Obedience to Orders

Memo

MEMORANDUM

TO: Defense Section

FROM: Captain D. Hudson

IN RE: Obedience to Orders

I. The Defense To "Obedience to Orders' In International Law - By Yoram Dinstein, A. W. Sijthoff - Leyden, 1965.

The extreme approaches to this defense range from respondiat superior to absolute liability. The most familiar compromise, however, has been the 'manifest illegality principle -' "not formal unlawfulness, hidden or half-hidden, not unlawfulness which is discernible only to legal experts, but a conspicuous and flagrant breach of the law, a clearly criminal character."

Leipzig Trials

Pursuant to theGerman Government's refusal to abide by Art. 228 of the Versailles Treaty of 1919, only a few minor offenders were ever tried after WW I, and then by German Courts. These trials, for many, are synonymous with a judicial force.

In the Robert Neumann Case, 'American Journal of International Law, Vol 16, p. 699', the court stated that it would convict only if the defendant knew that the order called for a criminal act. In the Flandovery Castle case, A.J.I.L., Vol 16, p. 708, the critical language of the court accepted the manifest illegality principle and further specified that a finding of guilty could be mitigated by obedience to orders.

Manifest Illegality and Personal Knowledge Principles

Clearly, manifest illegality is objective in character, and to stand the test the illegality must be "obvious to any person of ordinary understanding," Fauterpacht, The Law of Nations and the Punishment of War Crimes, British Yearbook of International Law, Vol 21, p. 73.

The problem of the principle at hand, arises when the objective perception of the reasonable in the situation does not tally with the subjective cognition of the particular delinquest. As the principle is ultimately concerned with the awareness of the individual charged, the manifest illegality criterion can operate only as an auxiliary, technicd continuance of the law of evidence. It is a test to facilitate the task of ascertaining subjective knowledge. Manifest illegality will raise the rebuttable presumption that the

accused was aware of the illegality (p. 30). In some circumstances, perhaps there can even no allowance of attempts to rebutt the presumption.

Manifest illegality thus leaves the Kernel issue of personal Knowledge - a conclusion that confronts the old legal tenet that ignorance of the law is no excuse. Some writers try to escape this conflict by saying that it is the facts, not law, that have been mistaken. More commonly, the old tenet is simply rejected in the obscure field of war crimes, Glaser, Introduction, pp. 122; L. R. V. N. W. C. C. (Law Reports of the United Nations War Criminal Comission), Vol 7, p. 64.

The problem might not ever arise as where there is no doubt as to the illegality of particular orders. Or as Dinstein suggests, the mistake of law under obedience to orders can be regarded as sui genesis and set apart from mere mistake of law or obedience with no mistake of law. But in any case, there is no true way to evade the issue of mistake of law as a defense in international law.

ABSOLUTE LIABILITY & RESPONDEAT SUPERIOR

Dinstein is positively against any credence being given to respondeat superior and marshalls much authority and precedent against it. He points out that obedience to orders in every case could be as much the destruction of Army discipline as its keeper. For if an order were not subject to scrutiny, the Captain could order the Sergeant to kill the Colonel and so on. Nor does he find that every order produces irrestible compulsion on its subject to obey. Likewise he rejects the idea that every order does and should cause the recipient to make a mistake of law. Any imagination at all can visualize that a subordinate might knowingly obey illegal orders, or while not knowing, yet gleefully obey them. And it is the existence of such responses that destroys the validity of giving per se immunity when orders are obeyed.

The rejection of respondeat superior does not compel the adoption of absolute liability. Even where obedience does not constitute a defense, it is always a factor to be considered in mitigation, Gluek, War Criminals, pp. 156-57, (1944).

Mistake of Law and Compulsion

Speaking first to compulsion, Dinstein quite correctly perceives that a per se rule would be inappropriate. The caliber and extent of the crime in each situation must be balanced against the duress or coercion acting on the delinquet. He would not accept the following dicturn of the American Military Tribunal at Nuremberg: "there is no law which requires that an innocent man forfeit his life to avoid committing a crime he condemns," N. M. T., Trials of War Criminals before the Nuremberg Military Tribunals Under Council Law No. 10, 1946-1949 (1950), Vol 4, p. 480. Only where the

choice was one for one would Dinstein grant that contention. Where wholesale atrocities are contemplated such an escape from responsibility would transfer those with the power to resist a tyrant into doleful menions. In this connection obedience to orders is not a prerequisite for these defenses that depict a lack of mens rea, nor can obedience to orders exist apart as a per se rule without compulsion or mistake.

It is further suggested that obedience to orders may be used to substitute a defense based on mistake of fact, Glaser, Nuremberg, Revue Penale Svisse, Vol 63, p. 30. The defense arises when a subordinate really believes, bona fide, in light of the explanations of a superior and the circumstances, that he is performing a legitimate act. Kelsen, Peace Through Law, p. 107 (1944).

"Obedience to orders constitutes not a defense per se but only a factual element that may be taken into account in conjunction with other circumstances of the given case within the compass of a defense based on lack of mens rea, that is, mistake of law or fact or compulsion." It is to be considered a long with the time, place, the weapon used and the manner of the alleged crime, orders given; along with myriads of other circumstantial minutiae.

International Legislation

The 1918 British Government Committee of Enquiry into War Crimes endorsed the manifest illegality principle. Subsequently the draftsmen of the Versailles Treaty of 1919 were never able to reach agreement on the matter and the treaty itself takes no stand on the matter. Art. 228 merely recognized the right of the Allies to try war crimes.

The next major international consideration of the defense took place under United Nations auspices before the close of WWII. In both 1943 and 1945, the United States submitted resolutions to the effect that obedience to orders be considered both in defense and in mitigation where justice so requires, International Conf. on Military Trials, Longon, 1945 (ed. by Jackson, 1949), p. 24.

Justice Jackson, American Chief of Counsel at Nuremberg, submitted a report to the President in 1945. "There is doubtless a sphere in which the defense of obedience to orders should prevail ... But the case may be greatly altered where one has discretion because of rank or the latitude of his orders..... The tribunal can then determine whether (the orders) constitute a defense or mere extenuating circumstances, or perhaps carry no weight at all." Trial of the Major War Criminals before the International Military Tribunal, Vol 22, p. 85.

This attitude towards obedience to orders was not acceptable to the Soviet Union. The later proposed that action under orders not be considered in justification or mitigation - absolute liability, International Conf., Supra. p. 61.

MEMORANDUM
CPT Hudson

The compromise that resulted (Article 8) was as follows: action pursuant to orders shall not free the defendant from responsibility, but may be considered in mitigationof punishment when justice so requires, Article 8 of the Charter of the International Military Tribunal.

Nuremberg Trials

In all proceedings against war criminals which took place at the end of WW II, the plea of superior orders was raised by the Defense more frequently than any other.

In spite of the dictates of Article 8, even the prosecution was found to drift to a more lax expression of the defense. Justice Jackson in his Opening Speech, I.M.T., Supea, Vol 2, pp. 150, expressed that circumstances under which one commits an act should be considered in judging its legal effect. The French prosecutor, Menthon, stated the manifest illegality doctrine; and even the Soviet prosecutor, Rudenko, interpreted the bar of Article 8 to apply to "obviously criminal orders." I. M. T., Vol 19, p. 577. Yet in spite of the dissatisfaction with the rigid wording of Article 8, there was no successful defense as by every test of international law, common consciences and of elementary humanity, these orders were illegal.

As to any compulsion, theprosecution argued, Hitler did not govern souls and conscience. Cowardice would not exempt from criminal responsibility. They themselves participated in the destruction of free government but now plead that they became slaves of their creation.

The principle pronouncement by the Tribunal is to be found as follows: "That a soldier was ordered to (violate) international law of war has never been recognized as a defense to .... bruta[illegible] though....the order may be urged in mitigation of punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible," Nuremberg trial, Judgment, Command Papers No. 6964, p. 72. This has been widely interpreted to mean that the circumstance of obedience to orders will be considered as a factual element with the limits of a defense based on lack of moral choice, though not as a defense per se.

Dinstein amplyfies the courts "moral choice" test by pointing out that it was primarily directed at the defense of obedience to orders under

compulsion. Dinstein believes that the court would have concluded that there was no choice if the orders were made at the point of a sword, for it is impossible from a moral viewpoint to expect a person to choose death.

The French version of the Tribunal's finding uses two terms - "moral liberty" and "faculty of choice." With the latter, it would be easy to incorporate the other relevant aspect of a mens rea defense - mistake. When a person acts owing to a mistake, his discretion is perverted and consequently his "faculty of choice" is impaired. But without this expension, the judgment of the Tribunal is limited to only one aspect of mens rea - normally, that of compulsion.

The Tokyo Trial

Article 6 of the Charter of the International Military Tribunal for the Far East, Trial of Major War Criminals before International Military Tribunal., Vol 15, p. 1218, provided: Action pursuant to orders shall nof of itself (emphasis added) be sufficient to free the accused from responsibility for any crime, but such a circumstance may be considered in the mitigation of punishment if the Tribunal determines that justice so requires.

The judgment accepted the relevant opinions of the Nuremberg Court rather than reasoning anew and opening the door for conflict.

The Subsequent Proceedings at Nuremberg

These trials of lesser war criminals were held by the Military Government of the American Zone of Occupation. Law No. 10 of the Four Occupying Powers prescribed in Art II (4)(b) that: "The fact that a person acted pursuant to the orders of his government or his superiors does not free him of responsibility ....., but may be considered in mitigation."

In the Einsatzgruppen case, N. M. T., Vol. 4, p. 485, the judges interpreted law No. 10 as follows: "Law No. 10 does not invalidate the excuse of superior orders." This departure from the strict wording of Law No. 10 was explained in that the Law refers only to 'crimes', and not to every ordinary act.

The prosecution argued on many occasions the manifest illegality principle or the personal knowledge principle as the solution to the problem of obedience to orders. But the Judgments that were rendered had their own resolutions of the proper place for this defense. The court recognized the delimma facing a soldier under orders, yet rejected the idea that blind discipline contributes to military efficiency. Escalating transfer of responsibility would create

global immunity and concentrate all accountability on the shoulders of the single tyrant. Where obedience to orders was used to substantiate compulsion, the court declared the "test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order." Accordingly, the commanders of the Einsatzgruppen were acquitted. In the High Command case, N.M.T., Vol 14, p. 339, the Tribunal recognized that defendants had indeed been placed in a difficult position owing to their orders, but no more than that, and hence did not deserve to benefit of the defense of coercion or necessity as established by superior orders. In the Farben case, N.M. T., Vol 8, p. 1176, the court concluded that the order of a superior will not justify an act unless, in its operation, it is of a character to deprive the one to whom it is directed of a moral choice as to his course of action.

In the sphere of mistake of law, the tribunal accepted the personal Knowledge principle as the proper test. The court recognized that a soldier is not a lawyer and is entitled to assume the legality of orders issued to him, High Command case, N.M.T., Vol 11, p. 511. "One cannot be held criminally responsible for a mere error in judgement attributable to disputable legal questions."

Or as was the language in the Hostage Case, N.M.T., Vol 11, p. 1236, "We are of the view .... that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of the illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected." But "if the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance to the criminality of the order," N. M. T., Vol 4, p. 471. These pronouncements of many that were made illustrate the mollification of the stringent language of Law No. 10.

International Legislation Since 1946

The International Red Cross Committee reported to the Diplomatic Conference at Geneva in 1948, a rule on superior orders that bars its use as a defense where circumstances show that the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case, however, the punishment might be mitigated or remitted if the circumstances justify. (Red Cross Commentary on Geneva Conventions of 1948, Vol 1, p. 359 n. 1). But rather than battle with this difficult problem, the convention bypassed it altogether.

Simularily, the United Nations failed to act on the recommendation of the International Law Commission that had recommended: "The fact that a person acted pursuant to orders of his Government or Superior does not relieve him

from responsibility under international law, provided a moral choice was in fact possible to him." I.L.C. Yearbook, 1950, Vol 1, p.288, What the Commission had done was to keep the form of Article 8 of the Charter of International Military Tribunal (Nuremberg Court) but had made its recommendations in conformity with the judgment of that tribunal.

II. PRECEDENT IN AMERICAN NATIONAL LAW

Pre-World War II:

"Obedience to orders is the vital principle of the Military life - the fundamental rule of discipline in peace as well as war. This rule the offices finds recited in the commission which he accepts, and the soldier, in his oath of enlistment swears to it. The obligation to obey is one to be fulfilled without hesitation, with alarcity, and to the full. The inferior cannot, as a general rule, be permitted to raise a question as to the propriety, expediency, or feasibility of a command given him, or to vary in any degree from its terms. Even where the order is arbitrary or unwise, and its effect must be injurious to the subordinate, he should first obey, postponing till compliance his complaint and application for redress." An Abridgment of Military Law, Winthrop, 1893, p.230.

"Unless, however, the order is palpably illegal on its face (which will be of the rarest occurrence), the inferior should presume that it is lawful and authorized and obey it accordingly, and in obeying it he can scarcely fail to be held justified by a military court." Abridgment, supra; 2 Ed., 1920, p. 572.

"Acts of soldiers done in good faith in compliance with orders of a superior officer will not justify homicide if acts ordered are manifestly beyond the scope of the Superior Officer's authority..." Winthrop's, 2nd Ed, 1920, p. 296.

These statements of military law prior to Word War II illustrate the high priority placed on obedience and the almost non-existent situation where disobedience would be proper. If the test of "beyond a reasonable doubt" were used, it would be very difficult to hold that on accused had no rational basis for believing the order to be legal.

Post World War II

In US v. Keenan, 39 CMR 110 (1969), the court in a case of murder of a Vietnamese civilian upheld the instructions of the trial judge.

"The general rule is that the acts of a subordinate done in good faith and in compliance with a supposed duty or order are justifiable. This

justification does not exist however, when these acts are manifestly beyond the scope of his authority, or the order was of such a nature that a man of ordinary sense and understanding would know it to be illegal. Thus, the acts ... done in good faith and without malice, in the compliance with the orders of a superior ... (are) 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. Therefore if you find beyond a reasonable doubt that the accused under the circumstances of his age and military experience could not have honestly believed the order issued... to be legal under the laws and usages of war, then the killing.... was unjustified. A (soldier) is a reasoning agent, who is under a duty to exercise judgment in obeying orders to the extent that where such orders are manifestly beyond the scope of the authority of the one issuing the order, and are palpably illegal upon their face, then the act of obedience will not justify acts pursuant to such illegal orders." (See also US v Kinder, 14 CMR 742). Furthermore the court would not hold as error the failure to find the orders illegal as a prerequisite to finding the accused guilty.

After reviewing this recent decision of the Court of Military Appeals defining the obligation of a soldier to make legal and ethical judgments about orders he receives, consider the Board of Review case of US v. Levy, 39 CMR 672, also decided in 1969. In this case an officer was sentenced to 3 years hard labor and dismissed for refusing to obey what he had believed to be an illegal order. The Board sumarily dismissed the accussed's defense that based on his belief that the order conflicted with medical ethics and his own conscience. The Board relied on the fact that the order was issued by one who had authority to do so and it was related to the accussed's military duties.

Such a delimna should be unternable in the law of a civilized nation. To disobey, the soldier is faced with court-martial as was Captain Levy; to obey he is subject to war crimes or murder charges as was Private Keenan. A major change of the law in this area is the only way out of this hideous, irrational contradiction.

The Defense of Mistake

As discussed previously, the defense of superior orders is often interwined with that of mistake of law or fact: mistake of law as to whether or not orders may be legally disobeyed or as to whether the orders are palpably illegal, and mistake of fact as to whether or not the situation is such to uphold the legality of the order issued.

In US v. Kinder, 14 CMR 742, it was specifically recognized that "mistake of law" is in principle an applicable defense to negative the unlawfulness of the element of the specific intent to kill. The Board of Review stated, however, that it is "absurd" for the mistake of law defense to be based on

the accused belief that orders must be obeyed without exception. But such a rule of law flies in the face of the major premise that an accused should be allowed to establish what his honest beliefs were at the time of the alleged act.

In US v. Sicley, 20 CMR 118, the Court of Military Appeals ruled that in certain circumstances one may (1) err in the application of a rule of law to a particular situation, (2) reach an incorrect conclusion as to his rights, and (3) thereafter commit an act prescribed as criminal, yet (4) may do so quite without the necessary felonious intent. "We .... adopt the view that the defense of mistake of law as contemplated above is available to one accused of crime in the military establishment. One who acts under an honest (belief) is entitled to have that defense, whether it be one of mistake of law or fact. submitted to the court-martial in terms of honest misconception above, without the additional requirement that the mistake be reasonable. (Citing US v. Rowan, 16 CMR 4; 32 AM JUR 41; Keedy, Ignorance and Mistake in the Criminal Law, 22 H. L. R. 75, 91; Cutter v. State, 36 NJL 125).

In US v. Tatmon, 23 CMR 841, the Board of Review adopted the following status of the law:

"An honest mistake, be it one of fact or law, may be interposed as a defense to a crime requiring a specific intent even though that mistake be unreasonable or one occasioned by the accused's own carelessnesser fault (U. S v. Holder, 22 CMR 3)."

For such mistake of fact to constitute a defense, however, it must be a mistaken belief of such a nature that the conduct would have been lawful had the facts been as the accused believed them to be (U. S. v Rowan, 16 CMR 4). It is well established that the defense of honest mistake .... must be tested by the touchstone of honesty rather than that of honesty plus reasonableness' (US v Greenwood, 19 CMR 335; US v Bergen, 20 CMR 317). Certainly one of the factors in the determination of honesty of belief is the reasonableness or unreasonableness of the accused's belief (US v. Rowan, supra; US v. Short, 16 CMR 11; US v. Lampkins, 15 CMR 31).

The proper burden of proof for this defense is set forth in Rowan, supra. It is erroneous to instruct that the accused must establish mistake of fact beyond a reasonable doubt. Such a rule would shift to the accused the burden of establishing that he lacked the criminal intent alleged, whereas the government should always bear the burden of establishing the accused's guilt beyond a reasonable doubt (Minner v. US, 57 F2d 506 (1932).

MEMORANDUM
CPT Hudson

US v. McLeod, 18 CMR 814, provides another collection of law on the subject by A Board of Review. The Board found that it is an established legal maxim that ignorance of the law is no excuse (Reynolds v US, 98 US 145, 25 L ed 244). However, where the crime charged requires the existence of a specific intent, ignorance of the law which goes to negative such a state of mind may be interposed as a defense (Townsend v US, 95 F 2d 352).

Where intent is not an element, the accused is not entitled to an instruction on mistake of fact unless the possibility of a reasonable mistake was raised by the evidence. On the other hand, as to assault with intent to rape, he is so entitled regardless of reasonableness. US v. Short, 16 CMR 11.

DAVID E. HUDSON
Captain, JAGC