

6.2. Superior orders

Article 33 of the Rome Statute provides that criminal responsibility is generally not negated by the fact that a crime was committed pursuant to an order of a government or superior, unless three cumulative conditions are met: the person was under a legal obligation to obey the order; the person did not know that the order was unlawful; and the order was not manifestly unlawful. Article 33(2) adds that orders to commit genocide or crimes against humanity are always manifestly unlawful, placing those crimes categorically beyond the reach of this defence.

The Belgian CALL applied this framework in *X* v *CGRS* (20 April 2021). The case concerned a Chinese village secretary who had participated in the forced implementation of China's birth control policy, including through forced abortions characterised as crimes against humanity. CALL acknowledged that the applicant had acted under institutional pressure and on the instructions of his direct superior, but it found that individual responsibility was nonetheless established. Applying Article 33(2), it held that crimes against humanity are manifestly unlawful and cannot be justified by reference to superior orders.

Even when the manifestly unlawful threshold under Article 33(2) is not satisfied, courts have shown considerable reluctance to accept superior orders as a negating factor. The French Council of State's decision in *E.A.D.* v *OFPRA* (26 April 2022) is illustrative in this regard. The council considered that a former soldier in the Chadian Army was individually responsible for participating in violence against civilians, constituting serious, non-political crimes, as he was personally and regularly involved in committing such excludable acts. The fact that he acted under the orders of his superior in the performance of his duties was not found to be sufficient to negate his responsibility. Although the council recognised that his disobedience could give rise to severe penalties, the gravely illegal nature of the acts, of which he could not have been unaware, took precedence over this fact. While the applicant stated he was aware of the harm caused to civilians and regretted his actions, the council assessed this in light of his actions, which on the contrary demonstrated that he departed the army after 2 years of service for reasons related to renumeration and the lack of prospects for advancements within the ranks of the military hierarchy. It thereby concluded that the applicant was not coerced, nor did he disassociate himself from the crimes.

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