, 77). Other theorists maintain that aggression is a response learned through experience. Positive or negative reactions to acts of aggression in life can strengthen or weaken the individual's innate disposition towards aggression. That is, a person has an innate level of aggression, which varies between individuals, and personal experiences can increase or decrease

one's level of aggression (Bandura 1973, 26; see also Mackmin 2007, 70–1; Aron 1994, 78).

In addition to the hazing process and harsh treatment, military training can stimulate the recruit's innate aggression by providing positive reinforcement to acts of aggression. For example, the bayonet assault course involves pitting the recruits against each other and requires them to run an obstacle course where they must stab, slash and demolish straw dummies and rubber tyres. The recruits generally must perform these acts with stern faces and while shouting 'hooahs' and fierce infantry mottos. The course is designed with the objective of instilling an aggressive warrior spirit within the recruit. Indeed, the course has been described as 'pure exhilaration, an explosion of power and speed that unleashed an instinct for aggression' (Mullaney 2009, 29, 28–9). The drill sergeant, who acts as a role model for recruits throughout basic training, often reinforces this by imparting to recruits that aggression is a vital aspect of manliness and that violence is a necessary, successful and desirable response in combat (Grossman 2009, 322–3). Through these types of exercises military training provides positive reinforcement to acts of aggression and consequently builds on and releases the recruits' innate aggression.

The building of this aggression or warrior spirit is intended to inoculate soldiers to the aggression they will face in combat and to provide them with the will to fight. However, recent research indicates that the military's encouragement of 'targeted aggression' and survival could also increase the propensity to commit violent acts and has linked non-combat violent offending to exposure to combat (see McGarry et al. 2015, 353; MacManus et al. 2013). Moreover, in periods of high stress, such as war, it is much more difficult for an individual to control their aggression and their cognitive ability can be negatively impaired (Mackmin 2007, 72; Zillman 1979, 275). If the soldiers' aggression has been elevated in training, then they are likely to display a higher level of aggression in combat, their ability to control their response is lowered by the high-stress combat environment and this aggressive reaction can be triggered by even a small stimulus. This can culminate in the individual behaving in a manner that appears irrational and unreasonable to an outsider but which is rational and reasonable to the individual (Mackmin 2007, 72).

The hazing and humiliation of recruits and their subjection to harsh treatment by both military instructors and senior cadets and their forced exposure to direct aggression through activities such as boxing serve important military functions. These practices inoculate the recruits to stress and aggression by building their resilience and ability to avoid lapsing into 'learned helplessness', strengthen their physical capabilities and develop their ability to instantaneously respond to critical situations and orders. They train the recruits to survive the stresses and harsh conditions of war. However, these practices also teach recruits to suppress feelings of empathy and compassion and view them as weaknesses while enhancing their anger and aggression, embedding the recruit in the military and reinforcing their conditioning to conform and obey their superiors. The recruits' aggression is further enhanced by the military's positive reinforcement of acts of aggression, and the stress of war is likely to lower their ability to control this aggression. This creates a division between the recruit and the civilian as the recruit has a greater propensity to obey and follow the expectations of the military, an altered perception of the role of empathy and aggression and a higher level of aggression.

Stress Inoculation: Resilience, Realistic and Repetitive Training

Military training also inoculates the recruits to the stress, aggression and hard conditions of combat through purposeful training programmes. Physical training, exceptional standards, tough environments and even specialised programmes instil resilience. Realistic training settings prepare recruits for combat and repetitive training ensures the skills are deeply embedded and instantaneous.

Resilience Training

The military starts to rebuild the recruit physically and mentally by incorporating high standards of fitness. The recruits engage in physical training activities such as road runs, forced marches, drills, bayonet training,

assault courses, wrestling, boxing, circuit training and callisthenics, which include push-ups, sit-ups, bends, twists, jumping jacks and swimmers. The running courses are generally long, can pass through steep hills and a fast pace is set for these runs. Recruits can be awoken very early in the morning and given a few seconds to be on the floor doing push-ups. They must perform all physical activities to an exceptionally high standard. The military instructors can regularly discount push-ups if the recruits do not perform each one perfectly and they drive recruits to go well beyond the minimum requirements. Instead, the recruits may have to continue until they reach absolute fatigue. If the recruits do not move fast enough or show enough motivation, they may be given extra push-ups or flutter kicks; and if the recruits do not vomit at the end of training, then they can be told that they did not try hard enough. The recruits are generally required to meet an objective and meet it on time or else they are regarded to have failed in their mission. That is, they are trained to fulfil the mission, not merely to put in a good effort (see Mullaney 2009, 18–20, 41, 45, 90–1, 93, 111; Wadham 2004, 9; Tietz 2006, 55; Bourne 1967). The intensity of this physical training is increased even further as they leave recruit training and move into an operational unit (Hockey 2002, 155). In war, success and survival often depend on the completion of a difficult mission and soldiers must be able to endure and keep going. For this reason, military instructors can set these exceptionally high standards and constantly drive the recruits to do more, be better and strive harder.

A number of militaries also use mantras and personal example to spur recruits on and to teach them endurance. Terrible weather conditions are referred to as ‘Ranger sunshine’, and recruits are often told that ‘pain is just weakness leaving the body’, that ‘fatigue makes cowards of men’ and that ‘the more you sweat in peace, the less you bleed in war’. Recruits can be encouraged to keep going when they see their leaders and fellow recruits laughing and smiling through the mud, sweat, heat, rain and storms. This demanding training regime not only ensures that recruits are in peak physical condition but it also builds group unity and cohesion and conditions obedience (Mullaney 2009, 18, 44, 50–1). In addition, the exacting physical training regimes and tough conditions foster courage and self-sacrifice. The physical training is accompanied by physical discomforts and pain. The recruit’s body is bruised and battered during

assault courses, it is blistered from long marches with heavy rucksacks and equipment and it is grossly fatigued. Acceptance of the pain and suffering produced by physical exercise, exhaustion and exposure to the elements breeds stoicism (Hockey 2002, 155, 158–9, 2003, 16–17; see also Wadham 2004, 9). Moreover, it teaches the recruits to endure and keep going. They are physically and psychologically toughened, they learn to withstand pain and hardship, to plan and be resourceful and to use force efficiently as part of a larger team (see McGarry et al. 2015, 359; Hockey 2002, 155). They are taught resilience.

Resilience is crucial to the soldier's survival and to military success in combat. It can help soldiers to endure during combat, provide them with 'psychological capital' and assist them with withstanding traumatic events (see McGarry et al. 2015, 355; see also Schaubroeck et al. 2011). Given the importance of resilience, some militaries seek to build on the resilience instilled through the physical training regimes by also providing formal resilience programmes. For example, the USA runs mandatory Comprehensive Soldier Fitness (CSF) training and Stress Resilience In Virtual Environments (STRIVE) while Britain runs Trauma Risk Incident Management (TRiM) and Battlemind Training. These programmes are designed to foster resilience in soldiers, but, as yet, there is no strong evidence to support that these programmes produce the desired benefits (McGarry et al. 2015, 356–7).⁵ Moreover, the military's perception of the soldier as resilient can have negative consequences. If soldiers suffer harm and need help, needing this help may challenge their perception of themselves as a soldier as well as affecting how they are regarded by others and even their career prospects within the military. This means that the training and military culture that is intended to facilitate soldiers in surviving and processing the harsh and sometimes traumatic conditions of war can also hinder soldiers from seeking help when they need it (McGarry et al. 2015, 363–4). The benefits, effects and unintended consequences of these programmes are not yet fully known. The effects of the physical training regimes are more well known.

⁵ See McGarry et al. (2015, 355–7) for a discussion of military resilience as individual characteristics, as interpersonal relationships and as a learnt skill.

Holding recruits to exacting physical standards and pushing them to constantly strive harder can change the recruit's mind-set and perception. They can start to judge their success against the exceptionally high standards set by their leaders, which may lead to the recruits adopting the military's standards and relying on the military for their approval. This further entrenches the recruit's identity into the military and heightens their desire to please their superiors and follow orders. Forcing recruits to partake in exhausting physical training exercises and to persevere through harsh conditions also teaches the recruits resilience and to endure. Civilians are generally not exposed to these specially designed regimes and/or programmes and would not be able to withstand the physical and mental pressures of armed conflict to the same extent as a trained soldier.

Repetitive Training

Soldiers must complete complex manoeuvres in difficult, dangerous and sometimes life-threatening environments. Many militaries force the recruits to practice these manoeuvres again and again until they are deeply ingrained and the soldiers automatically and instantaneously complete the manoeuvre even in the highly stressful conditions of combat. Traditional repetitive training is 'qualification' as opposed to 'competency' focused. That is, recruits are trained in a static and controlled environment where they fire at a 'scored' target from various distances within a set time. Up until World War II, training consisted of the soldier firing at a bulls-eye target on a firing range. Once the recruit could hit the target with sufficient accuracy within the time frame given, then the recruit was qualified. Yet, firing in a controlled and safe environment where the emphasis is on accuracy and fine motor skills is different than being in a dynamic combat environment where many factors are at play and complex motor skills are required. Furthermore, firefights in combat often occur in less-than-ideal conditions. The soldier may have incomplete or imperfect information, the lighting may be poor and the soldier may be highly stressed which can lead to physiological impairments. All these factors hinder the soldier's marksmanship and physical technique (see Murray 2006, 25–6; Grossman 2009, 177). A number of modern

militaries have adjusted their training regimes to incorporate these factors and make soldiers competent and not just qualified. These changes are to prepare soldiers to effectively fight in the combat environment and not just effectively fight in the firing range.

Modern military training aims to build competency and for this reason it often combines repetitive drills and realistic environments. The combination of repetitive drills and realistic settings means that when recruits are faced with a similar scenario in combat, they automatically perform the trained response. This is known as conditioning and is supported by Pavlov's research on dogs and Skinner's research on rats. Conditioning involves providing positive reinforcement when the subject performs the desired response to a stimulus. When the stimulus and response are continuously repeated, they become associated in the subject's mind and the desired response becomes an 'automatic' response to the stimulus. Incorrect responses or failure to respond can result in punishment. For Pavlov's dogs, the repeated sounding of bells or buzzers (stimulus) before the dogs received food (reinforcement) meant that the dogs automatically salivated (response) whenever they heard a bell or buzzer (Pavlov 1927; see also Todes 2002, 232–55). For Skinner's rats, the pressing of a lever (response) released a food pellet (reinforcement). After several repetitions, the rats associated the pressing of the lever with food and this greatly increased the performance of the desired response. Furthermore, the presence of a stimulus, such as a light, in conjunction with the positive reinforcement conditioned the performance of the desired response to the stimulus (Skinner 1938).

To maximise firing and hit rates, modern training is reliant on these conditioning techniques. To ensure that the soldiers perform the conditioned response in combat, and not just in the static training environment, the US Army adopts realistic training that mirrors the combat environment. Instead of firing at fixed bulls-eye targets, the recruits wear their full combat gear, including body armour, rucksacks and helmets, and fire from an entrenched position at a human-shaped target. The recruits must scan for the human-shaped targets (stimulus) that pop up in an irregular pattern at unknown locations and for only a few moments. The recruits must instantly and correctly aim and fire at the human-shaped target (response). If successful, the target falls (reinforcement). In addition, the

army provides rewards and praise for success (reinforcement) whereas failure can often be met with reprimands and criticism (punishment) (see Grossman 2009, 177–8, 255–7; see also Murray 2006, 49–51; Tietz 2006, 58–60).

The recruits generally repeat the stimulus/response/reinforcement sequence thousands of times and fire thousands of shots until their response is instinctive and their accuracy is perfect. Then the military can increase the complexity of the environment while maintaining the same conditioning techniques. The recruit must instantly and accurately aim and fire at moving human-shaped targets and multiple simultaneous targets. Once hit, the human-shaped target may stay down, immediately pop up again or pop up after a lapse of time. This is to replicate events such as kill shots, misses, injuries and enemy reloading time. High repetition of these conditioning techniques builds competency and skill so that the desired action is a fluid movement that does not require conscious thought. In this way, the recruits learn to reflexively shoot at the human target without conscious thought. It is simply stimulus and response (Tietz 2006, 58; see also Mullaney 2009, 27, 71 and Murray 2006, 30 for repetitive training).

Conditioning through repetition is not limited to learning to fire. Many militaries adopt a host of drills in training. Weapon handling drills—loading, unloading, assembling, disassembling, correcting malfunctions and cleaning—are performed repetitively and under time pressure. In operational units, the drills are more complex, for example, performing the drill blindfolded to replicate darkness. There are also tactical drills, for example, for patrolling, reconnaissance, setting and avoiding trip wires, ambushes and counter-ambushes and launching an attack. Each person has a specific duty and action to perform, and the success of the drill is dependent on the recruits working together. The recruits are assessed both individually and collectively on their execution of these drills (Hockey 2002, 156–7).

Drills that instil collective action within the group are very important to military success. Sociologists have shown how the personal relations and bonds within the group build social cohesion and enhance military effectiveness (Janowitz and Shils 1975; Moskos 1975, 1989; Winslow 1997; Ben-Ari 2001). However, these formal collective drills also play a

pivotal role in building this social cohesion and effectiveness (King 2006, 495). The role of drills in group cohesion and military success should not be underestimated. For example, elite units, such as the special forces, display exceptional levels of military effectiveness not because the bonds within the group are stronger than the bonds within other units but because their training is more intense and realistic. This means that in extremely stressful environments when many groups would lose cohesion, these units continue to perform the trained collective and coordinated responses and actions (King 2006, 507–8). In military training, recruits repeat their collective drills until they are mastered and deeply ingrained into the mind and bodily memory of the recruit. This is so that when soldiers encounter the enemy in combat, then the operation of their weapon and the simultaneous and coordinated action of the group is with the greatest possible speed and efficiency. This increases the probability of the individual and group surviving and the enemy being defeated. (Hockey 2002, 156–8).

Wars, and especially firefights, are stressful. To prevent the stress of combat obstructing the conditioned response, training must involve a high level of skill in conjunction with stress inoculation (Murray 2006, 28). The military inoculates the recruits to stress by exposing them to several stressful environments, such as obstacle courses designed to incorporate higher heart rates into marksmanship, high-speed paintball matches and night-time missions where the recruits must fire at moving targets. In addition, the military instructors can force the recruits to truly imagine that they are in combat and under threat. This is largely successful as the recruits are normally stressed and have high adrenaline levels during these exercises (see Mullaney 2009, 71; Tietz 2006, 58). Repetitive training in realistic and stressful conditions means that soldiers are better able to manage the stress of war, the skills learned are less likely to be impaired by stress and they have greater confidence in their own ability and the ability of their comrades and leaders. Many veterans regard this psychological conditioning as a crucial process for maximising survival and success rates in combat, and there are indications that this type of training dramatically reduced the level of non-firing that was reported in World War II (Grossman 2009, 178, 317–8, 259–61).

The ability to better manage the stress of war allows soldiers to have greater control over their emotions, to accurately assess the circumstances and to devise and implement reasonable actions (Mackmin 2007, 74; Labuc 1991, 487). This training results in the soldier having a stronger ability to withstand the stresses of combat and their effects than the average civilian. In addition, the military does not want to train or condition soldiers to fire indiscriminately. For this reason, an essential element of the conditioning process is that soldiers shoot or act only in response to a threat stimulus or when ordered to do so (see Grossman 2009, 262, 318). Repetitive drills directly contribute to this objective as they not only instill the instinctive competence in the skill being acquired but also condition obedience and an automatic acceptance of orders and duty (see Tietz 2006, 56; Grossman 2009, 18, 322–3). This results in the average soldier having a much greater propensity to obey the orders of a superior than the average civilian would possess.

These conditioning techniques also ensure that the soldier instinctively and reflexively aims and fires at the threat stimulus. It trains them to respond and to kill without conscious thought. This conditioning reaches such a deep instinctive level within soldiers that they perform the conditioned response even in the stress of combat and even when they are exhausted and the sharpness of consciousness is lost (see Grossman 2009, 18–9, 235, 255–6; King 2006, 507; Gray 1959, 102). This means that in combat the soldiers respond as trained and perform the drill automatically, which increases the rate of success and survival in combat (Grossman 2009, 177–8, 256–7). However, by making firing a reflexive reaction, the military reduces the opportunity for moral reflection (Jordan 2000, 14–19). Instead of being guided by morality or a set of values, the soldier follows the conditioned response established in training.⁶ While this automatic response is more likely to apply to a threat stimulus instead of many forms of superior orders in combat, it further emphasises the divergence between the soldier and the civilian. These conditioning techniques mean that when soldiers enter the foreign environment of

⁶ See Douglas (2001, 38–42) for research on people's tendency to respond to a new situation by following an established manner of conduct.

combat, they no longer respond as the average person would but instead they respond reflexively and fire.

Repetitive training in realistic and stressful environments builds resilience and group cohesion, enhances the soldiers' ability to withstand the stresses of war and embeds the trained response deeply within the soldiers so that they reflexively and automatically perform the response even in highly stressful environments. It facilitates success and survival. It also conditions obedience and alters the behaviour and perceptions of the soldier. It separates the civilian and the soldier.

Reality-Based Training

Military training intends to better prepare soldiers for the realities of war. Accordingly, the training needs to be dynamic, three-dimensional and reflect the combat environment. That is, the training needs to incorporate realistic conditions, settings and stresses (Murray 2006, 208–10, 223–4). In war, soldiers not only have to perform specific tasks, they must perform these tasks while wearing heavy battle gear, carrying heavy weapons and being in tough terrain and weather conditions. Realistic training involves mimicking these conditions. During training, especially training for special forces, recruits can be forced to hike for 15 miles wearing full battle gear and carrying 60-pound rucksacks. They may be required to run for 10 miles in jungle boots and with 80-pound rucksacks, to run for 5 miles followed by close combat skills in intense heat, to march for 16 miles at night along sandy firebreaks carrying 60-pound rucksacks and 16-pound rifles and to climb cargo netting and crawl through freezing cesspits of mud with barbed wire overhead (see Tietz 2006, 76; Mullaney 2009, 83, 94–5, 98). On major exercises, soldiers are required to undertake long marches carrying around 80 pounds of weapons, ammunition, rations, water, sleeping bags and other equipment, and they practice patrols and ambushes. During these exercises, they are deprived of civilian comforts and are separated from their family, friends and the wider world. The training activities are performed with limited food and sleep and while being exposed to the elements, climatic vagaries and direct hazards. They can regularly be injured on these exercises and sometimes are even killed

(Hockey 2002, 158–9). This prepares them to endure the pain, exhaustion, dangers, isolation and often harsh conditions of war.

Specialised military training, like the Rangers, includes scenario training in woods, mountains and swamps. Soldiers must manage adverse weather conditions, dangerous native animals and environmental hazards for days or even weeks. They can again march over long distances carrying heavy rucksacks in order to build stamina and determination, and they conduct pretend ambushes and attacks in order to build their combat skills and tactical experience. The soldiers perform many of these tasks at night with simulated ammunition, which inoculates them to the effects of noise and darkness. They can also be denied basic goods that civilians would take for granted, such as painkillers or civilian underwear. If soldiers breach these rules and acquires such goods, they may be regarded as taking an unfair advantage over their peers. Such breaches can result in severe punishment and the removal of the soldier from the specialised training programme (see Mullaney 2009, 89, 93, 99–100, 104, 108, 118).

Moreover, militaries may mirror the stresses and conditions of combat by restricting the soldiers' access to food and sleep for extended periods of time (see Grossman 2009, 66–8; Mullaney 2009, 89). The soldiers may be given enough calories to stay alive but not enough to compensate for what they burn off in marches and manoeuvres. Sleep may be rare and they endure weeks of little or no sleep and can be so tired that they hallucinate or forget their own names. This means that the soldiers must live in the open environment, perform the required missions and march for long distances with heavy rucksacks all while they are sleep and food deprived. As the training progresses, the lack of sleep and food takes greater effect and the soldiers make more and more mistakes. At the end of this specialised training, the soldiers can be converted from healthy individuals in peak physical fitness to starving individuals that resemble ill-treated POWs (see Mullaney 2009, 92–3, 99–100, 109, 112). In this way, specialised military training not only teaches soldiers essential combat skills, tactical knowledge and the importance of planning but also the ability to show an extraordinary level of endurance in an incredibly stressful environment. It builds resilience and facilitates the soldiers in

withstanding and functioning in the stress of combat to a much greater degree than the average civilian.

Reality-based training also involves realistic settings. The US military has built some incredibly realistic urban cities for training. These cities are extremely detailed and the military continually updates them according to feedback from soldiers on the success of training in the field. During training, the soldiers fire blanks and may use laser sensors to indicate when they are dead. There may be imitation blood and the muzzle flashes and cordite smells are the same that the soldiers encounter in combat. The training may simulate the injury of civilians, the capture of POWs and the injury and treatment of comrades (Tietz 2006, 60). Reality-based training can also be incorporated into pre-mission training for soldiers. Sometimes training grounds are designed to replicate the grounds where the mission will take place, including dummy buildings to represent the various targets. Live rounds and battle simulations can be used (King 2006, 504). This realistic training, especially when combined with training on the ROEs, allows the soldiers to develop their practical judgment (see Osiel 1998, 1077–8; Martins 1994). It also produces fear and excitement in the soldiers while entrenching each individual's and group's position and role in contributing to the collective military objective. Repetitive rehearsals embed the battle positions and the coordinated movements and manoeuvres. These practices generate group cohesion on the mission. Social cohesion and communication in response to 'contact' with the enemy facilitate the group in continuing to function even in highly stressful and dangerous environments. It enhances military effectiveness and the survival of the individual and the group (King 2006, 504–5).

Resilience training and repetitive and reality-based training deeply ingrain the required responses to threat stimuli in soldiers and build group cohesion. This training also strengthens the ability of soldiers to overcome and perform the required duties despite the stresses of combat to a much greater degree than the average civilian. It enhances military effectiveness and increases the likelihood of success and the survival of the individual soldier and the group. It also conditions obedience, entrenches the soldier into the group and the military and results in the soldier responding automatically and reflexively. It changes the former civilian perceptions and actions of the soldier.

Dangerous Environments: Building Situational Awareness and Attention to Detail, Teamwork and Responsibility

As discussed, a number of militaries require the recruits to comply with extremely regimented specifications for the organisation of the recruits' routine, rooms, uniforms and behaviour. By demanding perfect compliance with all the exacting rules and requirements, militaries train the recruits to notice and pay precise attention to details. For example, if their belt buckle is loose or shoelace undone or if there is dust on the brim of their service cap, then the recruits may elicit the same response: you just killed your platoon. Militaries can reinforce the necessity of attention to detail and awareness by planting fake improvised explosive devices (IED) randomly throughout the barracks. Amidst their daily routine, the recruits must notice, disarm and report these fake IEDs. Failure to do so may result in punishment and an explicit account of how the recruits have killed and maimed themselves and their platoon. Militaries may further ingrain the need for attention to detail and awareness by forcing the recruits to chant 'stay alert, stay alive' (see Mullaney 2009, 23–4; Tietz 2006, 55).

Conditioning recruits to notice and pay precise attention to detail builds strong situational awareness, which is vital in combat. Missed details can endanger lives and jeopardise missions. Failing to clean a small part of a weapon can result in its failure to fire in combat, failure to bring an extra battery for the tactical radio can mean the inability to radio for support and cover, and failure to notice a small package can result in an IED exploding. A minor mistake can have severe consequences in combat (see Mullaney 2009, 24, 57–8; Tietz 2006, 55). Quite simply: in war, details matter. However, while this training builds vital situational awareness within recruits, it also changes the way that the recruits view their environment. They no longer view it from their civilian perspective but instead begin to see it from the soldier's perspective where the environment is dangerous and threatening (see Tietz 2006, 55, for how recruits begin to regard the environment as dangerous). This means that there is a division between the recruit's perception of an environment and a civilian's perception of the same environment, which may result

in a corresponding discrepancy between the soldier's and the civilian's perception of reasonable action within that environment.

Group bonds and loyalty to one's comrades are key factors in ensuring that a soldier endures in the dangerous combat environment and obeys and undertakes difficult and precarious missions (Mackmin 2007, 81–2; Manning 1991, 456). Strong group bonds also assist in overcoming the soldier's innate reluctance to kill. Accordingly, militaries can adopt a variety of techniques to build groups unity. As discussed, the disorientation and stripping process eradicates the characteristics that make the recruit feel unique and is a powerful equaliser (Bourne 1967, 192). This makes the recruit more amenable to integration into the group. A number of militaries also deliberately construct the morning inspections to ensure that the recruits need to form a unified team in order to successfully comply with all of the military's precise and exacting room layout and uniform requirements (Tietz 2006, 57; Mullaney 2009, 23).

Even drills create uniformity and a sense of a single organism working together as they require precise movements carried out in synchronised fashion with many others in response to a specific command (Hockey 2002, 150–1; Goodridge 1999, 259–68). Recruits are also often trained to selflessly protect the group, for example, to sit on dead bodies while searching them in case they are booby-trapped so that the recruit's body absorbs some of the shock. Through the forced recital of creeds and the emphasis on the recruits' role within the military organisation, the recruits can begin to identify strongly with their company. Its history becomes the recruits' history (Tietz 2006, 57, 76).⁷ The group is responsible for one of its member's mistakes and the entire group may be punished for one recruit's failure. In addition, while the military recognises individual success, it is generally within the framework of the recruit's performance within the group. In this way, militaries can emphasise the group which is different to civilian society which often focuses on individualism (see Mullaney 2009, 12; Tietz 2006, 56; Brown 2015, 123–4). This process ensures that the individual recruit's survival and success is dependent on the survival and success of the group. Their lives become

⁷ Bourne notes that despite the formation of these strong bonds, the recruits show little signs of distress about the disintegration of the group at the end of training; see Bourne (1967, 194–5).

interdependent. This combines with the inseparable living conditions and shared experiences to facilitate recruits in building strong bonds and cohesion.

A number of militaries also train the recruits to accept personal responsibility. In basic training, the recruit may be permitted only four responses to any question or order—yes, sir; no, sir; no excuse, sir; and sir, I do not understand. Throughout the course of the recruits' training, they can reply 'no excuse, sir' a thousand times until personal and complete responsibility is deeply embedded within the recruit. Furthermore, militaries may reward recruits when they show bravery and accept responsibility for actions that a civilian would regard as outside of their control and responsibility (see Mullaney 2009, 5–6, 41).⁸ While the 'four responses' method instils a sense of responsibility within the recruit, which is an important attribute of an efficient soldier, it also restricts the autonomy and reasoning of the recruit while conditioning obedience by limiting the opportunity to challenge orders.

In the course of developing the skills and attributes required of an efficient soldier and an effective military unit, the military alters the recruits' perception of their environment, conditions obedience and builds strong group bonds. As a result, there is a division between the soldier's perceptions and responses and the civilian's perceptions and responses.

Training to Kill

The objective of military training is to transform individuals into effective and efficient soldiers. In many cases, this means training an individual to kill. While there are numerous studies on war, there are limited scholarly studies on the training of people to kill, the act of killing and the effects of killing in combat. The research that does exist indicates that individuals naturally do not want to kill or hurt other individuals (see Marshall 1974, 50; Grossman 2009, xvi, 28; Jordan 2000, 14).

⁸ For example, Mullaney recounts how the military awarded a fake purple heart to a cadet who was accidentally stabbed in the neck with a bayonet during a marching drill. The cadet continued the drill and responded 'no excuse, sir' when it was noticed that he was bleeding; see (Mullaney 2009, 41).

Social expectations and values, morality, anxiety and guilt work together to curtail an individual's aggression and to instil an innate human resistance to killing even when the individual is stimulated towards aggression (Mackmin 2007, 72; see also Bourke 1999, 100; Lorenz 1996, 206–36). The soldiers are torn between their reluctance to and the burden of killing, their duty as a soldier to kill and the guilt of the death and injury of their comrades if they do not fight (see Grossman 2009, 86; see also McGarry and Walklate 2011, 908). When soldiers are confronted with a 'kill situation' or they actually kill, especially the first kill in combat, it can be very distressing and demoralising (Holmes 2004, 377 and see McGarry and Walklate 2011, 908; Browning 1998, 76, for soldiers' personal experiences). The trauma can be so profound that soldiers may even be reluctant to acknowledge their actions to themselves (Grossman 2009, 91).

This innate reluctance to kill is supported by the historical failure of soldiers to fire their weapons or to deliberately miss the enemy when soldiers fired in combat. SLA Marshall's research found that in World War II only 15–25 per cent of US soldiers fired at an exposed enemy, even when their own lives and the lives of their comrades were in danger (Marshall 1974, 50, 54; see also Grossman 2009, 16, 252).⁹ This low firing rate is not confined to US soldiers. Throughout military history, there is evidence that a large percentage of soldiers have failed to fire their weapons in combat. Instead of firing, a majority of soldiers generally assisted those soldiers willing to fire by gathering and preparing ammunition and loading and passing weapons. When soldiers did fire their weapons, the accuracy of their fire or the 'hit ratio' was statistically very low. Indeed, the hit rate was so low during the Vietnam war that soldiers expended approximately 50,000 bullets for every enemy soldier killed

⁹ Marshall's research has received criticism. However, Grossman argues that Marshall's findings are supported by Ardant du Picq's study on firing rates by the ancients, Holmes and Keegan's research on firing rates, Holmes' findings on Argentine firing rates in the Falklands War and Griffith's study on the extremely low firing rates by Napoleonic and American soldiers; see Grossman (2009, xvii–xviii and 348). In addition, the US Training and Doctrine Command (TRADOC) supports Marshall's findings. The military initiated a number of changes in training based on Marshall's recommendations and these changes led to significantly increased firing rates; see Watson (1978, 45–6) and Grossman (2009, xvii and 36).

(Grossman 2009, 9–12, 16–29, 20–1; see also Murray 2006, 24).¹⁰ This strongly indicates that the human instinct is to not fire at another person or to intentionally miss the person if one does fire. Military training is designed to suppress this human resistance to aggression and to killing. It is designed to ‘convert civilians into effective combatants’ (Bourke 1999, 72; see also Mackmin 2007, 73).

Militaries employ behavioural science to overcome the human resistance to aggression and killing (Doris and Murphy 2007, 39). These techniques include the conditioning repetitive drills, realistic training, hazing and the exceptionally tough standards discussed above. A number of militaries also emphasise the importance of communication. Communication in conflict is not only necessary for the group to coordinate their actions, and accordingly increase military effectiveness, but it also reaffirms the soldier’s commitment to the collective group and the commitment of the others to their common military objective. Communication sustains group cohesion (King 2006, 496).

In addition, the techniques of desensitisation and denial can be used to weaken the soldiers’ resistance to killing. To create psychological distance between the soldier and the action of killing, militaries can adopt a large variety of objectifying euphemisms. Instead of recognising targets as people, soldiers often refer to them as positions, marks or enemy combatants. They do not shoot but engage, suppress or return fire. This allows the soldiers to concentrate on the correct response to the threat and not on the consequences. In line with this lack of focus on consequences, military psychologists, who understand how much information a person is capable of processing in a certain time period, may focus the information on the mechanics and operation of the weapons rather than the real-life effects of these weapons (Tietz 2006, 58; see also Mullaney 2009, 27–8, for the use of euphemisms and the requirement to memorise precise details about guns and bullets). This focus along with repetitive and realistic training allows soldiers to deny, to some unconscious degree, that they are killing another human being in combat. Instead, the person is merely a realistic target as in training (Grossman 2009, 257–8).

¹⁰The use of automatic weapons, suppressive fire and reconnaissance by fire are likely to also be factors in the large amount of bullets fired per kill; see Grossman (2009, 338).

Militaries can desensitise recruits to killing and to the suffering of the enemy by providing praise for and incorporating the 'joys of killing' and/or winning into training. For example, cadence lyrics may be used during drills, marches or runs which promote that killing is acceptable and encouraged. During runs, the recruits or soldiers may chant 'kill, kill, kill' whenever their left foot touches the ground. This praise of killing trains recruits to believe that their job is not only to fight well but also to effectively kill the enemy (see Grossman 2009, 253–4; Brown 2015, 125).¹¹ Moreover, the inhibiting effect of social and moral values on the human ability to kill can be diminished when the individual feels the enemy is different to them or is violating important accepted social or moral principles (Mackmin 2007, 72–3). For this reason, militaries sometimes dehumanise the enemy in order to minimise the soldier's feelings of guilt and anxiety at the requirement to kill (Coleman 1946, 222, 224–5; Bourke 1999, 101; Mackmin 2007, 77). The success in creating this division between 'us' and 'them' or the 'soldier' and the 'enemy' is likely to be enhanced for the soldier as it is an extension of the extensive 'othering' that occurs within a number of military cultures (see, for example, Brown 2015, 125, for the degradation of civilians and civilian values). Wadham (2004, 12) highlights that there is an increasing scale of 'others' within militaries. This ranges from individual versus individual, battalion versus battalion, corps versus corps, services versus services and military versus civilian. In a number of militaries, these 'others' are continuously represented in derogatory and depreciating ways, and military training desensitises the recruits and curtails their ability to empathise and connect with the 'others'. A number of militaries also prioritise competence and effectiveness and create a competitive and adversarial culture. The potential for this competition to result in violence is mitigated by 'mateship' within the military but outside of the military 'the mateship solidarity works to generate Others through which the bonds of men can be tried and legitimised' (Wadham 2004, 12, 11–2).

The enemy can be turned into the ultimate 'other'. This can be assisted through intensified derogation of the enemy. The use of propaganda

¹¹ Grossman describes Vietnam soldiers chanting 'kill, kill, kill' everyday; see Grossman (2009, 253–4).

that portrays the enemy as evil and emphasises the necessity to avert the enemy's evil actions makes it easier for the soldier to fight and kill the enemy. The denial of the enemy's right to humane treatment is reinforced if the soldier believes that the enemy is committing atrocities. The enemy's supposed commission of atrocities can result in the soldier feeling that the enemy is no longer justified in demanding fair treatment. In this way, dehumanisation of the enemy eases the social and moral inhibitions to killing while ensuring that the soldier becomes a 'force for good' (Mackmin 2007, 77–8). The dehumanisation of the enemy and the ensuing greater ease in killing is often enhanced by racial or ideological differences between the soldier and the enemy. The use of derogative terms, such as 'slopes', 'dinks', 'ragheads' or 'cockroaches', strengthens this denial of the enemy's humanity (Mackmin 2007, 77–8; Grossman 2009, 254). During World War II, racial ideology meant that the Nazis showed greater respect for the rule of law and the humanity of the enemy in the West than they did against the Russians. Similarly, the Allies upheld the rule of law to a larger degree in Europe than they did in the Pacific (Doris and Murphy 2007, 40), and only 5–9 per cent of US soldiers in a newly formed division expressed a desire to kill a German soldier whereas 38–48 per cent expressed a desire to kill a Japanese soldier (Schrijvers 2002, 218; see also Doris and Murphy 2007, 40).

This racial ideology against the enemy can easily lead to atrocities. For example, in World War II and the Vietnam War, racial propaganda contributed to the practice of collecting enemy body parts as trophies or souvenirs (Doris and Murphy 2007, 40; see also Fussell 1988, 26; Bourke 1999, 30). Worryingly, there is evidence that racial ideology was also present in the recent conflict in Iraq (Doris and Murphy 2007, 40). Militaries may also instil a deep anger and hatred of the enemy within soldiers. This facilitates soldiers in killing the enemy, especially when combined with the dehumanisation of the enemy, as it undermines the guilt and inhibition against killing. However, it correspondingly diminishes the individual's innate restraint of force (Mackmin 2007, 79).¹² Despite

¹²It is important to note that not all soldiers feel hatred towards the enemy. Some just see it as a job. Some reasons for the difference are the individual's personality and coping mechanisms; see Mackmin (2007, 80) and Holmes (2004).

initial innate reluctance, some maintain that soldiers eventually enjoy killing in combat as it is an avenue to release the psychological stresses of war (see Bourke 1999; see also McGarry and Walklate 2011, 908, for an account of different arguments). Others argue that soldiers fear and dislike aggression and zeal for killing by their comrades as it exposes the group to greater risk (see Jamieson 1998, 497 referring to Little 1964). Notwithstanding these contrasting viewpoints and possible mind-sets of individual soldiers, there is evidence that modern military training is very effective at overcoming soldiers' inherent resistance to killing another human being. This is reflected in the increased firing rates in combat. The infantry's firing rate increased from 15–20 per cent in World War II to 55 per cent in Korea to 90–95 per cent in Vietnam to 98 per cent in the First Gulf War and was statistically insignificant in the war in Iraq (see Grossman 2009, 253; Tietz 2006, 54).¹³

While the weakening of the soldier's innate reluctance to kill increases the efficiency of the soldier's firing rates, it also affects the soldier's perception of reasonable response and use of force. The dissolution of the individual's resistance to violent behaviour 'reconfigures the range of available behavioral options; for soldiers in the fertile chaos of combat, reprehensible options may come to seem a legitimate part of this range' (Doris and Murphy 2007, 39, emphasis omitted). For this reason, the military must balance the release of the soldier's aggression to ensure an effective soldier and the restraint of the soldier's aggression to ensure that the troops are controlled, the application of force applied is correct and the soldiers adhere to the laws of armed conflict (Mackmin 2007, 73). This is an immensely difficult and delicate balance to create and maintain.

Military training is specifically and deliberately designed to alter the civilian. It is designed to overcome the human reluctance to killing in order to transform the civilian into an effective soldier. It teaches the soldier to repress empathy, especially for the 'other'. This is particularly effective when it is combined with the dehumanisation and hatred of the enemy. Accordingly, soldiers who have undergone military training and

¹³Tietz maintains that the firing rates were 25 per cent in World War II, nearly 60 per cent in Korea and 90 per cent in Vietnam; see Tietz (2006, 54). It is also important to note that these figures reveal the firing rate and not the hit rate, which means that it is possible that a larger number of soldiers are still deliberately missing the enemy target.

other psychological processes are likely to have a greater ability to kill and a significantly different perception of the 'enemy' and what is reasonable behaviour or treatment of the enemy.

Rebuilding the Recruit as a Soldier

Military training can break down the recruits, remove their individuality and dismantle their sense of worth and integrity. A number of militaries demand strict obedience and adherence to military rules and ways of life. The recruits may be demeaned, disrespected and hazed by not only their leaders but also by senior cadets. Following this breaking-down process, the military begins to build the recruits' skills and proficiency in weaponry, tactical knowledge and combat skills. Moreover, the military generally starts to recognise the skills that the recruits have acquired and their worth. This acts as reinforcement and a sign of acceptance of the recruits as soldiers and the recruits achieve a small level of status. This elevated status is strengthened by the arrival of new recruits, which means that they are no longer the lowest rung in the hierarchy. After being stigmatised by the military, this recognition and status create a powerful sense of worth. Yet, this sense of worth is directly linked to the military's approval. The military may also boost the recruits' damaged self-esteem, build a strong belief in their abilities and reinforce their new identity as soldiers. The recruits' identification with the group may also change from one of fellow sufferers to one of being part of a platoon that is part of a company that is in the Army. With impending completion, the recruits may have a feeling of elation, great confidence and invincibility (see Bourne 1967, 192–4, for an account of this rebuilding process).

The military training process represents a rite of passage. Rites of passage have three major periods: separation, transitional or liminal and incorporation (Van Gennep 2004, 21). The separation phase is the isolation of the recruits from civilian society and their former selves. The transitional or liminal stage is where the recruits are broken down through processes of disorientation, humiliation and degradation and rebuilt as a soldier. Incorporation is when the recruits' training is completed and they join the military community (see Wadham 2004, 7). The military breaks

down civilians and rebuilds them as soldiers who are efficient, tough and malleable (Bourke 1999, 80). As such, military training is a rite of passage that ensures that the recruit's identity, sense of worth and confidence are directly linked to the military and that the soldier is obedient to and deeply embedded within the military. Military training not only ensures that the recruit's body responds to the military's way of functioning but that the recruit is fully assimilated into the collective action of the group and the institution itself. The recruit fosters the military's virtues, such as courage and loyalty, and the military's ideology of obedience, discipline, survival, and sacrifice. Military training demands the recruit's full commitment to military doctrine and the adoption of the military's values, norms and practices and is so successful that it 'renders [the recruit's] previous civilian cultural values and norms *secondary* to the military total institution' (McGarry et al. 2015, 361, 360–2). Accordingly, military training results in the soldier being less likely than a civilian to disobey an order from a military superior or to break away from the military's culture.

After the initial basic training is completed and the soldiers are in operational units, the bodily regulation of the soldier is relatively relaxed. However, the soldiers are still required to adhere to high standards of discipline and obedience and they know that under the military law of many nations the strict regulation can be restored if soldiers do not conform to the principle of obedience to commands (see Hockey 2002, 151–3). The rite of passage undertaken in basic training means that the soldier is deeply embedded in the military and has adopted the military's values, thought processes and doctrine so there is not the need for the same level of regulation of the soldier as of the recruit. The power of the military to reinstate this level of regulation is known to the soldiers though. The rite of passage and the power of the military are very effective forces for ensuring obedience to superiors and adherence to the military's values and culture. The average civilian would generally not experience the same pressures for compliance.

Conclusion

Military training is intentionally and specifically designed to transform the civilian who enters into an effective and efficient soldier. The civilian is broken down through a wide variety of processes and techniques. These processes can include the separation and removal of the recruits from their former civilian lives and their isolation in the military institution, the stripping of the recruits' individuality, rites of degradation and humiliation and their hazing by military leaders and senior cadets. Complete and immediate obedience can be demanded of the recruits and they learn to obey without question. Many militaries also seek to 'build' the soldier by ensuring exceptional levels of physical fitness, developing their tactical knowledge and skills and instilling situational awareness and attention to detail. Recruits are generally trained repetitively in realistic settings that replicate the conditions of combat so that the soldier is resilient, the required responses are automatic and reflexive and the soldier can perform these manoeuvres even in the high-stress environment of combat. The recruits' 'warrior spirit' is often cultivated, their empathy repressed and a variety of processes can be implemented to overcome their innate reluctance to kill. Military training also generally forces the recruits to work together and fosters group unity and cohesion while gradually recognising the worth and skills of the recruit. This works to deeply embed the recruit's identity within their group and the wider military. In short, military training significantly alters the perceptions, standards and behaviour of the recruit. It creates a divide between the civilian and the soldier.

While many, including academics and courts, may disagree with these military processes and techniques and believe that they are outdated, these processes are nevertheless employed by a number of militaries. That is, these are government-sanctioned training techniques. Even though some courts have noted the effects of military training (see, for example, *R v Finta* 1994), there needs to be consistency across courts and jurisdictions and, moreover, much more research is required before the true extent of the effects of military training on the soldier is known. To be just, it is important that prosecuting courts are fully aware of and

take into account the effects of these training techniques on the soldier and the disparity they create between the civilian and the soldier when implementing the law. This is not to say that soldiers should not be held accountable for crimes that they commit or that a lower level of legal liability should be applied to soldiers. It is not contended that the standard should be lowered for soldiers in recognition of the military and combat environments but that it should be reflective of the military and combat environments. The courts should take into account the soldier's environment and the factors that shape their perceptions, standards and behaviour when determining the legal liability of a soldier. In some ways, this means that the soldier should be held to a higher standard than a civilian, for example, because their training builds resilience and allows them to withstand the stresses of combat to a much higher degree than the average civilian. In other ways, the soldier should be held to a lower standard than a civilian, for example, because military training instils a significantly greater propensity to obey and the identity of the soldier is deeply embedded within the military, which results in the soldier being much more likely to obey the order of a superior than the average civilian. That is, the legal standard imposed should be tailored to recognise the unique military and combat environments. It should be tailored to reflect the 'reasonable soldier' and not the 'reasonable civilian'.

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5

The Trained Soldier in Contemporary Combat

The law does not exist in a vacuum. Neither does society. The law is ‘not some mysteriously external force’ but is a part of the social experience in which the law forms the social and the social forms the law (Cotterell 2006, 25; see also Hall 2014, 103). That is, the law and society are interconnected and shape one another. In order for the law to be effective, it must take social and environmental factors into account. While those who have not experienced conflict are unlikely to fully understand the experiences of war (McGarry and Walklate 2011, 912), there has been increasing awareness and a growing body of knowledge of the soldier’s experiences and their impacts. However, significantly more research by psychologists, lawyers, anthropologists, behaviourist scientists, criminologists and the like is needed in order to develop a fuller and more comprehensive understanding of the effects of combat on the soldier. A greater understanding of the soldiers’ experiences and the role and effects of the environmental factors present in combat on the social production of crime in war would have many benefits. It would facilitate better training to withstand the pressures and stresses of combat, greater adherence to the rule of law and improved reintegration into society post-combat.

Moreover, this research would permit the creation and implementation of a law that is more attuned to the realities of the combat environment. A law that encompasses the realities and inherent characteristics of the combat environment has a stronger ability to shape the environment and the behaviour of the soldier within that environment.

The Combat Environment

An individual's actions are significantly impacted by the environment in which they find themselves. Several research studies and experiments have found that even insubstantial and transient environmental factors can lead to noteworthy changes in behaviour and normative competence. Environmental factors can even lead to unethical conduct.¹ War involves substantial and often sustained stressful environmental factors. If insubstantial and transient environmental factors can affect an individual's behaviour and normative competence, then the substantial and sustained environmental factors present in combat are likely to have an even stronger effect on the soldier's behaviour and normative competence (Doris and Murphy 2007, 34). The substantial and sustained environmental factors in combat are also a much stronger coercion towards unethical conduct for the 'reasonable soldier' than the more insubstantial and transient environmental factors in civilian society are for the 'reasonable person'. Combat represents a unique environment that is separate from and distinct to civilian society. This separation is likely to create a corresponding delineation between the perception of reasonableness in war and the perception of reasonableness in civilian society. Given

¹Doris and Murphy provide a summary of empirical research that has been developed over 70 years, which attests to the power of the environment over an individual's moral cognition and behaviour. The research found that a passer-by who finds a dime is 22 times more likely to assist someone than a passer-by who did not find a dime; a passer-by who is not in a hurry is 6 times more likely to help a person in significant distress than a passer-by in a hurry; a passer-by is 5 times more likely to assist someone when the surrounding noise is at normal levels than when a power lawnmower is running and Zimbardo's 'Stanford Prison Experiment' showed that people placed in simulated positions of power often abuse that power; see Doris and Murphy (2007, 33–4). Specifically, see Isen and Levin (1972, 384–8), Darley and Batson (1973, 100–8), Mathews and Cannon (1975, 571–7) and Haney et al. (1973, 69–97), respectively.

the substantial and sustained environmental factors present in combat and the uniqueness of the combat environment, a credible and accurate determination of responsibility needs to take account of the environmental factors present in combat and their effects on the individual (Doris and Murphy 2007, 27).²

In modern warfare, soldiers are exposed to a number of environmental factors and experiences. These include asymmetrical, urban and small group fighting, an omnipresent enemy, limited resources, a harsh living environment and witnessing and participating in killing and violence. Combat can be frightening and stressful and is extremely dangerous and tiring. In this environment, the processes that facilitate killing, for example, brutalisation, moral drift and dehumanisation, are likely to be even more pronounced. This chapter argues that the environmental factors and the soldiers' experiences in combat affect the soldiers' perception of reasonableness, their ability to identify an illegal or manifestly illegal order and the likelihood that they will disobey such an order. Combat creates a distinction between the 'reasonable soldier' and the 'reasonable civilian'. It is essential that the courts recognise this distinction when applying legal standards to the combat environment. This chapter also maintains that when the government or state promotes policies that encourage the killing or persecution of a group—and these policies extend beyond the processes necessary to overcome the innate human reluctance to kill—then the state and government leaders should bear the greatest responsibility.

The Modern War Environment

There are numerous environmental factors inherent in modern warfare that affect a soldier's decision-making abilities, perceptions and behaviour. For example, contemporary combat is dangerous and dynamic, the environment can be harsh and tiring, the enemy is omnipresent and there can be inadequate resources. The battlefield also generates high levels of stress and fear. Combat entails all the stresses of military training, as discussed

² Doris and Murphy also note that an examination of the environmental factors present in war and their effects on participants inevitably requires empirical evidence and analysis; see Doris and Murphy (2007, 27).

in chapter 4, but to a notably higher degree and with the additional danger of an enemy whose objective is to kill the soldier. While this stress and fear, and its effects on the perception and decision-making capacity of the soldier, is noted through this chapter, a much more comprehensive and detailed examination of the physiological and biological effects of high levels of stress is provided in chapter 6. This chapter explores how the soldiers' experiences and the environmental factors present in combat enhance the divergence between the 'reasonable soldier' and the 'reasonable civilian' that is created during military training. The courts need to take this divergence into account when determining whether soldiers acted reasonably when they obeyed the illegal order of their superior.

Urban Warfare and the Battle of Logistics

For most 'Western' or developed states' militaries, modern warfare generally takes place in countries far away from the soldiers' home nation. The soldiers are immersed in a foreign environment, often placed in rudimentary and crowded base camps, and they are isolated from their family, society and civilian comforts. For a number of soldiers, combat is the first, or one of the first times, that they have left their home nation. The soldiers also often do not have a full appreciation of their new environment, for example, the customs, local politics or tensions between groups (see Mackmin 2007, 73–4; Rowe 2008, 172; McNab 2009, 9, 302).³ This lack of worldly experience combines with a lack of military operational experience to generate strong anxiety, fear and stress in many new soldiers. However, this fear and anxiety can be balanced against a sense of anticipation and eagerness to test their ability under real-life conditions. Combat is their opportunity to do what they joined the army to do; to do what soldiers do. Military training can be a crucial factor in creating this eagerness as it eases their anxiety and fear and builds their confidence (see McNab 2009, [Colour Sergeant Richie Whitehead, Royal Marines] 28, [Captain George Seal-Coon, The Royal Anglian Regiment]

³ See McNab (2009), [Ranger Jordan Armstrong, The Royal Irish Regiment] 9 and [Private Tom Dawkes, The Mercian Regiment] 302, for accounts of how Afghanistan was the first or second time that they had been overseas.

231, [Captain Adam Chapman, *The Mercian Regiment*] 255, [Private Tom Dawkes, *The Mercian Regiment*] 302; Mullaney 2009, 315; see also McGarry and Walklate 2011, 909, for personal accounts of it being what they joined the army for and what soldiers do).⁴

Modern battlefields are generally urban centres. While the soldiers are often in relatively secure base camps, contemporary warfare is a place of contrast. The soldiers go from points of safety to harsh environmental conditions and immediate danger, alternating between periods of long waiting to life and death action. The danger of their environment can be emphasised for soldiers through events, such as needing to destroy personal correspondence in case they are captured or listening to guns fire over their heads and firing back (see McGarry and Walklate 2011, 906 which contains personal accounts). Although the base camps can be attacked (see Mullaney 2009, 270, 278; McNab 2009, [Sergeant Hughie Benson, *The Royal Irish Regiment*] 393, 413), the soldiers are particularly vulnerable when they leave these camps. They can leave these base camps in small groups to patrol the urban centres, to gather information, to fight the enemy and to provide security for professionals engaged in the running of the cities. For example, they can provide security for the establishment or repair of the cities' water supply, sewage, electricity and roads (Molan 2008, chapter 4; see also Mullaney 2009; McNab 2009). In larger formations, they can travel through the uncontrolled country between urban centres and enter unsecured cities that they are required to gain control of and to manage. Technological advances and sophisticated weaponry also combine with urban and asymmetrical warfare to create and facilitate the need for soldiers to engage behind enemy lines and to fight in small groups (see Osiel 1998, 1057).

The modern battlefield is dramatically different to the traditional battlefield. Instead of marching side by side against a clearly identifiable enemy, the soldiers are generally in relatively small and mobile groups and they are fighting an enemy that is often indistinguishable from the civilians that they are bound to protect. The contrasts between the mod-

⁴ Military training continues in war. Soldiers can run laps in body armours and with weapons. They can rehearse scenarios, often ambush scenarios, and they can inspect and prepare vehicles and weapons; see Mullaney (2009, 274).

ern and the traditional battlefield correspondingly lead to differences in the military structure and the decision-making structure. Instead of the traditional central hierarchical command structure, which is difficult to maintain over dispersed platoons or squadrons in battle, contemporary military structures and decision-making powers are often decentralised. In a decentralised structure, it is vital that the group is able to act decisively and quickly and that the individual soldier is competent, responsive to the changing environment, intelligent and committed (Osiel 1998, 1055–7). Soldiers need to be able to exercise independent and situational judgment because the commander may not be able to give orders for every response needed (see Mackmin 2007, 74; Bourke 1999, 85). As a result, the modern military command structure recognises that military effectiveness is reliant on the ingenuity of the group on the ground and its ground leader. The military structure also needs to be reasonably informal and egalitarian in order to build strong bonds, camaraderie and loyalties within the group and between the group and its leader. In modern combat, the group and the group leader rely less on formal command and have an enhanced need for situational judgment and on the ground initiative (see Osiel 1998, 1026, 1056–7; see also Kellett 1982, 92–3, for the dependence of military effectiveness on ground-level ingenuity, and Janowitz 1960, 8–9, for the need for an informal and egalitarian structure to build strong bonds).

A military structure that grants more freedom and ingenuity to the individual soldier facilitates the soldier in recognising and challenging an illegal order from their commander (Osiel 1998, 1028). This means that the modern soldier has a greater ability to identify and disobey an illegal order than the traditional soldier under the direct and immediate control of a commander. This greater ability leads to a higher standard of responsibility for the contemporary reasonable soldier. Although the modern soldier has greater freedom than the traditional soldier, the military hierarchical structure still exercises strong control over the individual soldier. The control and influence of the military hierarchy means that in reality, especially on the battlefield, a large number of a commander's illegal orders are likely to be followed (Osiel 1998, FN 541). The lower in the chain of command that the soldier is, the greater the level of compulsion is likely to be and the less likely it is that the soldier will question or

disobey the illegal orders of their superior (see *R v Finta* 1994, 838; see also Lippman 1996–1997, 51; Rowe 2008, 172).

Modern warfare is also a battle of logistics. There can be insufficient forces on the ground to fulfil all the tasks required of the soldiers, including protecting the region and fighting the enemy. In remote areas, the soldiers' base camps can be located in inadequate facilities, such as, an old police station in the town centre. The soldiers occupying these remote base camps can be too small a force to dominate the surrounding area and, therefore, are subjected to enemy attack.⁵ As a result, there is no secure area where the soldiers are protected from enemy attack. The combat zone is omnipresent. This constant danger and inability to escape from the combat zone heightens the stress, fear and fatigue of war.

There can also be difficulties in resupplying remote base camps with basic necessities, for example, because the roads are in terrible condition and there are limited landing sites which make resupplying by helicopters dangerous. Soldiers may not have access to the equipment that they need to effectively fight or due to the strain of war this equipment may be under repair when needed. When fighting intensifies, soldiers can run low on ammunition and helicopters may need to land during a live firefight in order to evacuate the wounded (see McNab 2009, 23, 41, 63–4; Mullaney 2009, 228–9, 316). The soldiers can also be provided with maps that are not detailed enough to allow moving vehicles and dismounted soldiers to navigate their way through unfamiliar hostile terrain. This leads to the paradoxical predicament where modern technology has the precision to fire a bomb through a chimney but can be of limited assistance in getting the soldier to the objective in the first place (see Mullaney 2009, 281). The soldier's isolation and scant resources can be exacerbated by the fact that soldiers generally receive relatively specialised training and accordingly are largely untrained in other specialised areas. For example, soldiers trained in light machinery are largely unskilled in

⁵For example, in 2006, 3300 British forces were deployed to southern Afghanistan, which was an inadequate force to enforce law and order in Helmand. The British commanders had only 700 infantrymen to cover 23,000 miles². In November 2007, the Security Council noted that the NATO force needed to be doubled to 80,000 front-line soldiers. Remote base camps were attacked by the Taliban using rocket-propelled grenades, small arms and Chinese 107 rocket attacks; see McNab (2009, 21–3, 340).

heavy machinery. However, the nature of combat means that the soldier may have to learn how to operate the new machinery quickly (Mullaney 2009, 229–30). Thus, the logistics behind modern warfare means that soldiers can be in a battlefield where there are insufficient troops to control the area, they are under constant threat as there is no ‘safe base’ and there is a lack of adequate equipment, maps, training and resupplies. These factors combine to significantly strengthen and exacerbate the soldier’s stress, fear and anxiety.

Omnipresent Enemy in a Hostile Environment and Harsh Conditions

While the military has a multitude of responsibilities in modern combat and there are a myriad of different factors affecting success in the contemporary battlefield, the military is still mainly concerned with finding and defeating the enemy. Many militaries dedicate most of its resources, time and effort into properly identifying targets and into trying to isolate and eliminate them. Reconnaissance missions and patrols are common and central components of the soldier’s duties. However, reconnaissance missions and patrols are generally through very dangerous places. The soldiers can be placed in large territories, a significant percentage of which are inhospitable and unsecured, and the soldiers may struggle to differentiate the enemy from civilians. The soldiers can often be fired upon with guns, machine guns or assault rifles and are vulnerable to suicide bomb attacks in urban centres and to mines and other improvised explosive devices in the terrain between urban centres. As the soldiers form patterns or the enemy gains confidence, there can be more attacks on the soldiers and even on their base camps (see McNab 2009, [Flight Lieutenant Christopher Hasler, DFC, RAC] 36, [Colour Sergeant Richie Whitehead, Royal Marines] 63, [Corporal Fraser Gasgarth, The Royal Engineers] 205 [Captain Dave Rigg, MC, The Royal Engineers] 222–4, 228; Mullaney 2009, 270, 278; see also Hockey 2002, 159, for some of the weapons used by the enemy). In this way, every location becomes a potential battlefield and every soldier is a ‘fair target’ at constant risk of being wounded or killed. Nowhere is safe (McGarry and Walklate 2011, 907, 910; Manderscheid 2007, 122).

The soldier's military training on how to perceive and interpret a hostile environment is cemented in combat. The soldier perpetually scans for potential danger, ambushes and cover. Every door and crooked tree is a potential threat and the soldier must continuously search for points of cover in case it is needed. The mantra of 'stay alert and stay alive' becomes real (see Mullaney 2009, 236, 271–2). This sense of constant threat and danger can result in high levels of stress, fear and anxiety for the soldiers. In response to this danger, and often the lack of sufficient intelligence on the enemy and the threat level, each military can respond differently. Some militaries, such as the US military, apparently took an aggressive approach in Afghanistan. They wore full combat gear, had heavily armoured SUVs and drove as fast as possible between destinations. On the other hand, the British military apparently took a gentler approach and got to know the locals (McNab 2009, [Colour Sergeant Richie Whitehead, Royal Marines] 28–9). The approach taken is likely to affect the soldiers' sense of danger and, in turn, their level of stress and fear.

The danger that soldiers encounter in the battlefield is compounded by the type of enemy that they face. In modern warfare, especially asymmetrical warfare, combat is 'fought by loosely knit groups of regulars, irregulars, cells, and not infrequently by locally-based warlords under little or no central authority' (Holsti 1996, 20). The enemy is very mobile and generally does not carry heavy combat gear, which means that they are able to manoeuvre quickly. They usually have an in-depth knowledge of the local terrain and they can be dedicated fighters. While some enemy fighters are simply handed a gun and are not skilled soldiers, others are well trained, well organised and well concealed (see McNab 2009, [Captain George Seal-Coon, The Royal Anglian Regiment] 261, [Private Tom Dawkes, The Mercian Regiment] 318–9, [Lance Corporal Daniel Power, The Royal Welsh] 367–8).

The most threatening and frustrating aspect of the enemy in asymmetrical warfare can be the difficulty in identifying the enemy and distinguishing them from the civilians that the soldiers are bound to protect. The enemy can regularly ambush soldiers and then blend easily back into the civilian population (McNab 2009, [Lance Corporal Daniel Power, The Royal Welsh] 367–8; Mullaney 2009, 231–2). In this way, the enemy is

everywhere and nowhere. This difficulty in identifying the enemy is often compounded by the particulars of the war or the nation. For example, in Afghanistan, most households have at least one gun so 'armed' does not equate to 'enemy'. Locals may not inform the soldiers of potential risks because informants can be killed by the enemy. Soldiers have also been told that they will know the enemy because they speak Arabic but the soldiers may not be trained to know if someone is speaking Arabic or the local language. Even children are potential enemies. While children sometimes provide reliable information, they also sometimes attack passing soldiers and are suspected of planting improvised explosive devices (see Mullaney 2009, 224–6; see also McGarry and Walklate 2011, 907, for an account of being shot at with an AK47 by a 14- or 15-year-old Iraqi teenager; the soldier notes that he did not know if the teenager was shooting because they were British forces or just a vehicle to aim at).

There is even a threat to soldiers from within their own group. Local police that are loyal to the coalition forces and local police that are not loyal to the coalition forces wear the same uniforms. The Afghan soldiers may not be reliable enough to take on patrol and they can sell their uniforms and equipment. As a result, reality is never more than approximation, and intelligence is often little more than a probability. This can have a psychological toll on the soldier as every local is a possible enemy and a single individual can be an enemy, comrade and a civilian depending on the time and the circumstances (see Mullaney 2009, 225, 232, 236, 248). The invisibility of the enemy and their ability to blend with the civilian population increase the group pressure to kill and the relevance of the civilian population as targets (Grossman 2009, 190). This blurring of the enemy and civilian means that shooting, or following an illegal order to shoot, an apparent civilian may not be perceived as clearly illegal to the soldier who has experienced civilians firing on his or her self or comrades or using seemingly innocuous devices like mobile phones to detonate bombs. While this raises some issues around the standard of 'reasonableness' with respect to the defence of superior orders, it also highlights important issues for the legitimate use of force and the soldiers' ROEs. The power and invisibility of the enemy and the uncertainty surrounding where the threat lies can also further increase the soldier's fear, stress, anger and anxiety.

The soldiers' behaviour can also be affected and their fear and stress exacerbated by the environmental conditions of combat. Research supports that common loud environmental noises, such as a lawnmower, can increase the likelihood of antisocial behaviour (see Mathews and Cannon 1975), and there is evidence that pleasant smells increase the likelihood that people will behave in a pro-social manner (Baron 1997; see also Doris and Murphy 2007, 36–7). Combat entails noises, sights and smells that are generally not experienced in peacetime (Mackmin 2007, 74). There are putrid smells, such as the distinctive smell of death, decomposing corpses, human excrement and rotting food (Sledge 1990, 142–3; Doris and Murphy 2007, 36–7). The noise level is exceptionally high. Artillery fire, helicopters and armoured vehicles all contribute to this noise level. If pleasant smells encourage pro-social behaviour, then, correspondingly, it is possible that unpleasant smells would hinder pro-social behaviour, and if loud environmental noises in civilian society can increase the propensity to antisocial conduct, then it is highly likely that the exceptional noise level of combat would have an even stronger effect on a reasonable soldier's conduct (see Doris and Murphy 2007, 36–7). In addition, the level of noise experienced during war can hinder the soldiers' ability to think and to process information (Doris and Murphy 2007, 36; see also Keegan 1978, 142–3). In this way, the combat environment is likely to have a strong effect on the soldier's moral functioning and behaviour and increase the possibility of unethical conduct.

Combat is exhausting and requires endurance. The soldiers sometimes live on rations for extended periods of time and must withstand extreme weather conditions. The soldiers must also undertake missions that can last days or weeks, march long distances and stay active, alert and awake for several days at a time. They must keep going and maintain the 'pressure' during these operations. This can lead to extreme fatigue and tiredness. This fatigue is significantly enhanced when the soldiers engage in one or more live contacts during these extended missions. This fatigue combines with the fatigue that is inherent in being in war for prolonged periods of time (see McNab 2009, [Warrant Officer Class 2 Pete Lewis, The Mercian Regiment] 272–3, 334 [Colour Sergeant Simon Panter, The Royal Anglian Regiment] 319–20; Mullaney 2009, 278, 325–7; Mackmin 2007, 74, McGarry and Walklate 2011, 907; Williams and

Smith 1949). The result of the combined fatigue can be deep physical and emotional exhaustion. Exhaustion directly affects cognitive function and induces ‘irritability, inattention, inability to concentrate, and excessive physiological responses to stress’ (Doris and Murphy 2007, 37; American Psychiatric Association 2000, 599–602). This extreme fatigue leaves the soldiers more vulnerable as they do not have the same ability to focus and process information and it increases the likelihood that soldiers will make mistakes or even act irrationally (see McNab 2009, [Colour Sergeant Simon Panter, The Royal Anglian Regiment] 319–20; Mullaney 2009, 325; Mackmin 2007, 74–5). These effects are compounded by the fact that each battlefield is unique. The weather, supplies, armament, unit strength and the unit’s spirit mean that every live contact with the enemy will be different. The rules and laws must be flexible enough to govern the widely varied and complex conditions of the battlefield (see Hooker 1993, 30; see also Osiel 1998, 1074–5).⁶

The Combined Effect of the Modern Battlefield

The environmental factors present in war and the soldier’s experiences can impair the soldier’s cognitive function and ability to process information. The foreign environment, the lack of resources and military personnel, the constant danger, the blurring of the enemy and civilian and the omnipresent enemy can combine to create strong feelings of fear, confusion and frustration. This level of fear can result in exceptionally high levels of stress and anxiety that far exceed the levels generally experienced by the reasonable person in civilian society. This high level of stress can produce physiological and psychological symptoms such as ‘changes in mental processes, moods, attitudes and motivation ... [and] ... a loss of working efficiently’ (Taylor 1991, 496; Mackmin 2007, 74). Some outcomes of this cognitive impairment are freezing, overreacting and irrational behaviour (Mackmin 2007, 74). The soldier’s cognitive impairment and the likelihood of irrational or unethical behaviour is exacerbated by

⁶Osiel regards the position that each situation must be approached on its own merit and the elimination of reliance on *ex ante* norms as too extreme and believes this approach heightens the risk of legal rules being excessively disregarded at the expense of tactical advantage; see Osiel (1998, 1075).

the soldier's sustained exposure to the noises, sights and smells of war and by the extreme fatigue associated with prolonged missions, firefights and war itself.

The modern decentralised military structure and the dynamic and changing nature of combat mean that the military is reliant on this stressed, fearful, frustrated and cognitively impaired soldier to exercise good situational judgment in combat. The dynamic and changing nature of combat also means that the law must balance creating rules that are sufficiently clear and structured to ensure that the behaviour of soldiers is of a high standard against the need to create rules flexible enough to account for and reflect the unpredictable nature of combat. The often quickly changing nature of war requires that sufficient latitude is given to the soldiers on the ground to utilise their ingenuity and situational judgment. When implementing the law, the courts need to be conscious of this balance, and when determining whether the soldier's situational judgment and actions were reasonable, the courts need to take account of the powerful effects of the modern combat environment on the soldier's cognitive function and behaviour.

Live Contact in Combat

The effects of the modern combat environment are compounded and significantly heightened during a firefight or a live contact with the enemy. Firefights are uncertain, confusing, frightening and perceptually corrupt events. They can also generate excitement and exhilaration. There are many practical hindrances to survival and success in firefights and they can result in death or injury, for the soldier or their comrades, and strong emotional pressure. These factors coalesce to affect the soldier's levels of stress and fear, decision-making ability and moral functioning.

Live Contact with the Enemy

A firefight is an immensely confusing and stressful event. During live contacts with the enemy, the soldiers may be under fire from multiple directions, there may be few places to take cover and the environmental

conditions may be unfavourable, such as temperatures in excess of 45-degree Celsius. The soldiers are generally carrying kits, ammunition, body armour, radios and weapons with a combined weight of approximately 70 to 120 pounds. The soldiers have to run for cover and to strategic positions, often over uneven ground, while carrying this, or a portion of this, weight. Despite this weight, adrenaline generally allows the soldiers to move quickly when under fire and exposed. However, this adrenaline and weight also contribute to exceptionally high levels of fatigue post-contact and weakens the soldiers' ability to fight and make decisions in a prolonged firefight.

The soldiers can be exposed to simultaneous, sustained and accurate fire from small arms, machine guns and/or rocket-propelled grenades. The crack and thump of fire is generally instantly recognisable to soldiers so that they know that they are under attack but it may be very difficult to pinpoint where the fire is coming from or how many shots have been fired. Sometimes the soldiers can see the muzzle flashes of the guns or the trail of the rocket-propelled grenades but they cannot see the enemy themselves. This means that while the soldiers know that they are under attack and in immense danger, they often do not see the enemy or know the enemy's position to return accurate fire. If the soldier's or the enemy's shots miss their target, they generally land in the ground nearby. In places like Iraq and Afghanistan, this means that firefights can raise large dust clouds. The movement of people and vehicles also contribute to these dust clouds. The dust further obscures the soldiers' vision. As a result, soldiers are not always certain if they have hit and killed the enemy target or not (see McNab 2009, 42–3, 68–9, 233–7, 245–6, 249–52, 260, 265, 277–80, 289–92, 327, 363–6, 370; 388–93, 395; Mullaney 2009, 287–90; Marshall 1974, 47, for personal accounts of what live contacts are like in modern warfare).

When the contact with the enemy is in an urban centre, the soldiers may need to clear the compounds and buildings. This can require the soldiers to breach the wall or door, possibly with an explosive charge and crowbars, throw in a grenade and then clear the compound or building in an aggressive manner. While clearing compounds or buildings, soldiers must be alert and exercise sound situational judgment. Clearing buildings requires soldiers to identify, distinguish and protect civilians, to

provide medical assistance to injured parties when possible, to fight the enemy inside and to take prisoners. The soldiers must also protect and evacuate their own injured comrades and soldiers suffering from shock or heat exhaustion. The length of a live contact with the enemy can range from minutes to days and a single firefight can last for hours. During a prolonged contact, the soldiers may be fighting non-stop for hours in intense heat and without access to dry clothes, food and water resupplies. The heat, exertion, weight of their combat kit, adrenaline and lack of food and water throughout the contact can combine to ensure a level of exhaustion generally never experienced in civilian society. Despite this exhaustion, the soldiers may have to stand guard, patrol or even fight the enemy as soon as the following day (see McNab 2009, 42–3, 68–9, 233–7, 245–6, 249–52, 260, 265, 277–80, 289–92, 327, 363–6, 370, 388–93, 395; Marshall 1974, 47; Mullaney 2009, 287–90).

As well as danger, the potential need to kill, noise and frustration, combat also involves a high level of uncertainty and confusion (see Williams and Smith 1949, 76–7). '[T]hree-quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty' (Von Clausewitz 1976, 101). Firefights and live contacts with the enemy are environments where a large number of dangerous and loud activities are taking place at once and there is a significant level of uncertainty surrounding many of these activities. This creates a combat environment that is extremely distracting and 'perceptually corrupt'. That is, it is not always possible to know what is going on. This means that it is immensely difficult for soldiers to accurately perceive all events taking place and, furthermore, the soldiers' cognitive ability to process the events that they actually perceive is impaired (see Doris and Murphy 2007, 35). This directly affects the decisions and actions of the reasonable soldier.

The soldier's ability to comprehend and cognitively process information and, thus, to accurately assess the situation is further deteriorated when they are exhausted due to heat, exertion, adrenaline and a lack of resupplies of water and food. The effects of perceptual corruption and exhaustion on the soldiers' cognitive function are significantly compounded by the fact that the reasonable soldier may have to make nuanced decisions in a complex environment, often in a matter of seconds or minutes, the decisions regularly have life or death consequences and the soldiers'

guiding rules—the rules of engagement—can be changed frequently and may even be changed during a live contact with the enemy (see, for example, McNab 2009, 292, 323–4; Warren 1996, 34; Osiel 1998, 1085, FN 620). Moreover, there is experimental evidence that confusing and perceptually corrupted environments can negatively affect an individual's ability to behave morally (Doris and Murphy 2007, 35. See also Latané and Darley 1970, 124; Clark and Word 1972, 1974). This is because moral behaviour is reliant on a clear assessment of the situation. The more difficult the situation is to assess, the more difficult it is to act morally (Doris and Murphy 2007, 35). Given the uncertainty and the dynamic and confusing nature of firefights, there is a heightened risk that soldiers may misinterpret the environment and act immorally or illegally.

When determining the parameters of the law, the government, legislature and courts should be aware of the need to balance the law so that it is stringent enough to ensure high standards, clear enough to guide the soldier on the ground and yet flexible enough to reflect the changeable nature of combat. When determining whether the soldier's situational judgment and actions were reasonable, the courts need to recognise and take account of the powerful effects of the modern combat environment on the soldier's cognitive function and behaviour.

Responses Under Fire and Witnessing Death

Firefights and live contacts can be shocking, extremely frightening and exciting experiences. Live contact with the enemy is an obvious source of danger and threat. Combat is a dynamic environment and, therefore, despite the best planning and strategies, plans often change in combat. This increases the potential for mistakes and reinforces the need for the soldiers to be able to adapt and to exercise situational judgment (see McNab 2009, 83–4, 88–9, 166, 168). This uncertainty and unpredictability is also likely to raise the soldier's levels of stress, anxiety and even excitement. Many soldiers experience high levels of adrenaline and some describe a firefight as the worst and best experience of their lives (see, for example, McNab 2009, 68–9, 148, 234, 245–6, 326, 365–6, 373, 392, 424–5; Mullaney 2009, 69, 287, 318–9; McDonough 1985, 52). Some

soldiers respond to this adrenaline, fear and stress by entering a state of shock and freezing. This is more common among young soldiers during their first firefight but it can occur to soldiers at any level of combat experience and even after several tours (see Murray 2006, 54; see also McNab 2009, 100–1, 246, 270, 373).

Most soldiers find that in the intensity of a firefight their military training takes over and they instinctively and automatically perform the conditioned response (see McNab 2009, 246, 367, 378–9; Mullaney 2009, 320, 333). Their training helps to maintain group cohesion and military commands provide a ‘clear voice’ in combat while the repetitive training significantly heightens the individual soldier’s ability to respond instinctively and the group to respond collectively to the commands (King 2006, 506–7). When military training and obedience to orders prove successful in the uncertainty, confusion and danger of combat, it can further reinforce the soldiers’ faith in their training and their superiors (see McNab 2009, [Ranger Jordan Armstrong, *The Royal Irish Regiment*] 379). Action can also steady the soldiers’ nerves and build their confidence along with a conviction that it is ‘kill or be killed’ and ‘us versus them’. Indeed, there are numerous accounts of soldiers overcoming their fear and showing courage in the face of fire and even performing heroic and selfless deeds in order to save their comrades or to ensure military success (see, for example, Mullaney 2009, 287–8, 318–22; McGarry and Walklate 2011, 907; McNab 2009, 129–130).

The tension between the soldier’s duty to fight and their fear of death or being maimed is a chief cause of war neurosis (Gabriel 1987; see also Jamieson 1998, 497). Witnessing the death of others can cause fear and force soldiers to confront their own mortality (McGarry and Walklate 2011, 907). This fear is amplified with the death of a comrade. The death or injury of a comrade in combat can have a powerful effect on soldiers’ confidence, their will to fight and their stress, fear and anxiety. It can make it personal and soldiers can feel that they are going to ‘pop’ or ‘go loopy’ (see Hockey 2002, 159–60, for a personal account). The death or injury of a comrade can lead to a state of shock that is comparable to ‘battle shock’, a strong sense of apprehension, fear, anger, frustration and guilt and soldiers can become withdrawn. Soldiers can lose their sense of invincibility and their confidence in their ability and their

survival can be shaken (see McNab 2009, 93, 245–6, 256, 290, 323, 328, 367; Mullaney 2009, 285–6, 289, 294–5, 322, 340). These feelings are heightened when the soldiers have to lift their wounded or dead comrades off the field and are directly confronted with the trauma of related events, such as holding onto their dead friend's bloody uniform to stop them slipping off the stretcher (see Mullaney 2009, 295).

Despite the powerful effect of the death or injury of a comrade, soldiers must continue to fulfil their duties and to fight and kill the enemy (Mullaney 2009, 298). This means that soldiers can be exposed to the additional death and injury of their comrades, which compounds and heightens the emotional pressure on the soldiers. The regular loss and injury of comrades can make soldiers question whether the war is worth it and heavy casualties and losses have been linked to decreased combat effectiveness and even moral failures (see Doris and Murphy 2007, 38; McNab 2009, [Captain Adam Chapman, *The Mercian Regiment*] 322). The death and injury of comrades can also combine with the blurring of the enemy and the civilian discussed above to enhance the group pressure to kill and the relevance of the civilian population as targets (Grossman 2009, 190). Indeed, Rowe notes that the desire for revenge for the loss of comrades can have the same effect as the soldier being intoxicated with alcohol or drugs (Rowe 2008, 181).

Firefights and live contacts with the enemy can elicit strong feelings of stress, fear, confusion and excitement and lead to high levels of adrenaline. For some soldiers, this morass of conflicting emotions results in battle shock and freezing; for other soldiers, it leads to heroic deeds; but for most soldiers, it validates and increases their reliance on military training and obedience to superior orders. This emotional pressure is significantly elevated when the soldiers endure death and injury, especially the repeated death and injury of comrades, and can result in decreased military efficiency and, moreover, it can negatively affect the soldiers' moral functioning. This effect is compounded by the perceptually corrupt nature of firefights, which directly impacts on the soldier's ability to accurately assess the situation and to cognitively process relevant information. Yet, firefights often require soldiers to process and assess large quantities of information in a very short period of time and their ability to gather all pertinent information may be limited by the environment itself. During

a firefight, soldiers must decide on actions, including whether to obey orders such as orders to fire on certain targets, when their ability to gather and process pertinent information is likely to be lower and their moral reasoning is likely to be altered.

Brutality in Combat

A number of combat soldiers describe war as a mixture of death, killing, survival and sacrifice (Brown 2015, 121). War involves bonding, loss and suffering, although this suffering is buttressed by resilience (McGarry and Walklate 2011, 911). Exposure to and participation in this killing, suffering, brutality and violence can affect the soldiers' perception of acceptable behaviour, their moral functioning, their levels of stress and fear and their psychological well-being.

Mass Deaths, Destruction and Human Suffering

'War is hell' (Walzer 2000, 22). It involves killing, death, violence and inhumanity to a degree that is rarely, if ever, experienced in civilian society. Large numbers of people are killed, injured or displaced from their homes. A total of 4815 coalition forces died in Iraq and 3506 coalition forces were killed in Afghanistan (Iraq Coalition Casualty Count 2015. See also Brown 2015, 121). In Afghanistan, by July 2007, the rate at which British soldiers at the front-line were seriously injured or killed had reached almost 10 per cent, which is nearly as high as the 11 per cent experienced by British soldiers on the front-line in World War II. One British battalion during one tour had over 200 firefights and live contacts with the enemy (McNab 2009, 304, 324). The number of civilian deaths from the wars in Iraq and Afghanistan is unknown. One estimate though is that more than 500,000 civilians died in Iraq (Brown 2015, 121; Hagopian et al. 2013). What is clear is that in war people die or are injured and often in very large numbers.

Although there are stringent regulations governing lawful conduct in war, war still inevitably entails violence and suffering (Chuter 2003, 5;

Mackmin 2007, 74). Professor David Grossman gives a vivid description of this violence and suffering when he states that soldiers

Hear the pitiful screams of the wounded and dying. *Smell* the butcher-house smells of feces, blood, burned flesh, and rotting decay, which combine into the awful stench of death. *Feel* the shudder of the ground as the very earth groans at the abuse of artillery and explosives, and *feel* the last shiver of life and the flow of warm blood as friends die in your arms. *Taste* the salt of blood and tears as you hold a dear friend in mutual grieving, and you do not know or care if it is the salt of your tears or his. And see what hath been wrought. (Grossman 2009, 73; see also McNab 2009, 252, 322, for an account of the sounds and smells of combat)

In some wars, this violence and suffering has been so prevalent and consistent that soldiers may have gradually believed that violence and suffering was everywhere and simply part of life (see Sledge 1990, 257).

Advances in weapon technology result in soldiers looking directly at the damage caused by devices such as mines, rocket-propelled grenades and improvised explosive devices. This means that the soldiers can be exposed to sights such as dead bodies, mutilated bodies, burnt bodies, exposed brains and intestines, limbs detached from torsos and severed torsos. Soldiers can also be confronted with the effects of bullets on the human body. Following a shooting, the soldiers may have to look at the scraps of human tissue embedded in the dirt and, unlike training, the soldiers realise that they or the enemy generally do not get up when shot (see Grossman 2009, 73–4; Mullaney 2009, 300, 317; McNab 2009, 10, 343–4; McGarry and Walklate 2011, 909). Soldiers may also have to remove the dead bodies. In contemporary conflicts, these bodies can be in a severely degraded state as they may have been exposed to intense heat for several hours. Sometimes, the soldiers have to scrape up the hands, feet and bits of their comrades into day sacks and load more complete bodies into trucks. They may have to extract comrades from burning vehicles and see the effects of the fire on the body. They may also see civilians, and even children, dead or injured and in agony after an encounter with the enemy or be required to witness and be in close proximity to injured or dead comrades (see Brown 2015, 121–2; McGarry and Walklate 2011, 909–10; McNab 2009, 10–1, 238, 356–7).

A large number of soldiers are exposed to these sights in war. Approximately 45 per cent of regular British soldiers and 49 per cent of British reservists have seen fellow comrades killed or injured and 15 per cent of regulars and 20 per cent of reservists handled bodies while on duty in Iraq (Browne et al. 2007, 487. See also McGarry and Walklate 2011, 910). Soldiers have a range of responses to this level of violence and destruction. A number of soldiers experience high levels of stress or depression, enter a state of shock or vomit. Other soldiers emotionally distance themselves from the event and 'feel nothing' at the sight of dead and mutilated bodies or their own risk of being killed or mutilated (see, for example, McNab 2009, 10–1, 286, 296, 338–9, 343–4, 357; Mullaney 2009, 317). In a number of cases, witnessing the sights of war including mass destruction and killing—and especially atrocities—carries a heavy weight and soldiers can experience severe mental health issues (McGarry and Walklate 2011, 910; see also Pols and Oak 2007; Bowling and Sherman 2008; Peters 2001). This level of violence, destruction and suffering can also have a strong impact on the soldier's sense of morality and perception of reasonable and appropriate behaviour.

Participation in Killing

In addition to witnessing the violence and destruction of war and dealing with its aftermath, soldiers also have to participate in the violence and destruction. Fighting and killing the enemy under certain conditions is simply part of the soldier's job and duty (Murray 2006, 55). Combat means that soldiers are not only at risk of being killed or wounded but that they may also have to kill or wound others (Keegan and Holmes 1985, 266. See also McGarry and Walklate 2011, 904). While soldiers often kill their enemy from a distance and sometimes cannot even be certain that they have indeed killed the enemy after firing, soldiers also have to kill at close range and see the effects of their actions (see McNab 2009, [Colour Sergeant Simon Panter, *The Royal Anglian Regiment*] 313, for an account of killing at mid- and close range). Due to the physical and emotional proximity to the other human being and the consequences of their actions, it is much harder for soldiers to kill at close range than at long range and the emotional effect of killing is much stronger

(Grossman 2009, 97–8, 114–19).⁷ The soldiers see the face of the dead enemy and the repercussions of their actions, albeit legal and militarily necessary actions (see, for example, McNab 2009, [Lance Corporal Daniel Power, *The Royal Welsh*] 242–3). While it is not a common feature of modern combat, soldiers sometimes still have to bayonet the enemy, which is an exceptionally intimate form of killing. The soldiers may be required to bayonet after shooting to ensure that the enemy is not feigning death. Soldiers may also have to kill enemy combatants that are wounded but armed and still capable of taking an active part in hostilities (see, for example, McNab 2009, [Colour Sergeant Simon Panter, *The Royal Anglian Regiment*] 311–3). Participating in these killings can have a powerful emotional and psychological effect on the soldier.

As well as legitimate and lawful violence and destruction, soldiers are also sometimes exposed to illegal violence and even the commission of atrocities against both civilians and enemy soldiers. Some drone operators in contemporary conflicts provide accounts of receiving and following potentially illegal, and at a minimum morally dubious, orders. These include firing missiles where notably more civilians than combatants were killed or firing on persons when no weapons were visible or the person was wounded (Goodman and González 2015). The actual legality of these orders would depend on legal principles such as the principles of military necessity, distinction between civilians and combatants and proportionality and the factual information known by superiors that would determine the application of these principles and which they may not have disclosed to the pilots. Ultimately, the courts would need to decide the legality of these specific orders. What is of particular relevance is that the soldiers have concerns over the legality of the orders but do not appear to have questioned the orders at the time. They have also suffered psychological issues after following their orders to kill (see Whigham 2015, for the psychological issues encountered). In other personal accounts of war, soldiers also describe the execution of wounded and surrendering soldiers as well as witnessing the rape and torture of civilians. In Vietnam, soldiers had to kill women, children and men in their homes in front of their families at close range. This means that the soldiers directly saw the

⁷ See Grossman (2009, 97–133) for an in-depth discussion on killing at a variety of ranges.

impact of their actions on the person and the family (see Stuart-Smyth 1989, 66; Grossman 2009, 113, 219–22, 268–9; Mackmin 2007, 75; Keegan 1978, 47–9; McManners 1993, 176, 347, for accounts of the commission of such violence or atrocities).

Participating in and witnessing violence and atrocities come with a high psychological cost. For lawful killings in combat, soldiers are torn between two moral pillars: to follow their civilian morals and provide greater protection to their mental well-being by not killing or to follow their moral duty as soldiers and fight and kill if necessary (McGarry and Walklate 2011, 908). The consequences of either decision carry a psychological burden: the taking of another's life or failing in their duty and the potential death of their comrades for their failure to fight. War can also attack the individual's instinct for self-preservation in the face of danger to a degree that is rarely experienced by people in a modern civilised community. This can lead to anxiety neuroses, such as weeping, tremors and sleep and memory issues, or physical disabilities, such as mutism, blindness or paralysis (Hynes 1997, 63, quoting British anthropologist WHR Rivers). We are gaining an increasing understanding of the psychological toll of combat and the connection between exposure to combat and mental health issues, such as post-traumatic stress disorders (PTSD), anxiety disorders, alcoholism, substance abuse, violent behaviour and depression. These effects can often extend beyond the combat environment (see McGarry et al. 2015, 353; McGarry and Walklate 2011, 904; Kulka et al. 1990; Forbes et al. 2011; Sundin et al. 2011; Prestwich 2003). The Department of Veterans Affairs (DVA) indicates that approximately 30–40 per cent of Iraq veterans will suffer serious psychological issues associated with PTSD and the US DVA estimates that 22 veterans commit suicide every day (Brown 2015, 129, 132). This research shows that war causes significant psychological harm to soldiers but we need to examine and research to a much greater degree the effects of this psychological harm on the soldiers' ability to process information in combat, their standards and behaviour and ultimately their legal liability.

The effect of close-range killing and witnessing violence and the commission of atrocities can have a dramatic effect on soldiers and their once civilian perspective of right and wrong and permissive and reasonable action. The bonds of civilisation are disrupted in war as, for soldiers to

be effective, they must move outside of and break civilised norms and restrictions (McManners 1993, 312, quoting David Cooper, a padre in the Falklands war; see also Mackmin 2007, 75). One soldier, after witnessing the commission of an atrocity, summed up this division when he stated that

[t]here was no honor here, no virtue. The standards of behaviour taught in the homes, churches, and schools of America had no place in battle. They were mythical concepts good only for the raising of children, to be cast aside forever from this moment on. (Stuart-Smyth 1989, 68)

In this way, war alters the soldiers' civilian morality and perceptions of reasonableness and creates a distinction between the reasonable soldier and the reasonable civilian.

Lawful Kills Versus the Commission of Crimes: The Processes Facilitating Killing

There is a spectrum of theories surrounding why and when people kill or engage in violent or aggressive acts. This spectrum ranges from inherent personality traits through to situational or environmental influences. Theodor Adorno and his colleagues advocate the 'authoritarian personality' theory. They maintain that persons with an authoritarian personality display characteristics such as strict compliance with traditional values, obedience to and an uncritical attitude towards authority figures, and stereotyping and aggression to 'others' or 'outgroups'. The authoritarian personality also has a strong propensity to aggressive impulses. These characteristics make the authoritarian personality more susceptible to adopting antidemocratic or divisive propaganda. This type of propaganda or systems that promote the subjugation of certain groups provide the authoritarian personality with an authorised outlet for their aggression and violence towards the targeted outgroup (Adorno et al. 1950). John Steiner argues that many violence-prone persons are 'sleepers'. That is, their more aggressive personality traits are generally dormant but can be awakened in certain environments. In these environments,

the violence-prone individual is more likely to self-select to participate in violent and aggressive organisations and movements (Steiner 1980). While Ervin Staub acknowledges that some individuals commit violent and aggressive acts because of innate personality traits, he also contends that most people are capable of extreme violence against others under the right circumstances. Common psychological processes as well as common human motivations, thoughts and feelings can be manipulated to lead ordinary individuals to commit mass violence. He proposes that '[e]vil that arises out of ordinary thinking and is committed by ordinary people is the norm, not the exception' (Staub 1989, 124, 116–49).

Zygmunt Bauman rejects that violence or aggression is primarily the result of 'faulty personalities'. He argues that human cruelty is social in origin and that people fulfil the roles that society sets for them. Bauman maintains that the real exception is the person who is able to overcome social authority and exercise their own moral autonomy (Bauman 1989). Philip Zimbardo's Stanford Prison experiment famously illustrated how one's environment can significantly alter the behaviour and moral standards of psychologically sound and well-adjusted individuals. In this experiment, Zimbardo deliberately excluded any individual who scored outside of the 'normal' range in a variety of psychological tests, including a test to identify an 'authoritarian personality' type. The accepted participants were separated into guards and prisoners and placed in a simulated prison. Despite rules against physical violence, within a short period of time the guards displayed increasing brutality and humiliated and dehumanised the prisoners (Haney et al. 1973; see also Zimbardo 2007). Approximately one-third of the guards actively sought ways to mistreat the prisoners, the majority of guards enforced the standard rules but did not seek opportunities to act cruelly and less than 20 per cent of the guards did not punish the prisoners and showed acts of kindness. This distribution of responses matches Browning's study of a German police battalion during World War II.⁸ He found that a number of the policemen were enthusiastic killers, the majority followed orders to kill

⁸ Although Browning's study was of a reserve police battalion, it was not a civilian police environment. Instead, the reserve policemen were in a war environment and were directly participating in the killing and/or capture and transportation of people to extermination camps. In this way, their actions and standards shed light on behaviour in combat.

but did not go out of their way to kill and a small minority of less than 20 per cent refused or evaded orders to kill (Browning 1998, 168; see also Browning 1998, 165–8, for an overview of the different theories for violence). These studies indicate that the environment by itself is capable of producing abusive and unethical actions against more vulnerable or defenceless individuals.

The above spectrum of theories supports the proposition that aggressive and violent behaviour is likely to be a combination of innate personality traits and external environmental factors. The extent to which innate characteristics or environmental factors lead to violence will vary from individual to individual and situation to situation. The individual personality traits of each soldier will also vary significantly and will often be, with the exception of active recruiting for particular personality types, outside the control and responsibility of the military and the state. It is also estimated that only 2 per cent of the population are predisposed towards psychopathic aggressive tendencies (see Swank and Marchand 1946; Grossman 2009, 43–4, 60; Murray 2006, 48). This lends support to the influence of external environmental factors on behaviour. There are a host of environmental factors that can facilitate violent and aggressive behaviour in soldiers. These factors are sometimes deliberately created or exacerbated by militaries in order to enable soldiers to fight and kill the enemy if necessary. Yet, the factors that assist lawful kills can also assist unlawful kills and even the commission of atrocities, especially when they are excessively strong and not sufficiently countered with a culture of legitimacy and accountability. While we will explore some common environmental factors that are likely to influence the soldier's behaviour, it is important to note that these factors are applicable in varying degrees, and none without qualification, and whether and the extent to which these factors are relevant will differ between each individual case.

Brutalisation of Combat

The processes put in place during military training to enable soldiers to overcome their innate reluctance to killing are cemented, and even intensified, in war. A process of 'brutalisation' can begin in military training

with the commanders' severe treatment and arbitrary abuse of power. This treatment can mean that soldiers are eager to take on the role of aggressor in combat in order to avoid the role of aggressed, their anger towards their superior can be transformed into combat strength in the field and they can form strong group bonds and unity (Osiel 1998, 1042; see also Leed 1979, 105–6, for the soldier's eagerness to adopt the role of aggressor; Ienaga 1968, 53 and Dyer 1985, 102–3, for the transformation of mistreatment into combat strength and group unity). As such, this process serves important military purposes. The combat environment itself is also brutalising. A recurring theme in soldiers' accounts of contemporary war is the brutalising effect of the exposure to and participation in high levels of violence and suffering (see Osiel 1998, 1041; see also Fussell 1996). This builds on and heightens the effects of the brutalisation process in military training.

The brutalisation of soldiers can also produce brutalisation by soldiers, and their aggressive behaviour is not always limited to legitimate enemies in combat. It may also be directed against unlawful targets, such as, prisoners and civilians (Osiel 1998, 1041–2; Ienaga 1968, 53). A World War I colonel acknowledged this effect when he stated that 'you can't stimulate and let loose the animal in man and then expect to be able to cage it up again at a moment's notice' (cited in Bourke 1999, 176). The soldiers' anger and fury towards being attacked by the enemy (see, for example, McGarry and Walklate 2011, 908, for a personal account), their desensitisation to violence and killing, their bitterness over their own casualties and their frustration at the tenacity of the enemy can sometimes cause the soldier to explode in war rage or a 'battlefield frenzy' or to resolve to take revenge on the enemy (Browning 1998, 160). In this brutalised state, soldiers can commit atrocities.

These effects can be compounded by the soldiers' forced confrontation with their own fears, unimportance and mortality. The trauma of facing their own mortality is sometimes emphasised by 'shaming ceremonies' where the shaming involves the participation of the soldiers in the victimisation or humiliation of others. Group actions and even atrocities, which are often informed by an 'unfocussed, and uncontrolled, fear of death', act as a collective catharsis for the soldiers' fear, guilt and shaming (Jamieson 1998, 499). In the face of brutalisation and violence, soldiers

can also have a feeling of their own unimportance. This sense of unimportance can lead to soldiers treating the lives of others, such as disarmed enemies, as equally unimportant (Keegan 1978, 322; see also Osiel 1998, 1041). These emotions and effects can be particularly prevalent in asymmetrical warfare. In such conflicts, there are no clear demarcations of war zones, enemies or ground gained. This can result in soldiers feeling frustrated, angry and seeking revenge and they may retaliate unlawfully against someone or anyone when they are unable to fight or retaliate against their actual opponent (see Karsten 1978, 69; Grossman 2009, 269; Osiel 1998, 1041).

Wartime teaches violence. The brutalisation of the soldier can stimulate lawful aggression and violence but also unlawful aggression and violence and, in some cases, even atrocities. Although, in the past, atrocities from war rage and fear have sometimes been tolerated and excused by militaries, and have occasionally even been supported by commanders, these atrocities represent a breakdown in military discipline and the chain of command. As such, they generally do not reflect government policy or military procedure (Browning 1998, 160–1). Bar exceptional circumstances, these types of atrocities are unlikely to result from the orders of commanders. However, it is necessary to understand the processes and effects of brutalisation in order for the law and government policy to be able to prevent or even lower the occurrence of such atrocities.

Desensitisation and Moral Drift

Exposure to and active participation in violence and/or killing not only has a brutalising effect on the soldier but it can also lead to desensitisation and eventually 'moral drift'. These processes significantly shift the soldiers' standards of reasonable and acceptable conduct (see Doris and Murphy 2007, 38, 44–5, 47). Desensitisation can occur due to the stresses inherent in combat and the fact that war is innately replete with death and killing. The routinisation or habituation of any task through repetitive performance, even morally repellent tasks, can desensitise the individual to the nature of the act. Continuous exposure to the sight of dead and mutilated bodies and the repetitive requirement to kill or injure

others can desensitise or numb soldiers to these sights and tasks. War can change the moral values of an ordinary person to such an extent that killing another human being is a routine act that requires little to no moral reflection. It can be just a job (see Bourke 1999, 58–9; Laufer et al. 1984, 79; see also Goodman and González 2015, for a personal account of the numbing effect of repeated kills).

This desensitisation can then seep into a lack of empathy and even cruelty. The process is a gradual one in which group norms and the behaviour of the group towards the enemy evolves. An action that was once unthinkable can become first acceptable and then routine (Muñoz-Rojas and Frésard 2004, 10). This process is known as ‘moral drift’. It is particularly effective when combined with norms that encourage criminal or immoral conduct. This is because criminal behaviour is learned when such behaviour is encouraged and promoted to a greater degree than non-criminal behaviour (Burgess and Akers 1966; see also Klein 2012, 89). Browning describes this process with respect to a police battalion in World War II. Repetitive exposure to violence and killing meant that many of the policemen became numb and indifferent and some even became eager killers. Within a few months, the policemen went from being shaken and bitter and with no desire to talk after their first mass killing of Jews to some policemen telling jokes about their killing experiences (Browning 1998, 127–8; see also Goodman and González 2015, for an account of desensitisation in contemporary conflicts where a safety observer says ‘splash’ when a missile hits and fatally wounds a man). Habituation to violence and death in war can breed the ‘atrocious habit’ (Von Hentig 1947, 336; see also Jamieson 1998, 485), where soldiers become accustomed and desensitised to committing very violent acts and even atrocities.

Desensitisation and moral drift mean that the soldiers’ civilian perceptions and standards can be progressively eroded until soldiers regard atrocities as the norm and as morally appropriate (see Doris and Murphy 2007, 38, 44–5, 47). Once atrocities begin to become acceptable, they are likely to escalate in frequency and force and, in direct correlation, the soldiers’ altered standards of reasonableness and perceptions of appropriate conduct are further entrenched.

Dehumanisation of the Enemy

Dehumanisation involves denying the enemy's humanity and regarding the enemy as an inferior form of life.⁹ The effects of dehumanisation and 'othering' are particularly effective in war. War creates a division between 'us' and 'the enemy'. This division allows the enemy to be readily objectified and to move them outside the realm of human obligation. In this environment, governments can more easily adopt 'atrocities by policy' (Browning 1998, 161–2). That is, as opposed to atrocities that occur as a result of war rage or battlefield frenzy by brutalised, numbed or frustrated individuals, strong levels of dehumanisation and othering as part of government policy in the war environment can stimulate and 'justify' breaches of the law or even atrocities. Genocide represents the most extreme form of violence against another group and dehumanisation, and the othering of the targeted group is often one of the mechanisms used to enact a genocidal campaign. Genocide encompasses rational, irrational, cognitive and emotional elements. For the mass persecution and destruction of an entire group to succeed, a large number of people must accept the need and purpose of this destruction. The acquiescence of the people can be obtained through ideological propaganda and policies by politicians and others that manipulate the belief system of the masses. This ideology provides the irrational component of the genocide campaign (Alvarez 2008, 214, 217).

Dehumanisation and othering can not only be used to gain community support for the persecution of a particular group but also be employed by the military to facilitate the soldier in fighting and killing in war. By denying the enemy's humanity and portraying them as inferior, soldiers do not have to engage in the same moral reflection or consider the negative consequences of their actions, which in turn weakens the human innate resistance to killing (Grossman 2009, 161). This dehumanisation process can be initiated in military training. However, the process is generally intensified and cemented in war. This denial of the enemy's humanity can be achieved through propaganda and by renaming the enemy as an abstract or lesser object. The greater and more obvious

⁹ See chapter 4 for a discussion of the dehumanisation of the enemy in military training.

the differences between the soldier and the enemy, such as racial or ethnic differences, the easier it is for the soldier to deny the enemy's humanity (Grossman 2009, 160–1). Indeed, deeply embedded racism or racial stereotypes, especially in the brutalising context of combat, have been linked to more frequent and severe violations of the laws of war by both sides (Browning 1998, 159–60).

Denial of the enemy's humanity through propaganda and through renaming the enemy has been a prevalent feature in numerous wars. During the Vietnam War, the American soldiers referred to the Viet Cong as 'gooks'; during World War II, the Nazis called Slavs *untermensch* or inferior men; during the Rwandan genocide of 1994, the Hutus called the Tutsis 'cockroaches' or 'snakes' (Frésard 2004, 47); and during contemporary conflicts in Afghanistan and Pakistan, targeted children are referred to as 'fun-sized terrorists' or 'tits' (terrorists in training) (Goodman and González 2015; Pilkington 2015; Liebelson 2015). Euphemisms are also used to create psychological distance from the actions of targeting and killing other human beings. During World War II, policemen searching for and killing Jews that had escaped or were hiding referred to these searches as 'forest patrols' for 'suspects'. Informally, these searches were referred to as 'Jew hunts' (Browning 1998, 123), which has a likely association with the general hunting practices of searching for and killing animals. In recent conflicts, killing was called 'cutting the grass before it grows too long', or 'pulling the weeds before they overrun the lawn' (see Goodman and González 2015; Pilkington 2015). The humanity of the enemy can also be denied through the adoption of a 'body count' mentality. This mentality means that instead of regarding the enemy as a human being, the soldier regards the enemy as only a number. The objective is to get the highest number (see Grossman 2009, 161, for the body count mentality in Vietnam). This dehumanisation of the 'enemy' contributes significantly to creating the psychology distance that enables killing (Dower 1986, 11).

In asymmetrical warfare, the dehumanisation of the enemy can extend beyond the enemy forces and into the civilian population. This style of warfare can result in soldiers feeling that the local civilians are trying to kill them or in soldiers suspecting that the civilians are part of the enemy group or are supporting the enemy. This can lead to a deep and profound

suspicion and even hatred of the local population (see Grossman 2009, 163, for a discussion of this process in Vietnam). This suspicion when combined with the effects of dehumanisation can lead to atrocities. The dehumanisation of the enemy and associated groups in both training and the combat environment has been attributed to atrocities such as the My Lai massacre (Holmes 2004, 391; O'Brien 1973, 42).¹⁰ Moreover, the history of warfare shows that international law has little influence over the actions of the soldiers when there is a strong belief that the enemy is not human or deserving of rights (Osiel 1998, 1049).

Dehumanisation and othering are mechanisms to psychologically distance the soldier from the person that they are required to fight and kill. This facilitates and eases the burden of killing and, as such, serves an important military purpose. However, dehumanisation can also facilitate excessive violence against the 'other' and even breaches of the law or the commission of atrocities. This is particularly so when the dehumanisation and othering is part of a wider governmental policy that is directed towards the persecution of a particular group and is set in a war context where individuals and the community feel more threatened. In this environment, soldiers are more likely to commit, and to follow orders to commit, actions in violation of the laws of war.

Distance: Moral, Physical and Psychological

Dehumanisation provides an important psychological distance between the killer and those they have to kill. However, there are a number of other forms of 'distance' that can also ease the burden of and facilitate killing. 'Moral distance' is when the soldiers condemn the enemy's cause or actions and affirm the legitimacy of their own cause and actions. The enemy is determined to be guilty and there is a corresponding need to punish or avenge their actions. There is generally also a need to assert the

¹⁰ Holmes believes that the dehumanisation of the Vietnamese through the 'mere gook rule' paved the way for the My Lai massacre. The 'mere gook rule' stated that killing a Vietnamese civilian did not count; see Holmes (2004). O'Brien believes that the dehumanisation of the enemy and the conditioning process in military training contributed to the actions of the US soldiers in My Lai; see O'Brien (1973, 42).

legality of the soldiers' cause and to defend their values and land. That is, the enemy's humanity is recognised but their death is necessitated by justice (Grossman 2009, 164–6; see also Mullaney 2009, 270, for the enemy's atrocities making it easier to kill). The language of 'crime and punishment', 'what's right', 'justice' and 'deserts' have pervaded many war narratives and the use of moral distance to justify war and to enable soldiers to kill has been employed in numerous conflicts. Its use stretches from the Crusades to modern conflicts, such as Iraq and Afghanistan (see Grossman 2009, 164–6; Jamieson 1998, 495; Shay 1995). Moral distance is less likely than the dehumanisation of the enemy to produce atrocities and, correspondingly, it is more likely to assist soldiers in upholding international law and individual human dignity (Grossman 2009, 168). However, moral distance, especially when combined with the dehumanisation of the enemy, can progress into demonisation of the enemy. Demonisation involves branding the enemy as an evil malicious alien force that threatens the well-meaning and virtuous society. In this regard, any suffering inflicted contributes to the greater good and is therefore, not only acceptable, but a duty of the soldier (Baumeister 1997, 89, 170). This can lead to the commission of atrocities against the enemy.

Physical distance facilitates aggression, violence and killing. It is significantly easier for pilots, drone operators, artillery personnel, bomber crews, naval gunners or missile crews to kill from a long distance than it is for a soldier on the ground to kill the enemy in close contact. Physical distance allows the kill to be more clinical and 'clean' and less personal. They do not see the bodies or hear the screams. In this way, physical distance provides an emotional and psychological distance that allows individuals to kill large volumes of people and cause extreme suffering, often to civilians, with comparative ease and less psychological trauma (see Grossman 2009, 97–110). Diffusion of responsibility through the division of labour also allows soldiers to feel that they are not ultimately responsible for the deaths. For example, during the mass execution of Jews during World War II, individuals did not believe they bore responsibility as they only rounded up and guarded Jews to be killed by someone else, or loaded them on trains destined for extermination camps (Browning 1998, 77, 84–5, 89–90) or scheduled the trains or manufactured the poisonous gas. Yet, each action was integral to the eventual deaths. The division of

labour for acts of killing is also a component of modern warfare. In drone operations or missile strikes, the imagery analysts select the target, the decision makers decide to fire and the pilots pull the trigger. This diffusion of responsibility can mean that no one feels the full responsibility of killing (Goodman and González 2015). Responsibility for killing can also be mitigated by orders. Following the orders of a superior means that the person does not have the 'burden of choice', which can provide the person with a psychological 'relief' (Browning 1998, 86).

These moral, physical and psychological distances can facilitate the soldier in overcoming their innate resistance to killing, which is often an inherent aspect of combat. However, these distances also have the potential to facilitate breaches of the laws of war, and obedience to orders to breach the law, as the soldiers are more removed from the consequences of their actions.

The Cumulative Effect on the Ordinary Individual

While it may be comforting to believe that evil acts are only done by evil people, the reality is not that simple. Evil or psychopathic individuals do not commit the majority of atrocities in war. As noted above, only approximately 2 per cent of the population are predisposed towards psychopathic aggressive tendencies (see Swank and Marchand 1946; Grossman 2009, 43–4, 60; Murray 2006, 48), and the military purposefully tries to identify and reject people with these tendencies at the recruitment stage. This is because they are unlikely to adhere to discipline and rules, which is a central aspect of the military (Mackmin 2007, 78–9; McManners 1993, 35).¹¹ Many soldiers also want to ensure that their actions in combat comply with the law and perceive themselves as reasonable people who need to make decisions in difficult situations. They are aware that it is the law that separates their actions as 'just combatants' and a 'lawful kill' from murder. This means that they must consider their

¹¹ Once in the military though, individuals with an aggressive personality are more likely to be in specialised units and volunteer for dangerous operations, which are likely to be higher-stress environments and have greater occasions to kill; see Mackmin (2007, 79) and Watson (1978, 243–6).

ROEs before each shot (see, for example, McGarry and Walklate 2011, 909, for personal accounts).

It is ordinary individuals whose actions have been shaped by their environment that commit most atrocities in war. Many academics believe that every person is capable of committing atrocities—they merely need to be placed in the correct situation (see Fiske et al. 2004, 1482–3; Miller et al. 1995, 5; Arendt 1963, 276)—and the International Committee for the Red Cross argues that most people are susceptible to the transformation from ordinary law-abiding individual to a person capable of committing atrocities in grave violation of international law (Frésard 2004, 31). War can create this situation and the processes involved in overcoming the human innate reluctance to kill can also enable breaches of the law.

Brutalisation, desensitisation, dehumanisation and moral, physical and psychological distance assist soldiers in overcoming their innate reluctance to kill. If soldiers focus on the destructive nature of their weapons, that is, their ‘knee smashing and widow-making characteristics’ and if they thought of the enemy as just a person like them, then they would generally find it immensely difficult to fight and to do their duty in war (Holmes 2004, 361). Quite simply, combat would be extremely difficult to maintain without an abstract image of the enemy and the depersonalisation of the enemy in training (Holmes 2004, 361; see also Grossman 2009, 156–60). In this way, brutalisation, desensitisation, dehumanisation and moral and psychological distance help soldiers to fight the enemy and fulfil their duty and, hence, they serve important military purposes. However, if the level of depersonalisation reaches the level of hatred, then restraints can slip and atrocities occur. This highlights the need for the military to create a balance between depersonalisation and humanity (see Holmes 2004, 361; Grossman 2009, 186).

The effects of these processes to overcome the soldier’s innate reluctance to kill can be exacerbated by the combat environment itself. Baumeister highlights that every person has violent tendencies or impulses and that these tendencies will emerge when culture stops restraining them (Baumeister 1997, 276–7) while Ignatieff maintains that for some the collapse of the state’s monopoly of violence creates chaos and an environment where all is permitted (Ignatieff 1994, 140–1). War can create this culture of violence. Numerous personal accounts of soldiers and academics

within the field describe how an average individual often derives pleasure and satisfaction from the acts of war and combat, especially combat from a distance (Grossman 2009, 111–2, 124, 136, 237, 245; Mackmin 2007, 79; Shalit 1988, 3; McManners 1993, 308, Bourke 1999, 13–5; Holmes 2004, 380; Mullaney 2009, 239, 283, 320; McNab 2009, 242). This feeling can become like an addiction with the effect that an average individual can slip beyond reasonable force in search of this pleasure (Mackmin 2007, 79). When this pleasure combines with the effects of brutalisation, desensitisation, dehumanisation, moral distance and moral drift, there is a significantly heightened risk that the soldier will regard excessive violence, and even atrocities, as normal and morally appropriate behaviour. The history of war attests to this as extensive and significant atrocities are a common feature of conflict (Mackmin 2007, 65). However, this does not mean that all soldiers lose their sense of humanity, deliberately violate the rule of law or commit atrocities. Indeed, there are many personal accounts of soldiers being sickened by cruel acts, upholding the law under immense pressure and taking actions to prevent the commission of atrocities (see McNab 2009, 101, 371–6, 401, 417–8, 412; Mullaney 2009, 238, 299–300).¹² But undoubtedly, war can alter a reasonable individual's perceptions and standards.

A person's actions and standards of behaviour are determined to a large extent by the environment. The combat environment contains a level of violence and suffering generally never experienced in civilian society. This level of violence and suffering can lead to desensitisation to killing and significant moral drift, which in turn can result in the soldier perceiving violence, even excessive violence, to be the norm and morally appropriate conduct. The likelihood and the extent of the change to the soldier's perceptions and standards are considerably increased when desensitisation and moral drift are combined with moral, physical and psychological distance, and dehumanisation and demonisation of the enemy. In this way, the brutality of war can substantially alter the soldiers' civilian perceptions and standards and create a divergence between the reasonable soldier and the reasonable civilian.

¹²It is important to note that generally war does not irreversibly brutalise soldiers. Instead, many or most soldiers live normal lives when they return from war; see Doris and Murphy (2007, 31).

Conclusion

Combat and the act of killing are experiences that are largely unknowable to those who have not experienced them. This, however, does not remove the courts' responsibility to gain the best possible understanding of the soldier's experience and the effects of the combat environment when implementing the law. To implement a law, informed from a predominately civilian perspective, into the unique and exceptional circumstances of war would be not only unjust but it is likely to create a divergence between the law as on the books and the practice on the ground. That is, a law that does not reflect the environment in which it will operate is at greater risk of not being adhered to in practice. For the courts to have a more comprehensive understanding of the soldier's experience and the combat environment, we need more research, especially more empirical research with those who have first-hand experience of war. It is also not enough to engage in legal research. Instead, the courts' understanding needs to be built from interdisciplinary research across a spectrum of disciplines including criminology, psychology, sociology and behavioural science.

Soldiers' accounts and academic work reveal that modern combat is an immensely stressful environment. Soldiers can be immersed in a foreign and dangerous environment with insufficient resources, subjected to attack from unpredictable sources and can be fighting an enemy that is largely indistinguishable from the civilian population. Soldiers can also experience sustained exposure to the noises, sights and smells of war and extreme fatigue from prolonged missions, firefights and war itself. These environmental factors and experiences can result in stress, anxiety and strong feelings of fear, confusion, anger and frustration. This stress and anxiety is likely to reach a level that far exceeds the level of stress and anxiety experienced by the reasonable person in civilian society. As discussed in chapter 6, high levels of stress can have physiological, biological and psychological effects including changes to the soldier's cognitive function, mood and attitude and can lead to the soldier freezing, overreacting or behaving irrationally. These responses to the combat environment combine to create a divergence between the perceptions, responses and behaviour of the reasonable soldier and the reasonable civilian.

The effects of the combat environment are amplified and exacerbated in firefights and live contacts with the enemy. Firefights can be immensely stressful and they can also be loud, chaotic and dangerous situations. As a result, they are distracting and perceptually corrupt, which directly impacts on the soldier's ability to accurately assess the situation, to cognitively process relevant information and can negatively affect the soldier's moral functioning. However, the nature of firefights means that the soldiers generally must process and assess large quantities of information in a very short period of time even though their ability to gather all pertinent information may be limited by the environment itself. This means that soldiers may have to decide on actions and whether to follow orders in an environment where the factors determining the appropriateness or reasonableness of their decision are uncertain or unknown to the soldier and there is little to no time for deliberation. Military and resilience training aims to offset the effects of war and stress on the soldier. This is likely to be successful to a notable degree, and the soldier is likely to withstand the stresses of war to a much greater degree than a civilian, but some combat environments may exceed the resilience of the soldier. More importantly, the average civilian rarely encounters this type and level of stress or the need to make life and death decisions in such conditions. When determining the reasonableness of the soldier's action and/or decision to obey an illegal order, the courts need to take into account the emotional pressures, stresses and the perceptually corrupt and confusing nature of combat and its effects on the reasonable soldier's cognitive function, moral functioning and perceptions of reasonable and appropriate behaviour. This means that rather than a civilian-informed perspective, the courts need to understand the combat environment and tailor the legal standard to the actual combat environment and the trained reasonable soldier. The legal standard should match the specific environment of war and not the generic environment of society.

It is through state policy that soldiers go to war. Accordingly, it is important that the state acknowledges the effects of this extreme and unique environment that they have purposefully immersed soldiers in when determining the legality and appropriateness of the soldier's action. To do otherwise would distance the state from their own role and responsibility and would excessively shift the burden of the effects of

war to the soldier. This could lead to a falsehood where the state would be able to initiate wars without having to fully acknowledge the effects and consequences of war. Breaches of the law could be claimed as only the actions of 'bad apples' rather than being symptomatic of the environment. Instead, the effects of the combat environment, including its effects on the soldier's perceptions and behaviour, need to be confronted. By recognising and understanding the effects of war, we not only have a greater opportunity to lower the occurrence of breaches of the laws of war and even atrocities through legal and policy changes that more effectively tackle the environmental factors that facilitate these breaches but it also highlights the consequences and severity of the decision to engage in war. This, in turn, should force states to provide stronger and clearer justifications to their civilian populations before engaging in war, given the known consequences to the nation's soldiers and foreign combatants and civilians.

The combat environment contains an exceptionally high level of violence and suffering. This level of violence and suffering can lead to brutalisation, desensitisation and moral drift, which when combined with moral and physical distance, dehumanisation and demonisation of the enemy can result in the soldier perceiving violence and even excessive violence to be the norm and morally appropriate conduct. In this way, the brutality of war can substantially alter the soldier's civilian perceptions and standards and result in actions or obedience to orders that violate the laws of war. It can create a significant divergence between the reasonable soldier and the reasonable civilian. Whether and the extent to which these processes and factors influence the soldier will vary between soldiers and conflicts and it does not mean that all soldiers engaged in war will commit crimes or atrocities. However, these factors have been present in many conflicts and, when present, a large percentage of people are susceptible to their influence and are capable of committing crimes or atrocities in such circumstances. This is especially so when these factors are supported by government policy and propaganda. To reduce breaches of the law and the commission of atrocities, laws prohibiting their occurrence are not sufficient. Instead, the social production of crime and the influence of the environmental factors present in war must be acknowledged and addressed so that policies and strategies can be established

to try to diminish their influence where possible. Moreover, when these factors are the policy of the state, then the responsibility of the state and its leaders must be at the forefront rather than solely holding the soldiers that implemented the government's policies liable.

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6

The Influence of Contemporary Combat on the Modern Soldier: A Force for Good or Bad

Humans are social creatures. Our actions and attitudes are dictated by our interactions with others and the influence of the wider environment and society. The culture of a nation or even an organisation, the attitude of the group and the actions of leaders shape our perceptions of right and wrong and of what is appropriate or permissible. They can even cause a person to act against their own belief system and to behave unethically or illegally. The influence of these societal and environmental factors is stronger in high-stress environments, and stress itself has a powerful effect on the human physiology, cognitive function and behaviour. The military and combat environments amplify and heighten these environmental factors and physiological processes. This means that the effects of culture, leaders, the group and stress on the soldier's behaviour, perceptions and standards are much greater than the effects of these environmental factors and physiological processes on the civilian. Yet, the courts do not pay sufficient regard to these processes or their effects when determining whether the soldier acted 'reasonably'. This means that the courts are implementing the law, and ascertaining the 'reasonable person' standard, without an in-depth understanding of the social, behavioural,

psychological, biological and cultural effects generated by society and intensified in the military and combat environments.

This chapter is an interdisciplinary exploration of these societal and environmental contexts and the extent to which they should be incorporated into the legal standard set for the soldier. While Chapters 4 and 5 looked at environmental factors that are largely unique to the soldier—namely, military training and combat experience—this chapter is concerned with factors that everyone is exposed to but which have an enhanced or particularly powerful effect on the soldier. This chapter highlights that the law's presumption that the reasonable person will identify and disobey an illegal order does not match the behaviour of the average person in practice.¹ The soldier is even more likely to obey than the average person. Accordingly, soldiers are more prone to obedience than the law recognises. The soldiers' propensity to obey illegal orders is also affected by their broader environment. A prevailing group attitude or culture that is respectful of the law will assist in soldier's upholding the law and disobeying illegal orders. By the same regard, a prevailing group attitude or culture that is disrespectful of the law will facilitate the violation of the law. To affect change in behaviour, the enactment and enforcement of laws alone is not sufficient; the much more complex issues of culture and attitudes need to be addressed.

Soldiers are also human and subject to physiological and biological responses. Emerging research sheds light on the human response to the high levels of stress that would be experienced in combat. The cumulative effect of the physiological, biological and psychological responses to high levels of stress reduces the soldier's ability to gather all pertinent information and to process that information as well as leading to a greater propensity towards aggression. Drawing together the above range of disparate knowledge allows this chapter to frame the problematic consequences of applying the law without a sufficient appreciation of these environmental factors and provides a more comprehensive understanding of the modern soldier's environment. These environmental factors

¹ Note that 'reasonable person' is a reference to the legal standard. The term 'average person' is used to distinguish between the legal standard and the decisions, actions or behaviour of most members of the population.

are complex and interrelated and, accordingly, this chapter highlights overlaps and connections between these factors. Moreover, a more comprehensive understanding of these environmental factors challenges the courts' perception of 'reasonable' and calls into question whether the legal standard that soldiers are held accountable to is representative of reality. In doing so, it brings to the fore the limits of the law. A natural corollary of understanding the soldier's environment is that it permits greater insight into avenues for the regulation and prevention of violence and violations of the laws of war in contemporary combat. While the law plays a vital role, legislation against and the threat of prosecution is not enough. The law alone is not enough. Instead, the much more nuanced and complex issues of culture, deeply embedded attitudes and government and military policies must also be addressed. In conjunction with the law, this offers the greatest opportunity to prevent breaches of the laws of war in combat.

The Influence of Military Leaders on Soldiers' Obedience

We are more prone to obedience than the law recognises. The factors influencing obedience are also more complex and nuanced than the law generally purports. The proclivity towards obedience is significantly heightened in the military and combat environments so there is an even greater risk of a divergence between the law and the actions of the reasonable soldier. Recognising and understanding the nature of obedience and the influence of authority figures will not only assist the law in reflecting reality but it can also inform policies and strategies to lower the instances of obedience to immoral or illegal orders. Understanding is the first step.

The Power of the Need to Obey

The influence of and the power of military leaders over soldiers should not obstruct the soldier's ability to identify that a superior's order is unlawful or even manifestly unlawful. However, the leader's power and

influence is likely to directly affect the reasonable soldier's decision to obey the illegal order. Our knowledge of the ability of authority figures to induce obedience can be traced back to Sigmund Freud who cautioned that one should 'never underestimate the power of the need to obey' (see Grossman 2009, 142). From early socialisation, we are taught to obey authorities (see Klein 2012, 96; see also Altemeyer 2006, 75), which becomes so deeply ingrained that the individual's propensity to obedience can be very strong (Milgram 1974, 1; Browning 1998, 171). This propensity to obedience was corroborated in Stanley Milgram's research on the power of authority. Milgram conducted an experiment to test the willingness of the average individual to obey an apparently legitimate authority even though the order conflicted with the dictates of the participant's personal conscience.² The experiment involved the participants, known as 'teachers', administering electric shocks of increasing intensity to the 'learner' partner when the learner answered a question incorrectly. The teachers were ordered by 'scientists' to ignore the learner's response of pain and terror. The 'learner' was acting in complicity with the experimenter but the 'teacher' was unaware that no shock was actually being administered.

Despite the fact that many participants suffered stress and extreme discomfort at performing the task, almost two-thirds continued to administer shocks to the maximum voltage of 450 volts (Milgram 1974, 3–5). All participants obeyed the order to administer shocks to the level of 300 volts, which was labelled as 'Intense Shock' (Milgram 1963, 375–6, 1974, 35). The power of the need to obey is clearly demonstrated through Milgram's description of an originally composed and confident businessman's response to the experiment:

I observed a mature and initially poised businessman enter the laboratory smiling and confident. Within 20 minutes he was reduced to a twitching, stuttering wreck, who was rapidly approaching a point of nervous collapse... At one point he pushed his fist into his forehead and muttered:

² While Milgram's study has received some criticism, see, for example, Baumrind (1964), it has shown robustness when replicated in different cultures and times and, despite these criticisms, it offers important insights into the responses of ordinary people which are relevant to the legal perception of reasonableness.

“Oh God, let’s stop it.” And yet he continued to respond to every word of the experimenter and obeyed to the end. (Milgram 1963, 377)

This illustrates that while the power of the need to obey may not disrupt our innate sense of right and wrong, it strongly affects our ability to act on that sense of right or wrong. As Klein highlights: criminologists generally regard deviance and obedience as opposites, but extreme obedience by individuals can lead to their participation in harmful organisational policies and actions (Klein 2012, 96; see also Kelman and Hamilton 1989).

The businessman’s obedience was the norm rather than the exception. Nearly two-thirds of the participants followed orders to administer the maximum voltage possible. However, a number of psychiatrists had anticipated that only 1 in 1000 participants would obey to such a degree (Milgram 1974, 31, 35; Perloff 2010, 160).³ The people who administered these electric shocks were not evil or sadist people. They were ordinary individuals without any psychological issues or apparent perverse natures (Miller et al. 1995, 2).⁴ Most of the participants believed, at the level of stated opinion, that there is a moral obligation to refrain from such actions and any order to do so should be disobeyed (Milgram 1974, 6, 28–9). These findings call into question our belief that a reasonable person will disobey an order to cause serious harm to those unable to defend themselves. Yet, it is this belief that forms the premise of our legal standard. The law presumes that the reasonable person would recognise an order to inflict unjustified harm as illegal and, once recognised as illegal or immoral, they would disobey. This presumption simply does not marry up to the average person’s behaviour in such circumstances.

Milgram’s experiment has since been replicated on several occasions and in various countries (Grossman 2009, 142). The results from these experiments give a deeper and more nuanced understanding of the environmental factors that influence obedience. They show that the proximity to the ‘learner’ and the authority figure, the authoritativeness of the figure and the extent of the individual’s role and control all affect obedience. If

³ The psychiatrists’ predictions were in relation to when the ‘teacher’ could hear the vocal protests of the ‘learner’. When the verbal feedback was present, 62.5 per cent administered the maximum voltage; see Milgram (1974, 30, 34–5).

⁴ The participants were also recruited from all sectors of society.

the individual can see and hear the learner, obedience to the maximum voltage fell to 40 per cent, or if the individual had to physically force the learner's hand onto an electric plate to deliver the shocks, obedience was reduced to 30 per cent, whereas if the individual could not hear or see the learner, then obedience was raised to 65 per cent. If the individual does not personally inflict the shocks and instead performs a subsidiary task, over 90 per cent obeyed but if the individual has complete discretion as to the level of shock to administer, the vast majority only gave a minimal shock (Milgram 1974, 32–43, 60–1, 70–2, 119, 121–2; see also Browning 1998, 172).

The authority figure is also key to an individual's obedience. People are much more likely to obey the orders of a respected and known authority figure than a disrespected and unknown authority figure, especially if the person has bonded or connected with the authority figure (Grossman 2009, 144). This was confirmed in Milgram's experiment where obedience to the orders of a non-authority figure was 20 per cent, as compared to the nearly two-thirds that obeyed an authority figure (Milgram 1974, 35, 93–7). The proximity of the authority figure also directly impacts on the likelihood of the person obeying the leader's orders. That is, the closer the authority figure, the more likely the person is to obey (Grossman 2009, 144). In Milgram's experiments, when the authority figure was physically not present, then the obedience rate dropped to around 20 per cent, and, interestingly, the individual was more likely to give a lower shock than prescribed when they participated in the experiment (Milgram 1974, 59–62). People are also more likely to obey an unpalatable order when the order is unambiguous and there is a clear expectancy of compliance (Grossman 2009, 144–5), but the individual is less likely to obey if there is a group that is willing to disobey. Indeed, the rebellious group was the most effective mechanism at inducing disobedience to the authority figure in Milgram's experiments (see Milgram 1974, 116–21). Encouragingly, legitimate and lawful orders have greater influence than unlawful or unexpected orders and, therefore, are more likely to be obeyed (Grossman 2009, 145).

Thus, authority figures exert the strongest control when they are nearby, well respected by the subordinates, recognised as a legitimate authority and give clear instructions on the actions to be taken (Schneider 2002,

19). People are even more likely to obey these authority figures when they are further removed from the consequences of their actions and/or can mitigate their sense of responsibility but a 'defying' group can assist the individual in disobeying the illegitimate orders of an authority figure. In contrast to the simplified understanding advocated in the law, the decision of the reasonable person to obey is instead highly dependent on complex environmental factors.

Leadership Dictating Obedience in the Military Environment

The power of the need to obey is significantly heightened in the military. Obedience is the cornerstone of any military system. One of the primary objectives of military training is to condition soldiers to obey orders reflexively and without question or delay (Doris and Murphy 2007, 41). The average person, including those involved in Milgram's experiments, does not undergo this conditioning process. Soldiers are not afforded the same equality, dignity and autonomy enjoyed by the average civilian (*R v Finta* [1994] 1 SCR 701). This further limits their ability to disobey. Moreover, the position of the soldier contrasts sharply with that of an individual participating in a science experiment. The experimenter does not exert the same control and power over the individual as commanders do over their soldiers. The experiment lacks the urgency, danger, stress and dedication of a war and the experimenter is incapable of punishing the individual for disobedience (see Green 1976b, 259–61 for an outline of all these factors; see also Frésard 2004, 82). These factors, especially when combined with the strength of automatic obedience embedded in the military hierarchy and system, mean that the soldier's propensity to submission to authority is much higher than a volunteer participating in a science experiment (see Frésard 2004, 83).

The environmental factors that influence obedience are likely to converge on the battlefield. Military commanders are legitimate and socially approved figures of authority sanctioned to issue orders for the killing or injury of others. This legitimacy means that their orders are likely to have a strong influence and soldiers are correspondingly more

likely to obey. While the close proximity and the clarity of the order would vary with each case, commanders are often respected figures who have a high expectation of obedience from their soldiers. The soldier who is in close contact with the enemy may face a barrier to obeying a commander but orders to kill from a distance or where the soldier is assisting another in killing would not encounter the same level of resistance. The combined effect is that the on the ground commander in a combat environment issuing unambiguous orders exerts a great level of influence and control over the soldier who is trained to obey, and the power of the need to obey would be very high.

The powerful influence of the commander over the soldier and the soldier's strong propensity to obey the commander's orders is more than mere theory. It is directly reflected in combat experience and history. Research by Kranss, Kaplan and Kranss in 1973 into the factors that motivated soldiers to fire revealed that being ordered to fire was the most influential factor (Grossman 2009, 143). In addition, identification with and the bonds that the soldiers build with their immediate superior, as well as their bonds with the group, is the principal factor in inducing the soldiers' will to fight (Shalit 1988, 115). When soldiers have leadership that they identify with and they share affection with the other group members, then soldiers are often willing to risk and even sacrifice themselves in combat rather than leave down their leader and comrades (Janowitz and Shils 1975, 181).⁵ As a result, it is the commander's order to kill that is often the deciding factor in soldiers fighting in combat and overcoming their instinctual reluctance to killing (see Grossman 2009, 146). Given the strength of a person's innate resistance to aggression or killing,⁶ the fact that a superior's order to kill can be the chief factor in the soldier deciding to kill provides powerful evidence of the commander's influence over the soldier and the soldier's strong inclination to obey. This is not to say that it is impossible to disobey an illegal order in combat. Sometimes soldiers refuse to obey orders that they believe are illegal or wrong. However, this is relatively rare (Grossman 2009, 226, 228).

⁵ Shalit is referencing a 1973 Israeli study and Janowitz and Shils are examining German forces in World War II.

⁶ For a discussion on the strength of the human resistance to aggression and killing, see Chapter 4.

To facilitate a well-rounded look at the power of the commander, it is important to note that while the commander's influence can have a direct effect on the soldier's decision to obey an illegitimate order, it can also indirectly affect the soldier's ability to even identify the order as illegal. This influence is generally more prevailing when combined with other factors such as the belief of the group. When the commander, as a legitimate and respected authority figure, orders and even commends illegal conduct, it can affect the soldier's perception of the action. If this commendation and approval of the illegal conduct permeates the military structure to the highest ranks, the illegal conduct can become 'normalised' and, correspondingly, it becomes less likely that a soldier will identify orders to commit such conduct as manifestly unlawful upon their face.⁷ This is particularly effective when combined with the adoption of the leader's or organisation's ideology. If the person accepts the authority's ideology, then behaviour compliant with that ideology can follow logically and willingly as the person sees their behaviour as serving an important end (Milgram 1974, 142. See also Browning 1998, 176). The presence of a respected and legitimate authority figure can also reduce or even remove the individual's sense of responsibility for their actions. Instead of feeling responsible for their actions, they can feel that their responsibility is to be 'good soldiers' and to follow orders (Schneider 2002, 19). When the leader's orders are lawful and moral, then the power of obedience and the influence of the leader have military benefits and serve society's interest. However, when the orders are illegal or immoral, there can be negative consequences as it is the leader who 'set[s] the tone for the behavior expected and encouraged from' their subordinates (Browning 1998, 87).

We are more prone to obedience than we would like to believe. While the environmental factors will influence the extent to which we obey, the average person will obey an illegitimate order from an authority figure. This tendency is significantly heightened in the military and combat environments. That is, the 'reasonable soldier' is even more likely to obey the commander's illegal order. Yet, the legal standard of 'reasonableness'

⁷ See Doris and Murphy (2007, 48–9) for an account on how legitimisation by high-ranking superiors or through organisational policy obstructed the subjects' ability to identify their actions as manifestly unlawful in Abu Ghraib and Bosnia.

is based upon the presumption that the reasonable person will identify and disobey a clearly illegal order. There is a disparity between the legal ideology and behaviour in practice and this disparity is substantially more pronounced for the reasonable soldier. This disparity then calls into question whether the current legal standard is an appropriate and just standard.

The Influence of the Group on Soldiers' Obedience

It has been widely accepted for generations that the primary group plays a significant role in military effectiveness and is a central component of military practice (Mackmin 2007, 81; see also Janowitz and Shils 1975). A comprehensive understanding of the primary group requires understanding the benefits of the primary group to military success and the soldier and how the military builds group cohesion as well as the effects of the primary group on the soldier's perceptions, standards and behaviour. Military training is designed to build group cohesion and loyalty to an extent generally not experienced in civilian society. The primary group and the strong bonds between soldiers have many benefits and serve important military purposes, and if the ideology of the group is moral, honourable and reflects the principles of the law, then the influence of the group can act to uphold the law. However, if the ideology of the group is negative or immoral, then it can facilitate breaches of the law. It is also very important to note that the strength of the bonds formed and their influence over the soldier would vary between soldiers and across nations, wars, and even the army, navy and air force. While this is a generalised and simplified account, it gives important insights into the mind-set of the soldier.

Military Effectiveness and the Primary Group

The military often achieves group cohesion and loyalty by creating strong group bonds and linking the individual soldier's self-esteem to the group so that the soldier endeavours to contribute to the group's success and

honour (Mackmin 2007, 82). The discourse of 'mateship' or 'brotherhood' can be used to turn the recruits into family and the commitment to the greater authority of the brotherhood, as well as the nation, can be used to legitimatise the death of soldiers (Wadham 2004, 11). Militaries also generally promote the *esprit de corps* as it builds dedication, enthusiasm and strong respect for the honour of the group, but at the same time it can foster competition and the desire to win, which relates to the core military purpose of defeating the enemy (see Brown 2015, 124). As well as competition, the military environment of living in close proximity to one another for extended periods of time under often-tough conditions can instil a strong affective element in the primary group. For example, accounts include soldiers carrying part of an exhausted comrade's equipment towards the end of a long march or taping a colleague's blistered feet (Hockey 2002, 166). As such, the primary group provides benefits to both the military and the soldier and these bonds are encouraged by the military.

Group bonds and loyalties can be cemented in war. The combat environment can build group cohesion through shared hardships, fears and triumphs (see, for example, McNab 2009, 271, for bonds formed through shared hardships). Janowitz and Shils also maintain that bonds forged through spatial proximity, intimate communication, the paternal protectiveness of leaders and a disciplined hierarchy help form a strong primary group (Janowitz and Shils 1975, 196–203, 216). This primary group can assist survival and success. In combat, soldiers must trust their comrades and know how they will respond under fire. This knowledge and trust allows them to cohere under pressure and facilitates the individual soldier in committing to the collective goals of the group to such an extent that they will risk injury or death (King 2006, 493–4). For this reason, the strength of the primary group has been credited with military success (see, for example, Janowitz and Shils 1975).

As well as building group cohesion and effectiveness, the primary group can foster endurance and provide the motivation to fight. The incredibly strong bonds formed in war have been described as stronger than nearly any other relationship, including husband and wife (Grossman 2009, 89, 149, 238), and loyalty to one's comrades can be even stronger than loyalty to one's commander (Shalit 1988, 115). Numerous studies have found that the soldier's greatest fear in combat is letting down their comrades.

This fear can be so great that it overshadows the soldier's fear of death, personal injury, errors or being taken as a prisoner (Mackmin 2007, 82; Shalit 1988, 10–2; Grossman 2009, 51–2; see McNab 2009, 278, 344, for personal accounts of soldiers' fear of leaving their comrades down).⁸ This fear often allows the soldier to endure extremely tough environments and can result in the soldier performing heroic and life-threatening actions in order to save or protect their comrades (see Grossman 2009, 155; Osiel 1998, 1054; see also McNab 2009, 164, 178–9, 266, 327–8, 383–4, 386, 406–7, for accounts of soldiers risking their lives and safety in order to save and protect their comrades or rescue their bodies).

Fear of letting down one's comrades is one of the chief motives behind the soldier's willingness to fight. Soldiers often do not fight for 'Queen or country' or even for the military or the nation's objectives but for the extreme feelings of friendship, camaraderie and 'brotherhood' to their fellow soldiers (see McNab 2009, 383–4; Osiel 1998, 1054; Brown 2015, 132). Soldiers can suffer severe guilt and trauma when they feel that they have failed or let their comrades down (Grossman 2009, 89). This guilt can be so strong that soldiers can feel that they have failed the group if they leave the combat environment for non-immobilising injuries or spend unnecessary time out of combat (Osiel 1998, 1054). Several war studies highlight that group pressures are far more effective than ideology, hatred or fear at ensuring that soldiers overcome their innate resistance to killing and fight the enemy. These group pressures include the bonds the soldier feels to the group, their fear of failing their comrades or losing the group's respect, their own respect for their comrades and commanders and their need to contribute to the group's accomplishment (see Grossman 2009, 88–9, 235; Osiel 1998, 1053–4; Mackmin 2007, 82; Bourne 1967). These group pressures and fears help ensure that the soldier obeys, takes on dangerous missions, keeps going in the tough combat environment and kills the enemy (see Manning 1991, 456; Mackmin 2007, 81–2).⁹ As such, the group and group bonds clearly serve important military objectives and can encourage honourable and ethical behaviour.

⁸When Shalit studied Swedish peacekeeping forces that had never been in combat, he discovered that their biggest fear was death and injury; see Shalit (1988, 10–2).

⁹It is interesting to note that the bonds between soldiers in combat have been weakened by the modern organisation of fighting units. In and prior to World War II, soldiers trained and bonded

While the primary group can play an important role in combat, not all soldiers form strong bonds with one another and view one another as 'brothers' and the primary group is not the only mechanism of military effectiveness. As King highlights not all soldiers, even in highly effective groups, like each other, and strong bonds or intimate relations within the primary group do not necessarily equate to military effectiveness (King 2006, 494–5). Instead, King argues the importance of formal training rituals and collective drills in ensuring group cohesion and military effectiveness under the pressure of combat (King 2006, 495–6, 497–508). He also points out the crucial role of competency. Competency and proficiency in performing formal training rituals and collective drills during training and on operations are often prerequisites to admission into the group and access to the informal masculine group rituals, for example, drinking and fighting, that many sociologists credit with creating the primary group (King 2006, 508–10). The demand for competency and proficiency aligns with the dangers of combat. The individual soldier's survival is dependent on the correct and coordinated action of the group. Through being competent or 'switched on', the soldiers protect each other and confidence in the ability of one's comrades helps to manage the soldier's fear of death or injury (Hockey 2002, 162).

Strong bonds within the primary group can enhance military effectiveness and survival in combat, motivate soldiers to fight and endure the harsh conditions of war and can even lead to heroic and honourable acts. As such, the primary group serves important military purposes. While not all soldiers are like 'brothers', military training can be designed to build group cohesion and loyalty to an extent generally not experienced in civilian society. The military and combat environments can strengthen these bonds even further. When these bonds are formed, they are likely to be very strong and the individual soldier will be deeply immersed in the group.

together before going to war and knew that they would fight together until the end. However, in Vietnam, soldiers became part of the unit for a tour, which meant that they were reluctant to bond with new soldiers and were more interested in just surviving the tour. The military is again strengthening group bonding by sending entire units, instead of individuals, on tour; see Grossman (2009, 270–2, 297).

Conformity: A Force to Uphold or Breach the Law

While the primary group can serve important and legitimate military objectives, immersion in a group can also facilitate unethical behaviour and even the commission of crimes. The group exercises great influence and control over its members by providing anonymity, diffusing responsibility and creating a dominant set of beliefs and ideals. In this way, the group strongly shapes the individual's sense of responsibility, beliefs and behaviour. Membership of a group provides the individual member with a sense of anonymity and allows the person to shift and share the blame for unethical conduct (see Grossman 2009, 151–3). The anonymity provided by the group leads to a diffusion of responsibility. The effect of the group in the diffusion of responsibility process is clearly illustrated through research on intervention by bystanders who witness a crime or an emergency. Numerous experiments and studies reveal that a bystander is much less likely to intervene if they are in a large crowd than if they are alone (see Latané and Nida 1981; Latané and Dabbs 1975; Latané and Darley 1969; Levine et al. 2002; Grossman 2009, 152). When the bystander is alone, there is no one else to shift or share the responsibility and, therefore, the individual is much more likely to assume the responsibility and intervene. If there is a large group, responsibility is diffused among the group and, correspondingly, the individual's personal sense of responsibility to intervene is lower. In this way, membership in a group can hinder the reasonable individual from committing acts that they normally would and know that they should commit.

Just as the group can inhibit the individual from committing ethical acts, the group can facilitate the individual in committing unethical acts. The anonymity and diffusion of responsibility provided by membership of the group can allow the individual to commit acts that they would never normally commit (see Grossman 2009, 151–2). This effect is heightened when the group divides up the activities necessary for the commission of crimes or atrocities to allow each member to deny their own responsibility and guilt. Instead of killing and committing atrocities, each member convinces themselves that they only loaded people on a train that is destined for an extermination camp or conducted experiments for science

(see Schneider 2002, 20).¹⁰ The commission of such acts is further facilitated by the approval of the group, which can severely diminish the individual's guilt for group actions (Mackmin 2007, 82). The group also magnifies the individual's patterns of behaviour and feelings, including feelings of aggression or joy (Shalit 1988, 76; see also Grossman 2009, 151–2). This means that if the individual is angry or aggressive, the group intensifies this anger or aggression, which can enable violent acts. Baumeister calls this the *discontinuity effect* and maintains that it means that the group is more extreme than the individuals who form the group (Baumeister 1997, 193–4).

Members of a group are also likely to conform to both the actions and ideals of the group even if it goes against their own reasoning, conscience and better judgment. While the individual results varied, Asch's experiment showed that on average the presence of a group that unanimously selects an obviously incorrect answer can significantly influence the decision of the individual to also choose the incorrect response (Asch 1955), and Milgram's study found that the individual was willing to inflict a higher level of electric shock to the 'learner' than they would on their own when the group proposed higher levels (Milgram 1964).¹¹ These studies show that a group of strangers can influence one's behaviour and decisions. A person within a known group is even more likely to take on the beliefs and values of that group and prefer to act unethically rather than feel they have let the group down (see Grossman 2009, 150–3). Indeed, Freud affirms that inclusion in a group weakens the individual's ability for moral deliberation and the individual's inclination towards moral deeds (Freud 1959, 27). Thus, the anonymity and diffusion of responsibility within the group combines with the adoption of the group's beliefs and a need to maintain the group's approval to ensure that the group exercises great influence over the individual member. An individual in a

¹⁰Note that obedience to superior orders is not a defence to the crime of genocide or crimes against humanity. From the perspective of the soldier's legal liability, this discussion is limited to war crimes. Nevertheless, this discussion may also help us to understand the factors that facilitate the commission of genocide or crimes against humanity and lend insights into how to prevent these crimes.

¹¹However, on average, the individual did not choose the level of electric shock proposed by the group but a level that was halfway between no increase and the group's proposal; see Milgram (1964).

group may commit atrocities, under the direction of an aggressive leader or the group, which the individual would never commit alone (Mackmin 2007, 82).

The power of the group over the individual member is directly correlated to the individual's immersion within the group. The group greatly influences the individual's behaviour when the individual is bonded with the group (Grossman 2009, 152–3). Soldiers can be fully immersed within their units and the military and can have a high level of belonging and, as discussed, soldiers can form immensely strong bonds. This means that the group's influence over the individual's sense of responsibility and behaviour is likely to be notably higher for a soldier in combat than a civilian in peacetime (see Rowe 2008, 180)¹² and they are even more likely than a civilian to adopt the group's beliefs even if it goes against the dictates of their own conscience. The effects of anonymity, diffusion of responsibility and dominant beliefs experienced in civilian groups can be stronger in military groups.

The full immersion of the soldier and the strong bonds built within military units can also lead to exceptionally heightened peer pressure. There can be a 'dark side' to the group cohesion and 'brotherhood' that pervades many military structures. Group cohesion can be forged through small groups engaging in practices that bond the group but exclude or exploit others and has been linked to military misconduct (Wadham and Connor 2014, 4). Group bonding through 'othering' can see the 'other' being referred to in demeaning and derogatory ways (Wadham 2004, 11) and soldiers can fear being excluded from the group. Soldiers who breach the limits or rules of the group may face the full condemnation of the group. This can ingrain a fear of difference (McLean 1996; see also Wadham 2004, 11) and instil a very strong propensity to conform to the group's norms and standards. Soldiers can care about the group and what the group thinks of them so much that they would rather die than let the group down (Grossman 2009, 150). While this fear of their comrades' disapproval is a great motivator for the soldier to fight and kill the enemy (Gabriel 1981, 55, 71; Osiel 1998, 1054), it can also facilitate the commission of unethical acts that the soldier would never commit alone.

¹² Rowe also points out that the nature of military organisations alone means that group pressure is stronger in the military than in civilian society.

Diffusion of responsibility and a sense of accountability to the group combine with a strong propensity to conform and the domination of the group's reasoning and standards over the soldier's personal reasoning and standards to enable the soldier to commit actions that they once would have regarded as prohibited and morally repellent (see, for example, Solis 1997, 273; Janis 1963, 236; Grossman 2009, 149–52; Osiel 1998, FN 498).

The combat environment can also facilitate the commission of crimes, or even atrocities, that the soldier would never normally commit alone. In combat, soldiers are removed from civilian society, their family and their normal support networks. Soldiers are dependent on their comrades and their comrades are dependent on them. Soldiers rely on the group for basic needs such as food, protection and support. Separation from the group means that the soldier is vulnerable (see Osiel 1998, 1051; Mackmin 2007, 82). Soldiers can greatly fear ostracism from the group as membership is not only a source of comfort but also exclusion is dangerous (Baumeister and Leary 1995). Soldiers who refuse to participate in an action undertaken by the group, be it legal or illegal, or indeed report the action to an authority may be the victims of attack by their own comrades. This pressure alone is often enough to force even the 'uninspired' soldier to comply with and adopt the prevailing attitude of the group (Bourke 1999, 198–9). In this way, the group breeds conformity even when the group acts against the better judgment and conscience of the individual soldier. The combat environment can also facilitate the commission of illegal actions or atrocities through the death or injury of a comrade. 'The deaths of friends and comrades *can* stun, paralyse, and emotionally defeat soldiers. But in many circumstances soldiers react with anger ... and then the loss of comrades can enable killing... Revenge killing during a burst of rage has been a recurring theme throughout history' (Grossman 2009, 179; see also Mackmin 2007, 79; Bourke 1999, 156, and see Mackmin 2007, 80; Bourke 1999, 182–3, 204, for how this revenge can often be taken out on POWs). As a result, soldiers who experience the death or injury of a comrade in battle may be more likely to kill or commit war crimes or to obey orders to do so.

This is not to argue that strong group bonding and cohesion automatically lead to obedience to illegal orders and the commission of atrocities.

Although group loyalties and pressures can induce obedience to illegal orders in the soldier, these same group loyalties can induce disobedience. The power of the group over the individual soldier can be a strong force in determining whether the soldier disobeys manifestly illegal orders from a superior or a strong force in determining whether the soldier obeys manifestly illegal orders from a superior (Osiel 1998, 1061–2). The group can mitigate the power of the commander and give greater freedom to soldiers over localised military strategies and their participation in them (Osiel 1998, 1058–60).¹³ As such, if the prevailing attitude of the group reflects the principles of international law, then the power of the group enables the individual soldier to disobey an order of their superior that breaches those principles. Group pressure and power can be used to breach or uphold the law. Moreover, the law itself can be relatively powerless over the influence of the group. If the group sanctions breaches of the law and atrocities, the law and threat of punishment can have a limited impact in preventing their occurrence. If the group discourages the commission of atrocities, then, other than informing social norms, the law can be largely extraneous (see Osiel 1998, 1062).

In short, the soldier's group can be a very powerful force in determining whether the 'reasonable soldier' will obey or disobey the illegal orders of their commander. The courts should be aware of the group environment when determining how the reasonable person would behave. The solution to preventing obedience to illegal orders does not lie in weakening the group's bonds. It is these bonds that are a driving force for survival and success in combat and are the source of many honourable and heroic deeds. In addition, if the prevailing attitude of the group is based on 'honourable conduct', then the effects of the dominant beliefs of the group and group pressure will act to curb illegal conduct or obedience to illegal orders. This highlights the limits of the law. The simple fact is that enacting new laws prohibiting conduct and implementing high standards for what is considered 'reasonable' or even harsh punishments alone are unlikely to prevent a soldier obeying the illegal order of their commander if the group sanctions the behaviours. To prevent violations of the laws

¹³ Osiel notes that disobedience was mainly if the orders were militarily unwise and, occasionally, if the orders were illegal; see Osiel (1998, 1058–60).

of war, the much more complex and thorny issue of changing group attitudes and beliefs must be tackled.

Military Culture

The strong propensity for obedience to commanders and the influence of the group is embedded in the wider context of military culture. As with the group, military culture can influence the soldier's behaviour, beliefs and standards. This is especially so when the soldier's identity is entrenched in and the soldier has a strong commitment to the military. Depending on the ideology of the military culture, it can help to uphold the law and high standards of ethical behaviour or it can undermine these values. When the military culture varies from civilian society's culture, then a civilian court would need to have an appreciation of the military culture and its effects when implementing the law. This is particularly relevant when the military culture is a state condoned or created culture. Moreover, this gives rise to issues around whether and to what extent the military culture should be separated from society or whether the military should be 'civilianised'.

'Civilianisation' of the Military

The necessity, desirability and consequences of separating the military from wider society have long been debated. There are two main opposing camps within this debate. Samuel Huntington and his colleagues advocate the separation of military and political decision-making and see the military as a profession and promote autonomous military professionalism. The political leaders set the objectives and generalised conditions for military operations and the military carries out these objectives through military operations. The spheres of power and expertise are separate and the military does not engage in politics and the political leaders do not interfere in military operations. Although they are separate, the military is still subject to objective civilian control (Huntington 1957). In addition to setting the objectives and broad conditions or laws, civilian leaders can exercise control over the military in other objective forms.

For example, in the USA, the Supreme Commander-in-Chief of the armed forces is the civilian head of state and the military's budget is approved by the civilian legislature. The head of state and the legislature are the elected officials of the people and, in this macro-level form, the military is responsible to civilian society (O'Rukavishnikov and Pugh 2006, 133). Beyond this macro level, the military as a professional institution is separate and responsible for its own operations.

The separation of the military aligns with the argument that the military often has to sacrifice the values of civilian society in order to protect these same values. As General Walter Kerwin stated:

[t]he values necessary to defend the society are often at odds with the values of the society itself. To be an effective servant of the people the Army must concentrate, not on the values of our liberal society, but on the hard values of the battlefield. (Kerwin 1978, 4; see also Doris and Murphy 2007, 39; Osiel 1998, 956–7)

Quite simply, war often requires behaviour that clashes with many of civilian society's rules and values (see Brown 2015, 126). The role, responsibilities, tasks and functions of the military necessitate distance from society and a distinct structure and subculture that is non-civilian (O'Rukavishnikov and Pugh 2006, 134). To succeed in war, military organisations are hierarchical, focused on the group, instil obedience and discipline and promote training, decisiveness and prompt action rather than reflecting the more liberal civilian standards of egalitarianism, individualism, debate and analysis and freedom of expression (Wolfendale 2007, 129. See also Wadham 2012, 7). The military needs to suppress the mental freedoms and abilities required for ethical judgment, debate and open expression of preferences. Civilians in democratic societies are not so confined and are able to develop these critical capacities (Doris and Murphy 2007, 39). The separation of the military is also justified on the basis that military values and virtues need to be developed in an environment independent from civilian society in order to avoid 'secular temptations and material gratifications' (Osiel 1998, 956). As a result, the separation of the military society from the wider civilian society serves defined military functions (see, for example, *Parker v Levy* 1974, 743; Osiel 1998, 956).

In opposition to the 'separation' position is the argument for the integration of the military into civilian society. Morris Janowitz and his followers argue that genuine civilian control of the military can only be fully realised by the integration of the soldier into civilian society and the convergence of civilian and military values as much as possible. This can be achieved through a broader network of societal relations and the commitment of the military leaders to political goals. In this way, civilian society exercises control over the military through not only the law and tradition but also the self-imposed professional values of the soldier and a meaningful integration with civilian values. The soldier should be a citizen-soldier rather than a professional warrior and the soldier's civilian roots are strengthened to better link the military to society (Janowitz 1960; see also Wadham and Connor 2014; Born 2006; O'Rukavishnikov and Pugh 2006, for an overview of the civil-military relation positions).

The integration of the military into society aligns with the argument that 'the purpose of the military is to defend society, not to define it' (Kohn 1997) and that the military should reflect civilian society and values. In addition, the division between military and political decision-making advocated by the separation position is artificial and does not capture the complexity of the relationship. The line between policy and implementation or government and administration is not always clear cut and, accordingly, military commanders often need to make decisions during operations that have political implications (Born 2006, 156). The nature of combat has also changed so that in modern warfare it is increasingly necessary for soldiers to engage more with the civilian population—for example, in peacekeeping missions or even in the conflicts in Iraq and Afghanistan—than they would have been required to in traditional conflicts (Wadham 2012, 8). The new roles and responsibilities of the military may strengthen the benefits of increased civilianisation of the military. Moreover, a greater integration of the military into civilian society and values has the potential to reduce violations of the law. If the military culture is isolated from civilian society so that civilian society has little influence on the military culture, then if a negative or destructive military culture is present, as discussed below, it can facilitate the commission of crimes. An integrated military would lower this risk.

The 'separation' and 'integration' approaches represent extremes and no single approach has been adopted by Western militaries. Instead, civil–military relations in the West display characteristics from both approaches (O'Rukavishnikov and Pugh 2006, 133; Born 2006, 159–60; Wadham and Connor 2014, 6). This failure to adopt a single approach is not simply because there are advantages and disadvantages to each approach (see Born 2006, 160) but because balancing the civil–military relationship is also central to balancing values and violence. Militaries must be able to perform any task they are required to fulfil, including those that are against general social norms, but they must also defer to civilian authorities (see Wadham 2012, 6). In this way, militaries operate within an inherent tension of being 'agents of violence' that exist within and are accountable to a civilian society (Wadham and Connor 2014, 3). This can lead to a corresponding tension between the need for military effectiveness and society's fear of losing control of the armed forces (O'Rukavishnikov and Pugh 2006, 143). Nations will take different approaches in striking this balance. The state's decision on which approach to take and whether and the extent to which it favours military effectiveness or civilian values will impact on the military culture and, correspondingly, on the soldier's attitude and behaviour. It is a state-level decision that affects the soldier on the ground.

Military Culture of the Front-line Soldier

Military culture can vary significantly across different nations, times in history and even across the army, navy, air force and military police. Even within the same branch of the military, there can be variances in culture. There will be a different culture between personnel 'on the front-lines' or in 'hot' environments where they are in battle and personnel in the headquarters or garrisons and in 'cold' environments, such as, personnel in logistics, education and clerical administration (Soeters et al. 2006). This book is concerned with the culture of the front-line soldier in a 'hot' environment and generally soldiers that are exposed to this 'hot' environment on a relatively continuous basis. Although there are many variances between different military cultures, there appears to be some generalised characteristics that can offer important insights into the mind-set of soldiers.

Military organisations generally have a ‘communal’ or institutional nature; there is a strong emphasis on discipline and control; and they are hierarchical, which may foster an authoritarian ideology (Lang 1965; see also Soeters et al. 2006, 240). These features are more pronounced than they would be in civilian society. That is, militaries are generally much more institutional, have greater power distances or hierarchies and have a stronger coercive culture and ‘machine form’ of bureaucracy than civilian business organisations (Soeters et al. 2006, 241–2; see also Soeters 1997).¹⁴ Within militaries, front-line soldiers in the ‘hot’ environment have an even stronger institutional culture. At the extreme, an institutional culture means that the personnel are so fully committed to the military that military and personal life blend together and they are more concerned with the military and its values than with leisure time, salary or living conditions (Soeters et al. 2006, 241, 245). The more institutional character and the deeper adoption of military values by soldiers than civilians in business organisations is facilitated by the military organisation and training. Military training can be designed to break down the individual and strip them of their civilian values and to rebuild the individual as a tough and efficient soldier whose identity is deeply entrenched within the military. Soldier can be assimilated into the military’s thought processes, attuned to military values and adopt the military’s virtues. They can adapt to the collective culture (McGarry et al. 2015, 360–1). In this way, the military culture is not only more restrictive and controlled than its civilian counterpart but the soldier is more deeply entrenched in and committed to the military than a person in a civilian environment.

Militaries can promote the virtues of ‘loyalty, duty, respect, selfless service, honor, integrity, and personal courage’ and the ideology of ‘obedience, discipline, survival, and sacrifice’ (Brown 2015, 123; McGarry et al. 2015, 361, respectively). Militaries may also emphasise the nature

¹⁴ Soeters et al. predict that military culture is likely to shift gradually away from a traditional coercive type to a more enabling culture where soldiers will have greater freedom and there is mutual trust between commanders and soldiers; see Soeters et al. (2006, 244). If the military culture changes to one that gives the soldier greater freedom and control, this would have implications for the legal liability of the soldier. It also highlights that understanding the military and combat environments is not a once-off or stagnant process. Instead, it requires continual assessment.

and consequences of armed conflict. Army doctrine publications can highlight to soldiers the dangers of engaging in combat, including the exposure to and the need to engage in violence and killing and the risk of death or injury. The importance of the 'warrior spirit' and resilience in response to these dangers and consequences is generally also reinforced (McGarry et al. 2015, 358–9; see also Ministry of Defence 2012). Soldiers in 'hot' environments can display a 'can do' attitude and a culture that is often seen as virile and competitive (Soeters et al. 2006, 247). This virile and competitive character feeds into the masculine culture associated with many militaries. Even though militaries are becoming more inclusive and diverse, an archetypal image still remains. The warrior soldier is a physically fit and mentally strong male who is unemotional, brave, adventurous, sacrificing and resolutely heterosexual with the ability to fight (Woodward 2000, 643–4; see also Wadham 2004, 6; McGarry et al. 2015, 363). The great esteem placed on and the promotion of these values, virtues and characteristics combine with the military features of discipline and control, an institutional nature and a strong hierarchy to create a divergence between the military culture and the culture in general society. The soldier has a different culture and values and, accordingly, is likely to have a different perspective on reasonable actions and a more inhibited decision-making process.

A person's culture affects how they see the world and respond to it. Metaphorically, our genetics provide our disposition or 'hardware' but it is the 'cultural software' that determines how this hardware functions. This cultural software is learned from our social environment, not inherited (Soeters et al. 2006, 238; Hofstede 1991). Culture can provide 'a frame through which people understand and make sense of their experience[s]', including negative experiences and even traumatic experiences like war (Furedi 2007, 485; see also McGarry et al. 2015, 357). The military culture can provide this 'cultural software' or 'frame'. This is especially so when soldiers adopt the military culture and way of life so deeply that it is difficult for them to consider breaching its rules or virtues (see Osiel 1998, 954), and the soldier's identity is embedded within the military. Instead of the soldier's virtue and professional identity being grounded in international law, it is grounded in military culture, military history and the military's perception of an honourable soldier.

Thus, the military's culture and virtues provide the 'frame' for making sense of the soldier's experiences and set the parameters for the soldier in determining whether certain actions, and orders to perform such actions, are right or acceptable (see Osiel 1998, 954–5).

As with the group, when the military culture is one of respect, honour and self-sacrifice and reflects the principles of international law, then it is more likely that soldiers will recognise illegal orders and disobey them. Soldiers are more likely to identify and correctly respond to illegal orders in difficult situations if the military culture supports and the soldiers are trained to respond as an 'honourable soldier' rather than if soldiers merely question what their legal obligations are under international law. This aligns with the 'separation' theory above, in that, the virtues innate to the soldier's calling may be different from or even conflict with the common morality of civilian society but these virtues can also account for restraint in combat (Osiel 1998, 953). The rooting of respect and honour as central to the identity of a 'good soldier' is also more likely to encourage a higher level of restraint in war than international law currently imposes on soldiers (Osiel 1998, 955–6). An example of this restraint was seen when the US Joint Chief of Staff General Colin Powell stated that to continue to attack the overpowered and withdrawing Iraqi forces 'would be un-American and unchivalrous' (Barry 1992; see also Osiel 1998, 956).¹⁵ Rather than pursuing the Iraqi soldiers to the full extent of the law, the perception of what it meant to be an American soldier resulted in General Powell advocating restraint. In this way, the military culture and sense of morality can be in the best interest of lawful conduct and the prevention of violence and war crimes. Accordingly, there are dangers in distorting these military virtues, for example, by imposing civilian morality onto the military society. The imposition of such civilian norms could undermine important military virtues, for example, the willingness to lay down one's life for one's country.

¹⁵ Osiel notes that military virtue was not the only factor influencing Powell's recommendation not to pursue the Iraqi soldiers; see Osiel (1998, FN 51). While military virtues are unlikely to have been the only factor or even the dominant factor, the fact that this line of reasoning was chosen is insightful into the characteristics and culture that the American military would like to be seen to uphold.

On the contrary, a military culture based on racial ideology and disrespect for the law, especially when combined with a climate of non-prosecution and passive legitimatisation, is likely to hinder the identification of illegal orders and compliance with the law. Instead, the culture creates a new normative regime where the rule of law is distorted and atrocities become normal and ordinary.¹⁶ A negative or excessively masculine and aggressive military culture has been linked to physical, sexual and other abuses (see, for example, Wadham and Connor 2014, 2, 7), excessive violence (Soeters et al. 2006, 249; see also Winslow 1998) and even the abuse of POWs and the degradation of corpses (see, for example, Wadham 2004, 1–5). The war environment itself also fosters violent masculine conduct (McGarry and Walklate 2011, 901) and enhances the ‘us and them’ division. The uncertainty and the unfamiliar and dangerous situation of a ‘hot’ environment can build ‘swift trust’ and bonding between the team members. In some cases, this bonding can lead to a subculture with norms and rules that are counter to the rules of the larger organisation. In these circumstances, ‘the group generally closes the ranks, codes of silence are invoked, and whistle-blowers are ostracized’ (Soeters et al. 2006, 247–9). When the negative culture is pervasive throughout the organisation or breaches of the law are passively tolerated by authorities, the effects are likely to be heightened.

The effects of a negative or disrespectful military culture in a war context were illustrated in the My Lai massacre in Vietnam. Prior to the massacre, there was a failure in command supervision and soldiers received little to no instructions on the treatment of non-combatants. There was political pressure to show military success and success was evidenced through dead bodies. This contributed to a ‘body count’ mentality among soldiers. This mentality combined with a culture of racism, the regular commission of violent and illegal acts and the non-prosecution of offenders to result in atrocities becoming the norm. While soldiers often felt distress at committing these actions, they believed that it was

¹⁶ See Doris and Murphy (2007, 41–5, 47–8 and 48–9) for the effects of military culture on normative competence and obedience to superior orders in Vietnam, Abu Ghraib and Bosnia.

part of their duty as a soldier (see Doris and Murphy 2007, 43–6, for a detailed account of military culture in Vietnam and its effects on the soldiers at My Lai; see also Bilton and Sim 1992; Sallah et al. 2003).¹⁷ In this way, a corrupted military culture can lead to soldiers committing or obeying orders to commit serious violations of the laws of war. When such a military culture exists, the argument for the imposition of universal norms and civilian morality becomes a powerful force. It is these universal norms that balance the corrupted military culture to promote humanitarian concerns and respect for the law. This reasoning advocates for the ‘integration’ argument above and the greater immersion of the military into civilian society, perhaps, even, to the extent that soldiers share the same character, sensibilities and range of political views as their civilian counterpart. That is, there is no distinction between the civilian and the soldier (see Osiel 1998, 953).

In short, the military culture strongly influences the soldier’s decisions and behaviour and can be a force to ensure compliance with the law or to facilitate grave breaches of the law. The culture can also be more influential in determining whether a soldier will adhere to or breach the law than the law itself. This has led to conflicting calls for either the military culture to be strengthened and separated from civilian society or for the military culture to be assimilated into civilian society. The dilemma lies in that the imposition of legal reforms by civilian society, however well intentioned, may erode the military virtues that help ensure military success and restrain violence in combat. However, civilian society and the implementation of universalistic and humanitarian norms play a crucial role when the military virtues fail or are corrupted. Between the extremes of complete separation and complete integration, there lies a middle ground. A distinct military culture serves important military objectives and it is important that the imposition of legal rules or reforms balances this military necessity against the democratic and humanitarian virtues favoured in civilian society. This balanced approach cannot stop

¹⁷Not all soldiers in Vietnam committed illegal acts, not to mind atrocities. Even in the My Lai massacre, some military personnel acted to assist the Vietnamese; see Doris and Murphy (2007, 45–6).

at the legal rules. The balance between military necessity and respect for the rule of law needs to be incorporated into the military culture itself. The soldier's virtues and professional identity can be entrenched in the military culture and code of honour and, therefore, to ensure respect for and compliance with international law, the military culture must reflect the principles of international law. The mere enactment of rules and legal obligations is not enough. Accordingly, it is this middle ground that provides the greatest opportunity to maintain military virtues while also providing the 'check' of civilian norms. Achieving this balance will be difficult and would require a prudent, reasonable and open approach and greater engagement with and the collaboration of the military. The necessity of this balance though means that it is a challenge that we cannot shy away from.

In any respect, where society has chosen to separate the military from general society, which occurs to varying extents in many nations, they have chosen to create a separate military culture. In this way, to a large extent, the state decides on whether and the degree to which the nation will favour military effectiveness over civilian values and that decision has considerable consequences for the military culture that the soldier is immersed in. It affects the soldier on the ground. Society cannot select to only acknowledge the benefits of a separate military culture. The full consequences need to be recognised. A separate culture creates a divergence between the civilian's and the soldier's values, perceptions of reasonableness and ability to identify and disobey illegal orders. Accordingly, the courts need to firstly understand the military culture, which will vary over time and therefore requires continual assessment (see O. Rukavishnikov and Pugh 2006, 131, 143, for how the civil–military relations are permanently changing). Secondly, the courts should incorporate the effects of the military culture on the soldier's ability to identify an illegal superior order and on the likelihood that the soldier will be able to disobey the order into their implementation of the legal standard of a 'reasonable person'. To do otherwise would be to base the law on pure ideology and create a schism between the law and reality. This also means that the need to create and maintain a military culture that embeds the virtues of honour, has respect

for the rule of law and reflects the principles of the laws of war is all the more crucial.

Physiological, Biological and Psychological Effects of the Combat Environment

Exploring the influence of the commander, the group and the overarching military culture gives us insights into the soldier's mind-set and the factors that affect the decisions and behaviour of the reasonable soldier. However, combat is also inherently a frightening and stressful environment. To garner a comprehensive understanding of the soldier, the physiological, psychological and biological effects of high levels of stress, fear and anxiety need to be examined.

While it is established that stress can lead to physiological repercussions and the 'fight or flight' phenomenon, the effects of stress, especially survival stress, is still an emerging science. There is a need for further research to determine the exact physiological responses that result from survival stress and the effects of these physiological responses on a soldier's body and mind (Grossman and Christensen 2008, xi; Murray 2006, 44). Furthermore, stress and its ensuing effects are individualistic. Individuals can respond to stress differently and individuals can perceive the same situation differently. One person may regard a situation as threatening while another individual would not feel threatened. Indeed, two soldiers present at the same incident may reach opposite conclusions (see Mackmin 2007, 71; Murray 2006, 73). The stress experienced by soldiers in combat is different to the stress generally experienced by individuals in civilian society. Combat stress entails strong fears of death and injury as well as the need to display and resist overt aggression (Grossman 2009, 51, 53; Watson 1978, 195). Combat stress and its effects are likely to be significantly stronger than regular stress. Despite these limitations, current research on stress shows a general set of possible effects that have been reported by a wide range of individuals. While there is no specific set of effects that every individual will experience in high-stress situations, preliminary research sheds light on

some of the most common physiological and psychological responses to combat stress and the ensuing effects on the perceptions and the mind of the soldier.

Physiological and Biological Effects of Stress

High levels of stress can hinder a person's ability to gather information, to process the information gathered and to provide an accurate account of the events that took place. A just legal standard that is reflective of reality needs to understand and incorporate these effects. To understand these effects, it is necessary to understand the physiology and biology of stress, namely the activation of the sympathetic nervous system, heart rate, motor behaviour and performance, sensory distortion and perceptual awareness, attention, memory and cognitive function. Military training is designed to assist soldiers in overcoming the effects of stress and to perform trained responses in high-stress environments. This training is likely to be successful to a certain extent.

Stress can have a powerful effect on an individual's body and responses and an individual's ability to control their actions. Common physiological and biological responses to high levels of stress include elevated heart rate, increased production of certain hormones, visual narrowing, perceptual distortion and the takeover of the 'dominant responses'. Acute stress can lead to 'profuse sweating, uncontrollable trembling, temporary paralysis, shortness of breath, or hyperventilation', voiding one's stomach and bladder, remembering past traumas and simulating death (see Murray 2006, 38, 242–3). Mental stress alone, without any physical barrier or imminent physical threat, can be enough to deteriorate one's performance and affects one's trained skill (Murray 2006, 28). Combat generally entails physical barriers and imminent physical threats and, therefore, it is likely that combat stress will further deteriorate the soldier's performance and skills. Thus, the acute stress in combat has a powerful physiological effect on the soldier's performance, responses, control and cognitive ability. It is important to understand these responses and their effects in order to comprehend their impact on the soldier's perception of reasonableness and decision to obey illegal orders.

An individual's nervous system is made up of the sympathetic nervous system and the parasympathetic nervous system with the sympathetic nervous system being responsible for stress responses and the parasympathetic nervous system being responsible for repair and creating energy reserves. In times of high stress, especially in life-threatening environments, the body's sympathetic nervous system takes over resulting in the neglect of the parasympathetic processes. The body disregards all functions that are not key to survival. For this reason, it is common for soldiers in the midst of combat to suffer 'stress diarrhoea' and even lose bladder and bowel control (see Grossman and Christensen 2008, 14–5; see also Doris and Murphy 2007, 35). In World War II, 25 per cent of soldiers admitted to losing bladder control and 8 per cent admitted to losing bowel control (see Stouffer et al. 1949, 76, 201, for an account of the physical symptoms of intense fear and stress; see also Grossman and Christensen 2008, 9). Given the current lack of awareness and the macho persona surrounding a soldier's self-image, it is expected that the real figure is much higher (Grossman and Christensen 2008, 9–10). In addition, the activation of the sympathetic nervous system causes over 135 measurable changes to take place within the body. These changes include the secretion of hormones such as adrenaline, epinephrine and noradrenaline, which increase blood pressure, heart rate and body metabolism (see Murray 2006, 41; Siddle 1995, 88–9; Benson and Klipper 2000, 9).

While further research is required to establish a direct relationship between heart rate and physiological effects, heart rate is nevertheless a useful indication of physiological arousal due to fear or stress (Murray 2006, 41). It provides an overview of the effects of stress on the human body. An individual's heart rate will generally rise in direct correlation to the fear and stress that the individual feels towards an actual or perceived threat. High anxiety levels in the forms of fear, apprehension, anger or a sense of hopelessness are mental stresses and can affect a person's heart rate (Siddle 1995, 80; see also Vonk 2007; Murray 2006, 39). The combat environment entails high levels of stress, fear, anxiety, anger and frustration. Accordingly, soldiers are likely to have high anxiety levels and heart rates.

Each individual has a personal beats per minute (bpm) at which their heart rate will have certain physiological responses and each individual

has a personal bpm at which they optimally perform a given task. Despite the individualistic nature of heart rates, some generalisations can be made about the physiological repercussions of a rising heart rate. Between 115 and 145 bpm, a person's fine motor skills begin to deteriorate but their complex motor skills, visual reaction time and cognitive reaction time are at their peak. This can be classed as the optimal survival and combat performance level.¹⁸ Between 145 and 175 bpm, a person's complex motor skills deteriorate. Above 175 bpm, the average person's gross motor skills, such as one's ability to run and charge, are strengthened. However, the person's cognitive processing deteriorates and it is common to lose peripheral vision, depth perception and near vision which often results in a threat looking closer than it really is in reality (Grossman and Siddle 2000, 139–50; see also Grossman and Christensen 2008, 30–49, particularly at 31).¹⁹ An individual's heart rate can rise very quickly. A person's heart rate can go from a resting rate of 60–80 bpm to over 200 bpm in under a second (Murray 2006, 39). In a survival situation, it is expected that a person's heart rate will exceed 145 bpm. In a life-threatening situation, such as a fire, one's heart rate is likely to exceed 175 or 200 bpm (Siddle 1995, 57, 111–2). Accordingly, in a fire, soldiers' strength and gross motor skills are strengthened but their fine and complex motor skills as well as their cognitive ability are diminished. This affects their ability to process information and make reasonable decisions.

In times of high stress, blood flow is also directed to the major muscles, such as the thighs, chest and arms, but blood flow is restricted to the extremities, such as the fingers. In conformity with the research on heart rates, this redirection of blood flow can lead to greater strength and improved gross motor skill but diminished fine and complex motor

¹⁸ *Fine motor skills* are skills that utilise small muscle groups and generally require hand–eye coordination, for example, precisely shooting a weapon. The absence of stress or a low level of stress is the optimal performance environment for the exercise of fine motor skills; see Siddle (1995, 43). *Complex motor skills* are 'skills which involve hand-eye coordination, timing or tracking, and have multiple technique components' and they usually involve several muscle groups working together to perform a single action. A low level of stress is the optimal performance environment for the exercise of complex motor skills; see Siddle (1995, 44). See also Grossman and Christensen (2008, 30); Vonk (2007, 3); Murray (2006, 39 and 40).

¹⁹ *Gross motor skills* are skills that utilize large muscle groups, for example, pushing or pulling and double-appendage symmetry actions. High levels of stress or excitement increase the optimal performance level due to increased adrenal secretions; see Siddle (1995, 43).

skills (Siddle 1995, 46, 89).²⁰ According to the Inverted-U Hypothesis, an increase in stress to a particular level improves a person's performance. Once this level of stress is reached, additional stress decreases a person's performance. The Yerkes-Dordon Law stipulates that the optimal level of stress for behavioural efficiency decreases in direct correlation to the difficulty or complexity of the task (Sage 1984; Siddle 1995, 42, 45).

The activation of the sympathetic nervous system can also lead to sensory distortion that affects the individual's perceptual awareness of their environment. The physiological changes that take place will vary according to the individual. Some generalisations of common experiences are highlighted in order to give a deeper understanding of the experience and 'reasoning' of a soldier in combat. A range of sensory distortions can take place and have varying levels of commonality. In an immensely stressful environment where an individual believes their life is in danger, 85 per cent experience auditory exclusion, 80 per cent experience tunnel vision, 74 per cent experience automatic pilot, 65 per cent experience slow motion time and 51 per cent experience memory loss for some part of the event (Artwohl and Christensen 1997, 33–69; see also Grossman and Christensen 2008, 54–122 but particularly 55). These distortions represent only some of the most common sensory distortions reported and experienced in life-threatening circumstances.

Auditory exclusion means that the individual does not 'hear' a sound that would generally be audible. Auditory exclusion in life-threatening scenarios can be so severe that the person does not hear or consciously register gunshots, shouted warnings or radio transmissions. In line with auditory exclusion, some individuals experience auditory recall. This is where the individual recalls the words of another so clearly that the individual feels like the person is talking to them in the life-threatening moment. For soldiers and police officers, it can be the words of their training instructors that they recall and these words can save their lives (see Murray 2006, 37, 42). The activation of the sympathetic nervous system also affects an individual's vision. In period of stress, a person's field of vision narrows to the threat stimulus. High levels of stress cause

²⁰ Siddle notes that motor behaviour and performance is well researched but there is little research on survival training; see Siddle (1995, 49). See also Murray (2006, 45).

the pupils to dilate in order to gather more information but depth perception is reduced. The axillary muscle is also restricted. This leads to a reduced ability to focus, which in turn leads to blurred vision at greater distances (Siddle 1995, 76).²¹ Moreover, the activation of the sympathetic nervous system causes vasoconstriction to the blood vessels on the periphery of the retina. This reduced blood flow can result in a reduction in peripheral vision by 70 per cent and an inability to identify subtle movements (Siddle 1998, 3).²² In short, high levels of stress result in physiological changes to the eye. These changes diminish the individual's ability to visually track an object and to focus on close objects and they narrow one's peripheral visions.

Some researchers refer to the narrowing of one's vision in periods of high stress as 'funnel vision' as the brain excludes information that it believes is non-critical in order to focus on the relevant information (Murray 2006, 41–2). Similarly, auditory exclusion in life-threatening circumstances works to maximise the gathering of critical information with the exclusion of information considered non-critical (Siddle 1995, 78). However, funnel vision and auditory exclusion also mean that the soldier may fail to perceive pertinent information, such as, the presence of innocent third parties. Sensory distortion through auditory exclusion, auditory recall, vision distortion and vision narrowing disrupt a person's ability to clearly and accurately assess the prevailing circumstances, which directly impinges on the person's ability to make an informed and reasonable decision. This effect is exacerbated by the fact that high levels of stress in a threatening environment can cause a person to substitute speed for accuracy and make a decision before all information is acquired (Mendl 1999, 229). Combat is an immensely stressful environment and, accordingly, the ability of the soldier in combat to accurately assess a situation, to gather all pertinent information and to resist the urge to

²¹ Some researchers question whether the activation of the sympathetic nervous system in all cases leads to physical changes in the eye; see Murray (2006, 41–2).

²² The effect of stress on peripheral vision was also demonstrated in an experiment by Weltman and Egstrom (1966). This experiment found that scuba drivers' response time to a light stimulus in their peripheral vision increased by up to 400 per cent when the driver moved out of the static conditions of a tank and into the more dangerous conditions of open ocean; see Weltman and Egstrom (1966); Siddle (1995, 76).

'act first' is likely to be impaired. That means that the soldier's decision-making abilities are weakened.

The activation of the sympathetic nervous system can also impact on an individual's attention, choice of response and memory. High levels of stress in life-threatening situations often result in the person's mental attention narrowing to the threatening stimulus. If the task that the individual must perform and the threatening stimulus are the same, such as when a person must kill a dangerous enemy, then attention narrowing is likely to be advantageous. If the task requires the individual to take account of peripheral details, such as assessing the overall circumstances to determine whether it is legal to act, then attention narrowing is likely to deteriorate performance (see Mendl 1999, 228–9; Easterbrook 1959). The transfer of attention from the task to the threatening stimulus can also lead to the individual performing the 'default' or automatic reaction and to the individual indiscriminately selecting a response when a number of possible responses are available (Mendl 1999, 227). This means that soldiers in high-stress environments like combat are likely to perform the conditioned response that they learned in military training or to select a possible response without conscious thought. In this way, the soldier does not respond 'reasonably' but automatically or randomly.

An individual's attention can also be negatively affected by fatigue and heat. Fatigue through lack of sleep or fatigue through stimulus overload, for example, sustained exposure to loud noises, can result in a lowered state of alertness and lapses in attention. This can lead to delayed reaction time and failure to perform the task effectively (Mendl 1999, 227).²³ Soldiers in sustained combat are likely to be fatigued and to experience prolonged exposure to heat and loud noises. As a result, they are likely to be less alert and prone to lapses in concentration, which directly affects their ability to effectively perform and to make reasonable decisions.

Attention narrowing on the threat stimulus to the exclusion of peripheral details also means that individuals often remember the central event well but cannot fully recall relevant peripheral information (Mendl

²³ *Reaction or response time* is 'the length of time from the perception of the threat stimulus to the completion of the [person's] movement'; see Siddle (1995, 63). See also McGivern (2007, 181–6) and Schmidt (1991, 67–83).

1999, 228; Christianson 1992).²⁴ High levels of stress can alter a person's perception of time and events may be remembered out of sequences, incorrectly or not at all. There are numerous reports of officers in life-threatening circumstances having acute memories of events that never occurred, for example, the death of their partners (see Murray 2006, 42; Artwohl and Christensen 1997, 50; Mullaney 2009, 295, 299). Distorted and incorrect perceptions and memories of stressful incidents are not limited to participants in the event. Witnesses are also susceptible. DNA evidence has proven the innocence of over 100 wrongly convicted individuals and witnesses incorrectly identified more than 75 per cent of these individuals (Wells and Olson 2003, 278; see also Wells et al. 1998, 603–7; Scheck et al. 2000). The presence of a weapon increases the likelihood of the witness making a mistake. Moreover, juries tend to be unable to determine whether the witnesses' account is accurate or not and there is some evidence that jurors over-believe eyewitnesses (see Wells and Olson 2003, 282, 284–5). Consequently, soldiers or witnesses to an incident in combat may not be able to provide a full and accurate account of the incident. This directly impacts on the court's ability to accurately ascertain the prevailing circumstances in order to know whether the soldier acted reasonably.

In addition to affecting an individual's motor behaviour, performance, perceptual awareness, attention and memory, the activation of the sympathetic nervous system affects the individual's cognitive function. That is, the person's ability to think. While this is an emerging area of research and more studies are necessary, some generalisation can be made (see Mendl 1999, 236). Minor increases in stress levels can deteriorate a person's ability to process complex cognitive tasks whereas moderate levels of stress are the optimal performance environment for simple cognitive tasks. Moderate or high levels of stress can negatively impact on decision-making ability (Siddle 1995, 46, 49; see also Schmidt 1991; Sage 1984). Yerkes-Dodson Law and the Inverted-U curve provide a suitable descriptive summary of the relationship between stress and cognitive responses. According to Yerkes-Dodson Law, there is an optimal stress range for peak

²⁴ The impact of arousal, fear and emotional stress on one's memory has not been conclusively settled; see Wells and Olson (2003, 282).

cognitive processing. Above or below this range performance deteriorates (Mendl 1999, 225).²⁵ The Inverted-U curve reveals that the optimal performance environment for information processing is 115 to 145 bpm whereas performance deteriorates at 80 bpm or below and 175 bpm or above (Siddle 1995, 49, 79).²⁶ In a life-threatening situation like combat the soldier's heart rate is likely to exceed 175 or 200 bpm. This means that soldiers are cognitively impaired and their ability to think, process complex information and make decisions is reduced.

Stress and fear can affect cognitive processing through the 'jangle effect'. The 'jangle effect' impairs reasoning and problem solving, especially verbal problem solving and internal dialogue problem solving. Generally, people use internal dialogue to 'think' their way through a problem (Kosslyn and Koenig 1992, 480–4; see also Murray 2006, 43). As a result, the stress and fear soldiers are likely to feel in combat affect their ability to perceive and process relevant information and to reason and problem solve. The environmental pressures of war compound this effect. In prolonged combat, soldiers can be exposed to persistent fatigue, sleep deprivation, anxiety, extreme weather conditions, filth and hunger. These environmental factors can change the brain's chemistry and result in the soldier's mental capabilities diminishing to the extent that the soldier has 'great difficulty comprehending even the simplest instructions' (Gabriel 1987, 142; Osiel 1998, FN 69). Sustained combat, hunger and tiredness alone can lead to 'cognitive and moral disorientation' (Osiel 1998, 965). This reduced ability to perceive and process information can lead to soldiers making mistakes. Misinterpreting visual cues, for example, misidentifying objects as weapons, is relatively common in life-threatening circumstances (Siddle 1995, 78).

This confusion is further compounded by the amount, intensity and complexity of information and events that can take place at once in combat. A person can only concentrate and perform effectively a certain number of tasks, especially complex tasks, at any one time. Furthermore,

²⁵The Yerkes-Dodson law and the Inverted-U curve may be an oversimplification; see Mendl (1999, 224).

²⁶Pargman defines information processing as 'the deposition of information in memory, the retrieval of information from memory and the enactment of movement in response to a stimulus'; see Pargman (1986, 22).

a person cannot maintain high levels of attention indefinitely (Dukas and Clark 1995; Eysenck 1995, 22–38; Mendl 1999, 226). Combat can require soldiers to attend to multiple and complex tasks and to sustain high levels of attention for prolonged periods of time. Significant decreases in cognitive function due to stress may also result in fatal increases in reaction time or hyper-vigilance. Hyper-vigilance often causes illogical and unreasonable conduct, such as, fight, flight, freezing in place, irrational acts, defective decision-making, failure to see or hear specific human activity and repeating an act even though it is ineffective (see Siddle 1995, 7–8, 61, 75–6, 81, 89–91).

Military training, including realistic combat training in a simulated environment, can significantly affect how a person responds in a stressful environment. Military training can even extend the average individual's optimal performance level from 145 to 175 bpm (Grossman and Christensen 2008, 34–9). While this emphasises the importance of adequate training for soldiers, it also means that the reasonable soldier will be able to withstand the physiological and biological effects of stress to a higher level than the reasonable civilian in combat. This heightened ability to withstand the physiological effects of stress should be taken into account when determining the reasonableness of the soldiers' actions and decisions, including their decision to obey illegal orders.

While repetitive realistic training assists the soldier in overcoming physiological barriers in order to effectively respond, this training may also breed automatic and reflexive responses. In line with the discussion above, Dr Artwohl's research found that 74 per cent of officers involved in a deadly force encounter acted on autopilot, that is, without conscious thought (Artwohl and Christensen 1997, 33–69; see also Grossman and Christensen 2008, 74). Indeed, Grossman and Christensen (2008, 77) maintain that training can overcome any learned or natural resistance to killing, human emotions or logic. The legal standard set for soldiers is premised on the belief that, in the immensely stressful and deadly conditions of war, the illegality of an order will be apparent and the soldier will respond accordingly. Research and military experience indicate that the soldier will respond reflexively. This highlights the need for repetitive and realistic training that ensures that the automatic response of the soldier

is the correct one. Moreover, this means that the soldiers do not respond 'reasonably' but in accordance with their training. As a result, there is a divergence between how the reasonable soldier post-training will respond and how the reasonable person who has never undertaken military training will respond.

In summary, high levels of stress have physiological effects on the soldier's heart rate, motor behaviour and performance, sensory and perceptual awareness, attention, memory and cognitive function. The activation of the sympathetic nervous system due to high levels of stress provides many biological benefits in life-threatening environments, such as an increase in strength and improved performance. Once stress exceeds the optimal level of stress, there are detrimental effects. These detrimental effects include diminished fine and complex motor control and diminished performance. An individual's optimal level of stress is lowered if the individual must perform difficult or complex tasks. Combat is an immensely stressful environment where soldiers must often perform difficult and complex tasks and make difficult and complex decisions. It is likely that the stress in combat could exceed the soldier's optimal stress level and, hence, the soldier would have to perform complex tasks and make difficult decisions when their motor control and performance is diminished.

The conditions of combat can weaken the soldiers' ability to concentrate, to gather all the relevant information necessary to make an informed decision or to even fully process the information that they do gather. The various sensory distortions alone can result in soldiers failing to perceive pertinent information and disrupt their ability to clearly and accurately assess the prevailing circumstances. This means that the soldier must make a decision based on incomplete information, which directly impinges on the person's ability to make an informed and reasonable decision. The effects of sensory distortion are compounded by the fact that high levels of stress can also alter a person's perception of time and can cause the person to remember events out of sequences, incorrectly or not at all. As a result, soldiers or witnesses to an incident in combat may not be able to provide a full and accurate account of the incident. This directly impacts on the court's ability to accurately ascertain the prevailing circumstances in order to know whether the soldier acted reasonably.

The activation of the sympathetic nervous system due to high levels of stress can result in diminished cognitive function and a reduced ability to think and make decisions. The effects of this reduced cognitive function are exacerbated if the soldier is fatigued and/or is exposed to the elements and loud noises for a prolonged period of time. Fatigue and prolonged exposure to the elements are likely to cause the soldier to be less alert and prone to lapses in concentration, which directly affects their ability to effectively perform and to make reasonable decisions. The combat environment is dynamic and normally requires the soldier to be alert and able to evaluate and assess multiple and complex sources of information quickly.

While correct military training can mitigate the soldier's response to stress and improve the soldier's performance in combat, the high levels of stress associated with warfare mean that the soldier may experience sensory distortion, impaired cognitive function, a diminished ability to gather and process information and a reduced ability to concentrate. These effects can result in behaviour that appears irrational or unreasonable. That is, the soldier's physiological and biological responses to the combat environment may cause changes and lead to actions that are obscure to the 'reasonable person'.

These multitudes of factors come together to have a powerful cumulative effect on the perceptions, decisions and behaviour of the soldier. To create a legal standard that is just and reflective of reality, the courts must take these physiological and biological effects into account when determining the liability of the reasonable soldier for decisions and actions taken in combat.

Psychological and Physiological Effects of Stress

High levels of stress can also affect the psychology of the soldier or result in physiological changes that affect their mind-set. These changes can stimulate aggression and influence the soldier's perception and standard of reasonableness.

High levels of stress can affect an individual's ability to control their aggression. Significant stress impairs cognitive function. At a certain point,

peculiar to the individual, the cognitive impairment is sufficient to lead to actions that appear irrational and unreasonable to an outsider but are completely rational and reasonable to the individual (Mackmin 2007, 72; Zillman 1979, 275). This impairment can also weaken inhibitions to violent impulses and increase an individual's propensity to aggression. Aggressive behaviour is even more likely if the person is in an environment or a situation that would generally stimulate aggression (see Martell 1992, 321). Combat provides such an environment. In this way, combat may impair inhibitions of violent impulses while stimulating excesses in impulsivity and aggression. While aggression obviously serves a role in assisting the soldier to fight and kill in combat, excesses in aggression can result in violations of international law and, furthermore, an altered perception of appropriate use of force. This means that the military must create and maintain a delicate balance between releasing individual aggression to ensure an effective soldier and restraining aggression to ensure control of troops, correct application of force and adherence to the laws of armed conflict (Mackmin 2007, 73).

Stress can directly impact on the psychology of the soldier. In combat, a soldier may feel fear, exhaustion, hate and horror and be required to kill others. The requirement to personally kill and the knowledge that someone is personally trying to kill you is immensely stressful for humans and can have severe psychological repercussions (Grossman 2009, 53–65, 80). In addition, environmental factors, such as, the cold, heat, consistent rain, rats, lice and mosquitoes can have a significant negative physical and psychological effect on the soldiers (Grossman 2009, 72). The cumulative effect of all these factors can lead to 'changes in mental processes, moods, attitudes and motivation ... [and] ... a loss of working efficiently' (see Taylor 1991, 496; Mackmin 2007, 74) or a psychological breakdown or insanity for the soldier. In World War I, World War II and the Korean War, more soldiers were pulled from the front lines due to psychiatric wounds than were killed in combat (Gabriel 1987, 42; Grossman and Christensen 2008, 12; Grossman 2009, 43, 54). In sustained battle, that is, 60–90 days of continuous battle, 98 per cent of the soldiers involved experienced psychiatric wounds (Grossman and Christensen 2008, 12; Grossman 2009, 43–4).

Psychiatric disorders from combat include depression and *Ganzer syndrome*. Severe depression can lead to apathy and a sense of hopelessness, which in turn can affect the soldier's mental processes and memory and the soldier may become slow-witted (Grossman 2009, 83). This may impair the soldier's ability to make reasonable decisions. *Ganzer syndrome* is where the person uses inappropriate humour. This can combine with desensitisation to death and destruction so that the soldier feels that nothing is sacred and there is a loss of respect for human life. The result can be behaviour such as soldiers mock picking their nose with the dead enemy's hand or urinating on the enemy's corpse (see, for example, Grossman 2009, 45–6; see also Gabbatt 2012, for marines urinating on corpses). Such conduct has been seen in many conflicts.

Temporary removal from the combat environment can prevent and counter many of these psychiatric effects and psychological disorders. Sometimes it is not possible to rotate soldiers out of the battlefield (Grossman and Christensen 2008, 19). Sleep is an alternative to help counter the stress of war (Grossman and Christensen 2008, 23). In a combat environment, soldiers may be sleep deprived, with the ensuing medical and psychological repercussions of insufficient sleep, rather than be able to benefit from extra rest. The medical and psychological repercussions of a lack of sleep and food over an extended period of time include vivid hallucinations and a 'zombielike' state (Grossman 2009, 66–7, 71). If a person is deprived of sleep for even 24 hours, then they are the physiological and psychological equivalent of being legally drunk. Given the intense stress of war, these effects are likely to be heightened for soldiers in combat (Grossman and Christensen 2008, 25). Continuous combat is likely to produce a level of exhaustion that will result in nervous and mental disorders for a large number of soldiers (see Grossman 2009, 68). This means that instead of soldiers overcoming the stresses of war through the benefits of sleep, they may be sleep deprived which can significantly affect their ability to make reasonable and rational decisions and may even lead to significant changes to the soldier's perception of reasonableness.

Thus, the combat environment can result in the reasonable soldier having a higher propensity towards aggression and impulsivity, a lower inhibition to violence and an altered perception of appropriate behaviour.

The combat environment can also lead to mental disorders, depression and Ganzer syndrome. These psychological disorders can further impair the soldier's ability to make reasonable decisions and their perception of reasonableness. In this way, the combat environment creates a divergence between the reasonable soldier and the reasonable civilian.

The cumulative effect of the physiological, biological and psychological responses to high levels of stress can result in soldiers having an impaired ability to gather all pertinent information, a reduced ability to process the information that they do gather, a greater propensity towards aggression and an altered perception of reality and reasonableness. This creates a substantial divergence between the perceptions and decision-making ability of the reasonable soldier in combat and the perceptions and decision-making ability of the reasonable person in civilian society. The courts need to understand and reflect this divergence in their determination of the reasonableness of the soldier's decision to obey an illegal order.

Conclusion

The legal standard implemented against soldiers who obey the illegal orders of their commanders is based on a false presumption. The legal standard is premised upon the belief that a reasonable person will identify and disobey a clearly illegal order. A majority of people will obey the order of an authority figure even if they know the order is wrong; they believe in theory that they should disobey and the order goes against their conscience and sense of morality. The legal standard set for soldiers in combat reflects our ideology of how we believe a reasonable person should act, as opposed to the reality of how a reasonable person will act.

When the state separates the military from society, a separate military culture is created, which leads to a corresponding divergence between the soldier's values, perceptions and standards and a civilian's values, perceptions and standards. The influence of authority figures and the group over the decisions and behaviour of the soldier can be significantly stronger than its influence over a civilian. The effects of high levels of stress on

one's decision-making ability and perceptions are likely to be heightened in combat. The cumulative result of these effects is that there is a difference between the reasonable soldier and the reasonable civilian. In order to reflect reality and be a just and appropriate standard, the courts need to implement the standard of a 'reasonable soldier' and not the standard of a 'reasonable person' informed from a civilian perspective. To do this, the courts need to understand the soldier and the soldier's environment.

The courts should include emerging knowledge on the effects of high levels of stress in their assessment of what the reasonable soldier would do. The stress of combat is likely to have physiological, biological and psychological effects that greatly influence the decisions and actions of the reasonable soldier. This knowledge can often lend insights into behaviour that would otherwise appear irrational. To ignore this knowledge would only create a divergence between the law and reality. If soldiers feel that the law does not reflect reality then they are less likely to respect the law. This is especially the case if they feel the law is generally implemented to their detriment. In this way, the law weakens its own ability to guide the actions of soldiers.

We should accept that violations of the law are not solely committed by 'bad apples' and question the 'individuation' of criminality and the rhetoric of 'exceptionalism'. The social production of crime in war needs to be acknowledged. This awareness also highlights that the law alone has a limited ability to prevent violence and violations of the laws of war. The power of legitimate and respected authority figures combines with the admiration and interdependence within the group, group pressures, group absolution and diffusion of responsibility to make it very difficult to disobey orders to commit and to prevent others from committing serious crimes. This shows the limits of the law. These environmental factors can have significantly greater influence over the soldier's decision to obey illegal orders to commit serious crimes than the law does itself. This knowledge, however, also offers the opportunity for change. Instead of implementing a standard based on the ideology of how we want the 'reasonable person' to behave and hoping that the threat of that standard will force such behaviour, we need to look at how we can best ensure that the 'reasonable person' would behave as we want in reality. Rather than relying on 'high standards' and punishment alone as tools for deterring

bad behaviour, we need to look at the social production of criminality. We need to look at influencing the factors that would help ensure good behaviour.

This means that to ensure the standard we want, that is, soldiers do not obey clearly illegal orders, we need to address the thorny issues of military culture, group dynamics and the attitudes and behaviour of our leaders. These factors are far more difficult to address than merely imposing high standards, and change would require goodwill, collaboration and finesse. Yet, it is only by influencing the soldier's environment to encourage this standard and then reflecting that standard in the law that we can hope to prevent atrocities and serious violations of the laws of war.

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7

Conclusion

The standard of ‘reasonable soldier’, and not the standard of ‘reasonable person’ informed from a civilian perspective, should be the legal standard applied to soldiers that obey unlawful orders. The military and combat environments mean that the soldier is subjected to a multitude of experiences, such as military training and war, which the reasonable person does not experience. While the reasonable person is exposed to the effects of authority figures, the group, the broader culture and stress, these environmental factors can be substantially intensified for the soldier.

Military training breaks down the civilian and builds a soldier. It can condition obedience, heighten their aggression and teach them situational awareness and to regard their environment as dangerous. A soldier’s body and mind can be trained to fight, their resilience cultivated, group unity fostered and their identities embedded in the military. Combat can be a dangerous, complex, dynamic and often brutal environment. These characteristics are amplified significantly in a live contact with the enemy. Live contacts with the enemy can also be loud, chaotic, distracting and perceptually corrupt. This can affect the soldier’s ability to accurately assess the situation and to cognitively process relevant information, and it can

negatively affect the soldier's moral functioning. War generates an exceptionally high level of violence and suffering. Playing witness to and participating in this level of violence and suffering can lead to brutalisation, desensitisation and moral drift. When this is combined with moral and physical distance from the enemy and the dehumanisation and demonisation of the enemy, the perceptions, standards and morals of the soldier can become considerably altered. During combat, soldiers can also experience stress, anxiety and strong feelings of fear, confusion, anger and frustration, and the level of stress and anxiety is likely to far exceed the level of stress and anxiety experienced by the reasonable person in civilian society. Physiological, biological and psychological responses to high levels of stress can affect the soldier's decision-making ability. It can also alter their perceptions, cognitive function, mood and attitude. This can lead to a soldier freezing, overreacting or behaving irrationally. Recognising the physiological, biological and psychological effects of stress can often lend insights into behaviour and decisions that would otherwise appear irrational.

Military training can be designed to build resilience and to offset the effects of war and stress on the soldier. This means that a soldier is likely to be able to withstand the stresses of war to a much greater degree than a civilian. However, the stress of combat may exceed the soldier's resilience training in some circumstances. The average civilian also does not generally encounter the same type or degree of stress as a soldier in combat and correspondingly would not automatically fully appreciate or understand the stress of combat. Importantly, the effects of the military and combat environments operate in a wider context of common environmental or social factors that influence all our decisions, standards and behaviour. Our cultural environment affects our values, perceptions and standards, and the separation of the military from wider society creates a separate culture and a corresponding divergence between the soldier's and the civilian's values, perceptions and standards. Authority figures and group pressure influence a person's obedience and conformity. These environmental factors help shape the person's ideals and standards and influence one's behaviour. They can even cause a person to agree with a clearly incorrect conclusion and to obey an order that they know is wrong and goes against their morals. While the influence of the authority figure and

the group affect everyone, the effects can be significantly heightened for soldiers in military organisations or in combat. This means that they are even more likely to obey, conform and adopt the ideals and standards of the military.

Each of these environmental factors—military training, combat, military culture, authority figures and the group—independently affect the soldier's perceptions, standards and behaviour. When these environmental factors combine, then the effects are substantially compounded. The result is a divergence between the reasonable soldier's perceptions, standards and behaviour and the reasonable civilian's perceptions, standards and behaviour. The central argument of this book is that the courts need to recognise this divergence and adopt the standard of a 'reasonable soldier' and not the standard of a 'reasonable person' informed from a civilian perspective. That is, ambiguities and inconsistencies that exist in international and national law on what standard should be implemented and what circumstances should be considered when determining the legal liability of the obedient soldier should be settled by adopting a 'reasonable soldier under the circumstances' standard.

This book argues for the 'reasonable soldier under the circumstances' standard. It is not an argument to lower the legal liability of the soldier or that the military and combat environments should excuse the soldier of guilt. Instead, it argues that to be a just and appropriate standard that represents the realities of the soldier's experience, the legal standard needs to be reflective of the military and combat environments. The legal standard should be a tailored standard that represents the 'reasonable soldier' and not the 'reasonable civilian'. Some environmental factors, such as the soldier's resilience training, should raise the soldier's standard above a civilian's while other factors, such as the intensified influence of the group, should lower the standard below a civilian's standard. The legal standard should be adapted to match the specific and unique environments of the military, combat and the soldier's experiences and not the generic environment of society. Moreover, adopting a 'reasonable soldier under the circumstances' standard has the potential to justify raising the legal standard that soldiers are currently held accountable to under the Rome Statute. When the environmental factors, the soldier's experiences and all relevant circumstances are incorporated into the legal standard,

it would be just to hold the soldier accountable to the higher standard of a 'reasonable soldier under the circumstances would have known that the order was *unlawful*' as opposed to a 'reasonable soldier would have known that the order was *manifestly unlawful*'. This would hold soldiers accountable to a higher standard while setting a more practical and realistic standard that incorporates the soldiers' experiences and environment.

Including the effects of the military and combat environments in the legal standard imposed also means that the law will be more closely aligned to the environment within which it will operate. This will enhance the ability of the law to guide the actions of soldiers. On the other hand, to ignore these environmental factors and to implement a law, informed from a predominately civilian perspective, into the unique and exceptional circumstances of war is likely to create a divergence between the law and actual practice. That is, a law that does not reflect its environment is at greater risk of not being adhered to in practice. This is especially so if soldiers feel the law not only does not reflect their experiences but is generally implemented to their detriment. In such circumstances, there is a notable possibility of generating lip-service to the law rather than genuine respect. For the courts to incorporate these environmental factors into the legal standard to a greater degree, the courts need to have a more comprehensive understanding of the soldiers' experiences and the military and combat environments. In turn, we need more research, especially more empirical research with those who have first-hand experience of war. In order to provide the courts with the most comprehensive and complete understanding, this research also should be interdisciplinary and include a spectrum of disciplines such as criminology, law, sociology, psychology, behavioural science and anthropology.

Recognising the effects of the military and combat environments serves the important function of illustrating the limits of the law. The power of legitimate and respected authority figures can combine with the admiration and interdependence within the group, group pressures, group absolution, diffusion of responsibility, the ideals of the military and the brutality of repeated exposure to the sights and sounds of combat to make it very difficult to disobey orders to commit crimes, to prevent others from committing serious crimes and facilitate the commission of crimes. These environmental factors can have greater influence over the

soldier's decision to obey illegal orders to commit serious crimes than the law does itself. Acknowledging this limitation of the law offers the opportunity for change. While the law plays a central role in governing conduct in war and punishing violations of the laws of war, the imposition of high legal standards and the threat of punishment are not enough to prevent serious breaches of the law. The impact of the combat and military environments, group loyalties and pressures, the influence and attitude of military leaders and culture and techniques such as 'othering' and dehumanising the enemy in order to enable killing need to be addressed.

This is not to say that all of these environmental factors should be eliminated. The role of these environmental factors is illustrated by the fact that loyalty and respect for leaders and the group has been crucial to soldiers being willing to fight and to military success and has even lead to heroic and honourable acts. A certain level of desensitisation is also often necessary to overcome the innate human resistance to killing. These environmental factors can serve important military purposes. They can also be a force for upholding the law as well as breaching the law. Any changes to military culture, military leadership roles, the soldier's group and military training methods need to be approached with sensitivity and caution and with open collaboration with the military. This would be a difficult but important step. The central point is that instead of relying on high legal standards and the threat of punishment alone as methods for deterring crimes, we also need to look at the social production of criminality. As well as the law, we should address the environmental factors that facilitate the commission of crimes and develop policies and strategies to balance humanity against military success. Merely enacting laws prohibiting such behaviour is not enough. In addition, examining military and combat environments brings to the fore the potential role and responsibility of the state in the social production of crime in war. The state should not be able to distance itself from state-imposed training techniques, state policies or actions and behaviour that the state tacitly approves. The state's responsibility is especially relevant where it has implemented policies or propaganda that promote the 'othering' and/or dehumanisation of a group.

A predominantly civilian-informed 'reasonable person' standard fails to recognise the military and combat environments' substantial effects on the perceptions, standards and behaviour of the soldier. This is unjust and it creates a division between the law as on the books and the lived experience of the soldier on the ground. The appropriate standard is a 'reasonable soldier' and all relevant surrounding circumstances that influenced the soldier's decision to obey the illegal order should be considered when determining the liability of the soldier. This requires us to understand the military and combat environments and the soldier's experiences. This understanding is crucial in not only implementing a just legal standard but also developing and implementing legal, social and political policies to prevent or curtail the social production of crime in war.

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