The Defence of Superior Orders

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General observations on the efficacy of systems of law, including International Law

The efficacy of every system of law depends on there being (i) a properly constituted authority competent to enact rules, (ii) a readiness on the part of inferior authorities to obey the rules enacted by superior authorities, and (iii) an adequate system of surveillance and enforcement to ensure that inferiors obey the rules enacted by their superiors. In other words, to adapt a military expression, there is in a well-ordered legal system, whether military or civilian, a chain of command. Jurists might prefer to use the expression "a hierarchy of norms". At the top there is a single supreme authority, whether it be a sovereign Parliament as in the United Kingdom; or a written constitution, as in the United States or Australia, which allocates power between various authorities. The chain or hierarchy does not necessarily consist of two authorities only, one superior and one inferior. The chain may be quite extensive (e.g. parliamentary acts, ministerial regulations, council by-laws etc.). Especially is this so in the military sphere itself (e.g. Parliamentary Act or Crown prerogative; Chiefs of Staff; Army commanders; Corps commanders; Division commanders; Brigade commanders; Battalion commanders; Company commanders; Platoon commanders; down eventually to non-commissioned officers and private soldiers (enlisted men)).

Depending on whether the legislative authority at the top of the hierarchy is a self-appointed dictator or an elected body, we may say that the country concerned has a totalitarian regime or is a democracy. But this question, important though it is politically, has little legal bearing on the matter now under discussion. Because States are sovereign, independent and equal, international law in general has no right to prescribe what sort of a government a State should have. Special circumstances (e.g. a Security Council resolution as in the case of the Smith regime in Rhodesia) may arise which prevent other States from recognising a regime which has established itself de facto in a country, or part of a country, but it should be noted that Article 1 of both the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966) prescribes that "All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

International law is therefore in the main content to leave it to sovereign States to determine what form of polity they will have. International law is not, however, similarly indifferent to the enforcement of its own rules. The Permanent Court of International Justice went so far as to say that "a State cannot adduce as against another State its own Constitution with a view to

evading obligations incumbent upon it under international law or treaties in force''.[1] Therefore, to the extent that rules regulating the conduct of warfare exist, international law is concerned to see that these rules are complied with. The fact that the means of enforcement available to international law have been, and remain, weak, does not alter the principle. There is nothing new about the punishment of war crimes.[2] Grotius held the view that prisoners of war could be executed if they had committed crimes such as ''a just judge would hold punishable by death''.[3] Moser considered that ''Enemy combatants who act contrary to international law need not, when they fall into the hands of the belligerent, be treated as prisoners of war, but may be treated as robbers, murderers and so on.''[4]

The four Geneva Conventions of 1949 are therefore not entering into a completely new era when they prescribe, as they all do, that ''the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed'', what they define as ''grave breaches of the present Convention''. The fact that municipal law is relied upon as the machinery of enforcement does not alter the fact that what is intended to be enforced are the rules laid down in the Conventions (i.e. international law).

The personal responsibility of heads of state and other government leaders

The question of ''superior orders'' should not be considered in isolation. It is part of a general problem, which has three aspects. The first aspect concerns the personal responsibility, under international law, for breaches of international law, of the person or persons at the very top of a government, even Heads of State. This is an important question because if such persons could shelter behind the so-called ''act of state'', and if their inferiors could plead the defence of ''superior orders'' right down the line, nobody could be held personally liable for possibly very serious violations of international law. The second aspect is the one with which this paper will be principally concerned: it concerns the question whether persons below the top level of a government can plead, in answer to a charge of a war crime or similar offence,[5] that they acted in compliance with the orders of their superiors. As already indicated, this aspect affects persons right

1. *Treatment of Polish Nationals in Danzig*, (1932) PCIJ Ser A/B, No 44, p 24. See also the *Free Zones* case, where the same Court said: ''France cannot rely on her own legislation to limit the scope of her international obligations''. (1932) PCIJ Ser A/B, No 46, p 67.
2. In 1474 Peter von Hagenbach, the governor of the Upper Rhine area, which had been pledged by the Archduke of Austria to Duke Charles of Burgundy, was found guilty by a court of twenty-eight judges drawn from many towns and presided over by an Austrian judge of various crimes, including murder, rape and ordering his mercenaries to kill civilians. It availed him not at all to plead, as he did: ''Sir Peter von Hagenbach does not recognise any other judge and master but the Duke of Burgundy from whom he had received his commission and his orders.'' See the account of this trial in Schwarzenberger G, *International Law as Applied by International Courts and Tribunals*, vol 2, *The Law of Armed Conflict* (1968), 462.
3. *De jure belli ac pacis* (1625), III, XVI, I.
4. *Grundsätze des Völkerrechtes in Kriegszeiten* (1752), section 18.
5. By a similar offence here is meant mainly a crime against humanity, as defined in the Charter of the International Military Tribunal at Nuremberg, which was concluded in London on 8 August 1945. That Charter distinguished between ''crimes against peace''; ''war crimes''; and ''crimes against humanity''. By their very nature, ''crimes against peace'', which involve such actions as planning, preparation, initiation or waging of a war of aggression'', can only be committed by

down the line of command from senior generals at the top to lowly private soldiers (enlisted men) at the bottom. The third aspect is one which has not received the same degree of attention as the first two aspects, and is of a different order, but it is of no less importance: it concerns the extent of the liability of superiors who fail adequately to control the acts or omissions of their inferiors, so as to ensure that war crimes or similar offences are not committed.

Before the Nuremberg Trial of 1946 it could seriously, though not necessarily correctly, be argued that the leaders of a State were not personally responsible for actions they took in their official capacity. For example, the first sentence of Article III of Hague Convention No. IV respecting the Laws and Customs of War on Land (1907) provided as follows: "A belligerent party which violates the provisions of the said Regulations[6] shall, if the case demands, be liable to pay compensation". By "belligerent party" was clearly meant the government of a State, not an individual; and the obligation of that government to pay compensation was more akin to an obligation to pay civil damages for a tort or a breach of contract than to a penalty under criminal law. So, before the Nuremberg Trial, the position was thought by many to be that, while there were such things as war crimes, these could only be committed by the actual perpetrators of the crimes and not by the leaders of States or governments whose policies led to such crimes being committed.[7]

The question whether a sovereign State itself can commit a crime is an interesting and controversial one. It was raised at Nuremberg but not decided upon. The Convention on the Prevention and Punishment of the Crime of Genocide (1948) seems to envisage that crime being committed by persons rather than by States or governments. So, on the whole, does the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), which has not so far attracted quite the same degree of general support as has the Genocide Convention. Nevertheless, the Apartheid Convention states specifically in Article 1(2) that "those organizations, institutions and individuals committing the crime of apartheid" are "criminal", and it would seem that a State or a government could be regarded as an "organization" or as an "institution".

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persons at the very top level of a government. In terms of the analysis given in the text above, they relate to the first aspect of the problem, but not to the second or third aspect. However, the second aspect (ie "superior orders") becomes very relevant when persons are charged with "war crimes" or "crimes against humanity".

6. The Regulations annexed to Hague Convention No IV are usually referred to simply as "the Hague Regulations".

7. In Article 227 of the Treaty of Versailles the Allied and Associated Powers stated that they "publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties". It was proposed to constitute "a special tribunal", composed of one judge each from the five Powers, to try the former German emperor, but the proposal came to nothing because the Government of the Netherlands refused to surrender him. In the language of Nuremberg, the charge, if it had been proceeded with, would have been for a "crime against peace" rather than for "war crimes". At the trial of the Japanese war criminals in Tokyo between 1946 and 1948, the Japanese Head of State, Emperor Hirohito, was not indicted. This fact was criticised by Sir William Flood Webb, the Chief Justice of Queensland, who was the President of the Tribunal, and also by the French judge, Monsieur Henri Bernard. Judge Bernard concluded that, in the conduct of the trial, essential principles of justice had been disregarded to such an extent that the verdict, according to which most of the defendants were found guilty, on various counts, was not valid. He also commented that these defendants could only by considered as "accomplices" of "the principal author" of the Pacific War who has escaped prosecution. See also Ireland G, "Uncommon Law in Martial Tokyo", (1950) 4 YBWA 54.

This question is perhaps no longer of great political importance now that it has become generally accepted that crimes under international law can be committed by leaders of governments, even by Heads of State. Article 7 of the Charter of the International Military Tribunal at Nuremberg, concluded at London on 8 August 1945, provided as follows:

> "The official position of Defendants, whether as heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".

Similarly, Article IV of the Genocide Convention provides that persons committing genocide or other acts forbidden by the Convention "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". Similarly, again, Article III of the Apartheid Convention provides that "international criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State . . .", whenever such persons commit, participate in, directly incite, or conspire in the commission of, acts forbidden by the Convention or whenever they directly abet, encourage or cooperate in the commission of such acts.

Other, possibly more authoritative, statements of the law on this question are provided, first, in Resolution 95(I) adopted by the General Assembly of the United Nations on 11 December 1946; and, secondly, in the Draft Code of Offences against the Peace and Security of Mankind adopted by the International Law Commission in 1954. In the resolution referred to, the General Assembly simply affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal, whilst the International Law Commission's formulation was to the effect that the fact that "a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this code" (Article 3 of the Draft Code).

The Personal responsibility of superiors for acts or omissions of their inferiors

Before dealing with the question of obedience to superior orders, as a defence to a charge of a war crime, which as already indicated is the principal concern of this paper, the question of the liability of superiors who fail adequately to control the acts or omissions of their inferiors will be briefly commented upon. That such liability exists is clear from Hague Convention No. IV respecting the Law and Customs of War on Land (1907). It has already been indicated that Article III of that Convention establishes the liability of the Government concerned. Also, Article I of the Convention asserts that the "Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention" (i.e. the Hague Regulations). This Article clearly envisages that instructions shall be issued which shall ensure compliance with the Regulations and that these instructions shall be enforced from top to bottom of the military hierarchy. Even more explicit is Article I of the Hague Regulations themselves. This provides that the "laws, rights, and duties of war" apply to certain categories of units who qualify as belligerents. Such categories include

"armies", and also "militia and volunteer corps" provided they satisfy four criteria, the first of which is that they are "commanded by a person responsible for his subordinates", and the second of which is that they "conduct their operations in accordance with the laws and customs of war". Failure to satisfy these criteria involves loss of the "right to be treated as prisoners of war".[8]

Possibly the best known, and certainly one of the most controversial, instances of a commander being held responsible for atrocities commited by his subordinates, was that of General Tomayuki Yamashita, commander of the Japanese forces in the Philippines in 1944–45. He was found guilty by a United States Military Commission in Manila of having failed to exercise proper control over the troops under his command, and for allowing them to commit widespread violations of the laws and customs of war. He was sentenced to death, and the finding and sentence were confirmed by the General of the Army, Douglas MacArthur, Commander-in-Chief of the United States Army Forces in the Pacific. An application was then made to the Supreme Court of the United States for leave to file a petition for writs of habeas corpus and prohibition claiming, inter alia, that General Yamashita had not received certain judicial safeguards to which he was entitled under the Geneva Convention relative to the Treatment of Prisoners of War 1929. The application was rejected on the ground that these safeguards did not apply to "precapture" offences.[9] However, Justice Rutledge entered a strong dissenting opinion, and the 1949 Geneva Prisoners of War Convention was so drafted as to make it clear beyond doubt that the trial safeguards in question should apply to "precapture" offences as well as "postcapture" offences (Article 85).

According to the Military Commission in the *Yamashita* case, there was no doubt that the atrocities had been committed by troops under the command of the Japanese commander. The Commission conceded that it was absurd to consider a commander a murderer or rapist merely because one of his soldiers committed a murder or rape. "Nevertheless", said the Commission, "where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts

8. Article 44 of Protocol I of 1977 additional to the Geneva Conventions of 12 August 1949 has slightly qualified the rule laid down in 1907 in that it provides that in certain circumstances, subject to certain exceptions, violations of the rules of international law applicable in armed conflict "shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war". The purpose of this innovation, which was and remains controversial, was to introduce a greater measure of humanity into conflicts between regular and armed forces and freedom fighters (terrorists) acting on behalf of national liberation movements. Article 44 has, however, insisted that in principle "all combatants are obliged to comply with the rules of international law applicable in armed conflict", and Article 43 of Protocol I is even more explicit on that point than was the Hague Convention. Paragraph I of Article 43 provides as follows: "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict". Hague Convention No. IV was only concerned with armies and other military units expected to comply with the laws and customs of war on land, although other Hague Conventions of 1907 laid responsibilities upon naval commanders (eg Conventions Nos. IX and X). Protocol I of 1977 lays down a principle which applies to all force commanders, including commanders of air forces and occupation forces as well as military and naval units.

9. 327 US 1 (1946).

of his troops, depending upon their nature and the circumstances surrounding them". There appears to have been no evidence that General Yamashita actually gave illegal orders and the gravamen of the charge against him was that he and other Japanese commanders did not make personal inspections or independent checks during the Philippine campaign to determine for themselves the established procedures by which their subordinates accomplished their missions. According to the Commission, Japanese senior commanders appeared to "operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted".

Among the defences put up by General Yamashita was that certain naval and air forces had suddenly been assigned to his command; that Japanese naval forces had been in the habit of reporting to a separate ministry in the Japanese Government; and that Japanese naval commanders were not accustomed to the idea of taking part in a joint operation under the command of an Army general.[10]

Peculiarly difficult questions arise when there are a number of military units operating in the same area and taking orders from different superiors.[11] In such a situation not only may the validity (if any) of the defence of superior orders be affected, but also it may become difficult to determine who is ultimately responsible for the fact that the rules of international law were violated in that area.

In *United States* v *Wilhelm von Leeb at al* (the *High Command* case),[12] the United States Military Tribunal at Nuremberg endeavoured to lay down general principles concerning the responsibility of commanders for the actions of their subordinates. The Tribunal paid "great respect" to the decision in *Yamashita,* but pointed out that "the authority of Yamashita in the field of his operations did not appear to have been restricted by either his military superiors or the State, and the crimes committed were by troops under his command". In the *High Command* case, however, the Tribunal was confronted by the fact that many crimes had been committed in areas occupied by the regular German armed forces, but not by members of those forces. Rather they had been committed "at the instance of higher military and Reich authorities". According to the Tribunal, "a State can, as to certain matters, under International Law, limit the exercise of sovereign powers by a military commander in an occupied area", but it is also the case that under international law a commander of an occupation force "has certain responsibilities which he cannot set aside or ignore by reason of activities of his own State within his area. He is the instrument by which the occupancy exists. It is his army which holds the area in subjection".

The rationale of this decision appears to be that under international law an occupation force has certain rights and certain duties; that the Government which maintains the occupation force cannot modify those rights and duties save within certain limits; and that in case of conflict the commander of an occupation force is responsible under international law if he does not fully discharge the duties

10. For details of the trial of General Yamashita before the United States Military Commission in Manila see 4 LR TWC 1; Friedman, *The Law of War; A Documentary History*, vol 2, 1596; Document No 71 in Levie, HS (ed), *Documents on Prisoners of War (International Law Studies*, Vol 60, Naval War College, Newport, Rhode Island).
11. For example, in the Second World War, units of the Waffen SS were inclined to follow the orders of Herr Himmler in Berlin rather than those of the local Wehrmacht commander.
12. 12 LR TWC 1.

which international law has laid upon him. This is certainly a strict doctrine, and it is not made any easier by the options which, according to the Tribunal, the commander of an occupation force — or indeed any commander faced with illegal orders transmitted by his superiors — has in such a situation. These are (i) he can issue an order countermanding the illegal order; (ii) he can resign; (iii) he can do what he can unofficially to sabotage the illegal order; (iv) he can do nothing. The first three choices are likely to have very unpleasant consequences for him under his national law, whilst the fourth choice will not help him under international law because "by doing nothing he cannot wash his hands of international responsiblity".

The Tribunal in the *High Command* case also endeavoured to delineate the separate responsibilities of force commanders and their senior staff officers. From the military point of view, this is an important question, although what the Tribunal had to say may be of limited value inasmuch as practice may vary in different armies. The problem in general arises because a staff officer does not have command authority in the chain of command, yet it is a staff officer who normally signs orders for his commanding officer. As everyone with military experience knows, the commanding officer frequently will not have seen the orders issued on his behalf. Yet, as the Tribunal commented, in the normal process of command the commanding officer is informed of orders issued on his behalf and "they are presumed to represent his will unless repudiated by him. A failure to exercise command authority is not the responsibility of a chief of staff". However, a staff officer cannot shuffle off all responsibility on to his commanding officer, because, according to the Tribunal, it is the duty of a staff officer to bring to the attention of his commanding officer violations of international law of which he knows, or ought to know.

The plea of superior orders

I now come to the main part of this inquiry, which is to consider the position of a person, member of an armed force, who is given by his military superior an illegal order and is instructed to carry it out. What has just been said concerning the responsibility of superiors for the acts or omissions of their inferiors is very relevant to this point. For, if a superior is to be held responsible for the acts or omissions of his inferiors, it is only reasonable that in ordinary circumstances he should be entitled to expect, especially in a military formation, that his orders to his inferiors are obeyed. This does not of course absolve a superior from showing at least due diligence to ensure that his orders are not merely transmitted down the chain of command, but that they are actually carried out.

It may be said that the matter about to be considered is a simple one because all doubts concerning it have been removed. Did not, for instance, Article 8 of the Charter of the International Military Tribunal at Nuremberg clearly say: "The fact that the Defendant acted pursuant to 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"? And did not the Tribunal, in applying this Article, say that its provisions "are in conformity with the law of all nations", and add: "That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality . . ."? And did not the General Assembly, through its

resolution 95(I), adopted on 11 December 1946, unanimously affirm "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal"?

Needless to say, the position is not quite as simple as that. For one thing, the Charter and Judgment of the Nuremberg Tribunal are not necessarily binding precedents in international law. Also, it is not necessary to labour the point here that resolutions of the General Assembly, such as that adopted on 11 December 1946, are not binding statements of the law either, although obviously they carry considerable weight. Especially is this so in the case of a resolution which was adopted unanimously, as this one was. The matter remains, however, one which deserves serious inquiry.

It is not necessary to spend much time on the point that obedience to an order may be considered in mitigation of punishment. Few would disagree with this proposition. Indeed, unless international law were to establish a mandatory penalty for violations of international law, such as war crimes — which it does not do — it is obvious that a sentencing tribunal should take all relevant factors into account. The fact that the accused was a member of a military force, and therefore was normally expected to obey orders and was possibly subject to the death penalty if he did not carry out the order in question, would clearly be a relevant factor.

The best-known case involving obedience to superior orders that has arisen since the Second World War is that of Lieutenant William L. Calley.[13] This officer was charged before a court-martial of the premeditated murder of 22 infants, children, women and old men, and of assault with intent to murder a child of about 2 years of age. The incident occurred in the village of My Lai in South Vietnam on 16 March 1968, and Calley was convicted. The Army Court of Military Review affirmed this finding, and Calley petitioned the United States Court of Military Appeals (Darden, CJ; Duncan, J; Quinn, J) for further review.

Calley said in evidence that C Company, to which the platoon of which he was leader belonged, had been operating in the area of My Lai for some time; that each time C Company had entered the area it had suffered casualties from sniper fire, machine gun fire, mines and other forms of attack; that he (Lieutenant Calley) had accompanied his platoon on some of these incursions; that the day before the alleged incident a memorial service had been held for members of C Company killed in these operations; and that after the service the commander of C Company, Captain Medina, had issued orders concerning the following day's

13. 22 Reports of the United States Court of Military Appeals 534 (1973); 48 Court Martial Reports [United States] 19 (1973). A summary of the case appears in Levie, op cit, Doc No 171. The question of superior orders was naturally discussed both by the District Court of Jerusalem, and by the Supreme Court of Israel (sitting as a Court of Appeal), in *Attorney-General of the Government of Israel* v *Adolf Eichmann* (36 ILR 277). Eichmann was found guilty of various offences under the Nazi and Nazi Collaborators (Punishment) Law enacted by Israel in 1950, principally for his part in the "Final Solution" involving the killing of millions of Jews. However section 8 of this Law excluded the defence of "superior orders", which otherwise would have been available to the accused under Section 19(b) of the Israel Criminal Code Ordinance, 1936, where an act is done "in obedience to the order of a competent authority which he (the accused) is bound by law to obey, unless the order is manifestly unlawful". Section 11 of the 1950 Law permitted the plea of superior orders to be taken into account in determining punishment. In other words, the Israeli Law followed closely the Nuremberg principles, and the Supreme Court of Israel held that, in so doing, the Israeli Law did not depart from the provisions of international law. The Supreme Court further commented that, although State practice had varied in regard to the plea of superior orders, "in the past no principle recognizing such a defence had crystallized in international law".

mission.

So far, Calley's evidence appears to have been uncontradicted. At this point, however, a discrepancy occured. According to Calley's version, Medina's orders were to the effect that the units of C Company involved in the attack on My Lai were to kill every living thing, men, women, children, and even animals. Medina admitted that he had instructed his men to destroy the village by "burning the hootches, to kill the livestock, to close the wells, and to destroy the food crops". When asked if women and children were to be killed, Medina testified that he replied in the negative, adding: "You must use common sense. If they have a weapon and are trying to engage you, then you can shoot back, but you must use common sense". Witnesses came forward to support both versions of what was obviously not a very satisfactory giving of instructions.

Calley's platoon entered the village and apparently met no resistance. The villagers, including babies in mothers' arms, were assembled and moved to collection points. According to Calley, he twice received a radio signal from Medina asking why the operation was taking so long. On being told that a large number of villagers were being detained, Medina is alleged to have told Calley: "Waste them", and Calley added that, having been taught that he must always obey orders, he proceeded, with the help of a somewhat reluctant Private First Class, to carry out the massacre. Apparently, however, two other soldiers refused to join in the killings, and Medina denied that he had given the order he was alleged to have given.

Calley testified that he knew that the normal practice was to interrogate villagers, release those who could satisfactorily account for themselves and evacuate suspects for further examination. But he contended that Medina's order of "Waste them" overrode normal practice. Unfortunately the record of the court-martial does not establish whether the members of the court found that Medina did not give the alleged order or whether, on the assumption that Medina did give it, Calley knew such an order to be illegal.

The judges of the Court of Military Appeals concentrated on the instruction given by the military judge to the members of the court martial. This was to the following effect: (i) if Calley received an order to kill unresisting Vietnamese within his control or within the control of his troops, that order would be an illegal order; (ii) however, "a determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it"; (iii) although soldiers are taught to follow orders, "the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person"; (iv) "the law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders"; and (v) "the acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him 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".

Although differing in their opinions slightly, both Quinn J and Duncan J were satisfied as to the correctness of this directive, which was in fact based on paragraph 216(d) of the *Manual for Courts Martial,* United States, 1969 (Rev.).

Counsel for Calley had argued that the test should be not "a man of ordinary sense and understanding", but a person of "the commonest understanding". The opinion of the leading American commentator on military law, Colonel William Winthrop, was invoked. According to Winthrop's *Military Law and Precedents*, 2nd ed (1920 Reprint), 296–7, "for the inferior to assume to determine the question of the lawfulness of an order given him by a superior would, of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline". Consequently, according to Winthrop, it was the duty of an inferior to obey an order according to its terms, "the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness". However, Quinn J thought that the order allegedly given to Lieutenant Calley was "so palpably illegal that whatever conceptional difference there may be between a person of 'commonest understanding' and a person of 'common understanding', that difference could not have had any impact" on the court.

Darden CJ, on the other hand, considered the correct test to be "palpable illegality to the commonest understanding". He believed the provision in the Manual to be too strict, and he was convinced that "the phrasing of the defence of superior orders should have as its principal objective fairness to the unsophisticated soldier and those of somewhat limited intellect who nonetheless are doing their best to perform their duty". It is impossible not to sympathise when it is borne in mind that the United States forces in Vietnam consisted to a large extent of conscripts and that, because of various devices used by more "sophisticated" people to avoid the draft, an unusually heavy burden fell upon the "unsophisticated soldier". As against that, there is force in the point made by the Army Court of Military Review in the *Calley* case that

> "barbarism tends to invite reprisal to the detriment of our own force or disrepute which interferes with the achivement of war aims, even though the barbaric acts were preceded by orders for their commission. Casting the defence of obedience to orders solely in subjective terms of *mens rea* would operate practically to abrogate those objective restraints which are essential to functioning rules of war".

The views of authors

At this point I have felt that, though the dimensions of this paper do not permit of a comprehensive analysis of the literature on the subject, and therefore I have had to be very selective, it would be helpful to consult at least three contributions of outstanding merit, namely those of Sir Hersch Lauterpacht,[14] Professor Yoram Dinstein,[15] and Professor L.C. Green.[16]

14. See the article "The Law of Nations and the Punishment of War Crimes", (1944) 21 BYBIL 58–95, and especially 69–74; Oppenheim, *International Law*, vol 2, 7th ed (1952) 568–574. See also paragraph 627 of *British Manual of Military Law*, Part III (1958). According to the Introductory Note to this publication, the revision of Part III of the Manual was prepared on behalf of the United Kingdom War Office by Sir Hersch Lauterpacht "at the time when he was Whewell Professor International Law at the University of Cambridge and before his election as one of the Judges of the International Court of Justice. The revision was completed in the War Office after his election".
15. *The Defence of "Obedience to Superior Orders" in International Law* (1965).
16. "Superior Orders and the Reasonable Man", (1970) 8 Can YBIL 61.

1. *Sir Hersch Lauterpacht*

In his magisterial article written for the British Year Book of International Law in 1944, shortly before the conclusion of the London Charter which established the Charter of the International Military Tribunal at Nuremberg, Sir Hersch Lauterpacht surveyed the whole issue of the punishment of war crimes. He concluded, contrary to the view of many authorities, that the victor in a war is entitled, without making any offer of reciprocity, to demand that the defeated State shall surrender war criminals for trial by the victor, and he rejected the view that the only remedy for breaches of international law by the enemy's armed forces is payment of compensation by the enemy State. Since, however, the cause of international law justified, even demanded, the punishment of persons guilty of war crimes, it also required that "such punishment shall take place in accordance with international law". This led Lauterpacht to examine what he called "the limits of punishment of war crimes", the most important of which was the plea of superior orders, the others being the uncertainties of the laws of war and the operation of reprisals.

Lauterpacht thus felt obliged to comment on the fact that the British *Manual of Military Law*, in both its 1914 and 1936 editions, stipulated that "members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by the Government or by their commander are not war criminals and cannot therefore be punished by the enemy". Not a little embarrassment was caused by the fact that Article 366 of the United States *Rules of Land Warfare* was to the same effect, whereas in the case of the *Llandovery Castle*[17] in 1922 the Geman Supreme Court (Reichsgericht) had rejected the defence of obedience to superior orders put up by two officers of the German Navy, saying that a subordinate obeying an illegal order "is liable to punishment if it was known to him that the order of the superior involved the infringement of civil or military law". The German Supreme Court continued: "It is certainly to be urged in favour of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such order is universally known to everybody, including the accused, to be without any doubt whatever against the

17. This case is apt to be misunderstood. According to the report in (1922) 16 AJIL 708 the two accused, Dithmar and Boldt, fired on defenceless survivors in a lifeboat from the British hospital ship *Llandovery Castle* on the orders of Patzig, the commander of the U-Boat which had torpedoed the hospital ship. Patzig, who appears to have been a highly unstable and emotional person, had knowingly sunk the *Llandovery Castle* outside the area within which the German Naval Command had given orders that hospital ships were to be sunk. Patzig's orders to his subordinates to fire on the lifeboat were evidently intended as a means of concealing his own guilt. As Dinstein points out (op cit, 15, in 37) Dithmar and Boldt did not rely on the orders of the German High Command; they relied on Patzig's orders. Patzig himself was not brought to trial, the German authorities apparently being unsuccessful in their attempts to apprehend him. However, in the case of the *Dover Castle*, (1922) 16 AJIL 699, the German Supreme Court aquitted Karl Neumann, the commander of a U-Boat which had sunk a British hospital ship in the Mediterranean. This sinking took place in an area where the German Naval Command had ordered that British hospital ships should be sunk. The Supreme Court was satisfied that Neumann was "of the opinion that the measures taken by the German Admiralty against enemy hospital ships were not contrary to international law, but were legitimate reprisals". In the *Peleus* case, the commander of a German U-Boat and some members of the crew were found guilty by a British military court of a war crime in that they had fired on survivors from a Greek merchant ship which they had sunk. Regarding the plea of superior orders, the Judge Advocate advised the court that "the duty to obey is limited to the observance of orders which are lawful". See Cameron J, (ed), *The Peleus Trial* (1948); 1 War Crimes Reports 1–16.

law. This happens only in rare and exceptional cases. But this case was precisely one of them. . . ."

Lauterpacht commented that "it is an interesting gloss on the complexity of the problem that in Great Britain and in the United States the plea of superior orders is, on the whole, without decisive effect in internal criminal or constitutional law, although it is apparently treated as a full justification in relation to war crimes, while in France, where the plea of superior orders is an absolute defence in the municipal sphere, it is disregarded in the matter of war crimes". In view of this divergency in practice he preferred to approach the question from the point of view of principle, and his conclusion was that "while the fact of superior orders sets a limit to the punishment of acts which might otherwise constitute war crimes, it need not warp the effectiveness of the law in a manner which may rightly be regaded as a perversion of justice".

It has already been shown that Lauterpacht regarded the plea of superior orders simply as one, though the most important one, of three problems rendering it necessary to proceed with considerable caution in the punishment of war crimes. The other two problems were the uncertainties of the laws of war and the operation of reprisals. He connected these three problems together in that, if the superior order related to an area of the law of war where the rules were uncertain, or if the superior order commanded a violation of the laws of war but did so on the basis that it was a justifiable reprisal, a person charged with a war crime would, in his view, be more justified in putting foward the plea of superior orders. As examples of cases where the law of war was uncertain, Lauterpacht suggested mine-laying and the practice of general devastation, or "scorched earth" policies. An even more serious case was "the question of aerial bombardment of centres of population", and he doubted whether it would be feasible to prosecute persons for war crimes in that situation, except possibly for "clearly criminal acts unrelated to the major aspects of disputed rules, such as acts of mere terrorism and frightfulness as the bombardment of Rotterdam in April 1940".[18]

In the seventh edition of Oppenheim's volume on *Disputes, War and Neutrality*, which he edited in 1952 and which was of course written after the Nuremberg Trial, Lauterpacht accepted as the major principle that "members of the armed forces are bound to obey lawful orders only and that they therefore cannot escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity". He seemed generally content with the decisions of the various war crimes tribunals established after 1945 which had demonstrated "the possibility of the judicial application of the principle which rejects the plea of superior orders as an absolute defence" but which at the same time avoids "any resulting injustice inasmuch as it takes into account any relevant mitigating circumstances".

Paragraph 627 of Part III of the British *Manual of Military Law*, for which Lauterpacht was largely responsible, simply states that obedience "to the order of a government or of a superior, whether military or civil, or to a national law or regulation, affords no defence to a charge of committing a war crime, but may be

18. In fact the bombing of Rotterdam took place in May 1940.

considered in mitigation of punishment''. However, footnote (f) to paragraph 627 states the following:

> ''To admit without qualification the plea of superior orders may often amount, in practice, to abolishing a large part of the responsibility for war crimes. The decisions of many war crime tribunals established after the Second World War . . . showed fully the judicial application of the principle stated in the text. This principle rejects the plea of superior orders as a defence and, at the same time, avoids any resulting injustice inasmuch as it takes into account any relevant mitigating circumstances. In so far as fear of immediate and extreme consequences in cases of disobedience is a consideration properly to be taken into account as a mitigating factor in the matter of superior orders . . . no such consideration applies in the case of military commanders at the highest level of the military hierarchy. Far from being irresistibly compelled to obey unlawful orders they are in a position, by a refusal to obey them, to avert or prevent their operation. In the case of subordinate ranks, the plea of superior orders is entitled to greater consideration as a factor in mitigation of punishment but it can never constitute a defence.''

This addition seems to indicate a hardening of attitude on Lauterpacht's part compared to what he had written in 1944 (see below fn 24).

(b) *Professor Yoram Dinstein*

Professor Dinstein began his monograph by posing the dilemma as follows:

> ''The problem is that, when a soldier is confronted with an (illegal) order to perform an act constituting a criminal offence, the demands of military discipline, as expressed in the duty of obedience to superior orders, come into conflict with the imperative need to preserve the supremacy of the law as manifested in the prescriptions of criminal law: military discipline requires unflinching compliance with orders; the supremacy of the law proscribes the commission of criminal acts.''

Professor Dinstein was not impressed by a pronouncement of the Israel District Military Court in the *Kafr Kassem* case (first instance)[19] that these two basic values did not contradict each other, although he was impressed by the attempt of that Court to overcome the dilemma by laying down the so-called ''manifest illegality'' principle. According to that court: ''Not formal unlawfulness, hidden or half-hidden, not unlawfulness which is discernible only to the eyes of legal experts is important here, but a conspicuous and flagrant breach of the law, a certain and imperative unlawfulness appearing on the face of the order itself, a clearly criminal character of the order or of the acts ordered, an unlawfulness which pierces the eye and revolts the heart, if the eye is not blind and the heart not obtuse or corrupted — that is the extent of 'manifest' unlawfulness required to override the duty of obedience of a soldier, and to charge him with criminal responsibility for his acts''. In the same case the Israel Military Court of Appeal considered the ''manifest illegality'' principle to be ''the best attainable''.[20]

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19. Military Court, Central District 3/57, *Military Prosecutor* v *Melinki, Pesakim*, (D) vol 17, p 90.
20. *Kafr Kassem* case (second instance) (App 279–283/58), *Ofer* v *Chief Military Prosecutor, Pesakim*, (A) vol 44, p 362.

After an exhaustive survey of the problem, taking in international theory, international legislation, and also a study of the decisions of both national and international courts, Professor Dinstein detected what he called "a certain trend in the decisions of the courts". This as as follows:

> "(1) not to deny any standing to the fact of obedience to orders when the criminal responsibility of the defendant is being established,
> (2) not to take the fact of obedience to orders into consideration when establishing responsibility in cases other than those of mistake of law or fact and compulsion."

A few sentences further on Professor Dinstein put the same proposition in a more positive form when he described obedience to orders as "just a circumstance that may be taken into account for purposes of discharge from responsibility, within the scope of a defence based on compulsion or mistake, namely, on lack of *mens rea*". However, he also expressed the view that "neither the judgment of the International Military Tribunal at Nuremberg, hobbled as it was by the tether of Article 8 of the London Charter, nor other less renowned opinions, overcame all the obstacles and resolve all the questions". Finally, daring to formulate his own view in one sentence, he put forward the following:

> "The fact that a defendant acted in obedience to superior orders shall not constitute a defence *per se*, but may be considered — in conjunction with other circumstances — within the scope of an admissible defence based on lack of *mens rea*."

The key to Professor Dinstein's thinking lies in his attachment — like that of most common lawyers — to the principle that, before a person can be convicted of a crime, it must be demonstrated that not only did he perform the act but also that he did so with a guilty intent. This is usually referred to as the principle of *mens rea*, the full maxim reading *actus non facit reum nisi mens sit rea*. Although the common law itself has permitted one or two minor exceptions to this principle, and statute law has done so even more often, it is considered by many people to be a fundamental principle of justice that a person should not be convicted of so serious an offence as a war crime, possibly leading to sentence of death, without the establishment of *mens rea*. According to this manner of thinking, the language of Article 8 of the London Charter, which simply provides that superiors orders shall not free the person accused of a war crime of responsibility, even though it is willing to concede "mitigation of punishment" for crimes committed in compliance with superior orders, is unsatisfactory.

So far as mistakes of law or fact are concerned, Professor Dinstein is here wrestling with essentially the same problems as confronted Sir Hersch Lauterpacht when he referred to the uncertainties of the laws of war and to the even more difficult situation which arises when orders are given to commit admittedly illegal acts on the basis of reprisals. Professor Dinstein points to the fallacy in the position accepted by many writers that a soldier is entitled to assume that an order issued to him by his superior is lawful. In a modern conscript army, for instance, it may happen that the subordinate has a much greater knowledge of law, including international, than has the superior; and Professor Dinstein cites the obvious example that "a junior officer in the Judge

Advocate's office in the army may be a much greater expert on international law than the commanding general of an armoured corps''. Presumably, when Article 82 was included in Geneva Protocol I of 1977, it was not the intention of the draftsmen that the opinion of a junior legal adviser should be swept aside by his superiors simply by virtue of the higher rank of the latter.[21] At the same time the view has been expressed by persons of considerable authority that the principle *ignorantia juris non excusat* does not apply in international criminal law. As Kelsen put it:[22] ''Everybody knows, or is in a position to know, what the general criminal law of this country forbids. But can it reasonably be assumed that every soldier knows what international law forbids?'' And Dunbar has asserted even more graphically that ''there are numerous practices of modern warfare in respect of which no rule of law has been established or, at any rate, the law is disputed. A soldier cannot be expected to carry in his knapsack not only a Field Marshal's baton but also a treatise on international law''.[23] Whatever view one takes on this question, it points to the wisdom of including in each of the four Geneva Conventions of 1949 the provision to the following effect:

> ''The High Contracting Parties undertake in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.''

The question whether a person who commits an illegal act under some form of duress or compulsion is relieved of responsibility for the commission of that act is a general question of criminal law and is not peculiar to international law. The general tendency prevailing in national systems of criminal law is to accept compulsion as a defence, although within very strict limits. In international law the compulsion may, and often will, take the form of a superior order, but, as Professor Dinstein has pointed out: ''Obedience to orders is possible without compulsion, and compulsion is feasible without obedience to orders . . . compulsion may even happen when the compeller is a private armed with a deadly weapon and the victim an unarmed senior officer. And a soldier may obey the orders of his commanders, not willy-nilly, but gladly and of his own volition.'' The complexity of these situations seems to justify Professor Dinstein in his basic conclusion that obedience to orders, mistakes of law and fact and compulsion should all be considered together ''within the scope of an admissible defence based on lack of *men rea*''.[24]

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21. This Article reads: ''The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.''
22. *Peace through Law* (1944), 107.
23. ''Some Aspects of the Problem of Superior Orders in the Law of War'', (1951) 63 Juridical Review 261.
24. Professor Dinstein draws attention to a remarkable shift of opinion by Sir Hersch Lauterpacht on the issue of compulsion. In 1944 Sir Hersch had expressed the view that ''such a degree of compulsion as must be deemed to exist in the case of a soldier or officer exposing himself to immediate danger of death as the result of a refusal to obey an order excludes *pro tanto* the accused — unless, indeed, we adopt the view which cannot lightly be dismissed, that the person threatened with such summary punishment is not entitled to save his own life at the expense of the victim or, in particular, of many victims'': (1944) 21 BYBIL 73. However, apparently

(c) *Professor L.C. Green*

In his article, which was written shortly before the judgment in the *Calley* case was handed down, Professor Green made an extensive comparison of the situation of soldiers under municipal law on the one hand and international law on the other hand. Taking his own Canadian law as an example, he pointed out that Section 15 of the Canadian Criminal Code provides that: "No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs". Also Section 17 of the same Code provides a defence for "a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed", subject, however, to the doer of the offence believing that the threat will be carried out and subject also to the doer of the offence not being a party to a conspiracy or association whereby he is subject to compulsion. Also this defence does not apply in serious cases such as treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing serious bodily harm or arson. All civil defences are available to an accused Canadian serviceman appearing before a military tribunal.

A curious provision in Queen's Regulations and Orders in Canada (Chapter 19) lays down that "every officer and man shall obey the orders of officers and men who are senior to him", but goes on to say that "if an officer or man is given an order that he considers to be in conflict with the National Defence Act, Queen's Regulations and Orders, or general or particular orders binding on him, he shall point out the conflict orally, or in writing if the order does not require immediate obedience, to the superior by whom the order was given. If the superior still directs him to obey the order, he shall do so." Whoever drafted this provision was clearly doing so in an attempt to resolve Professor Dinstein's dilemma, and doing so in a manner which may be considered appropriate to an

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influenced by what he considered to be an improper statement by the United States Military Tribunal at Nuremberg in the *Einsatzgruppen* case, Lauterpacht wrote in 1952: "No principle of justice and, in most civilized communities, no principle of law permits the individual person to avoid suffering or even to save his life at the expense of the life — or, as revealed in many war crimes trials, of a vast multitude of lives — or sufferings, on a vast scale, of others": Oppenheim, *International Law*, vol 2, 7th ed (1952), 571–2. *Einsatzgrappen* (or *Ohlendorf*) was a case in which 22 German officers, members of various security groups or task forces organised by Himmler, were found guilty of exterminating Jews, Gypsies, Commissars and other elements considered racially inferior or politically undesirable on a large scale. They pleaded a combination of superior orders and compulsion, but all were found guilty. However, in a passage to which Lauterpacht took "serious objection" (op cit 571, fn 2), the Tribunal said: "There is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid commiting a crime which he condemns". The Tribunal was satisfied that in the case before it the officers "approved of the principle involved in the order" with the result that the plea of superior orders failed. The Tribunal commented: "The doer may not plead innocence to a criminal act ordered by his superior if he is in accord with the principle and intent of the superior". Inasmuch as this implies that the doer may plead innocence if he is ordered by his superior to perform an act with which he does not agree, it constitutes a potential loophole of wide proportions to the principle that obedience to superior orders is no defence to a war crime, and thus naturally it drew criticism from Lauterpacht. (For the judgment in the *Einsatzgruppen* case see *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10*, vol 4, p 480; (1948) 15 AD 656. Dinstein considers that "Lauterpacht's later view suffers from overstringency", and thinks that Lauterpacht "was led to this extreme position on a rebound from the impact of a vexatious *dictum* in the judgment rendered by an American Military Tribunal at Nuremberg in the *Einsatzgruppen* case" (Dinstein, op cit 79).

army in a democratic country in the present age. Whether such a system would be feasible on active service is open to doubt. For it would be a mistake to assume that the principle of military discipline and the principle of compliance with rules of international law are necessarily in conflict. Indeed situations may arise in which there is a conflict, but in general, as is quite clear from the Hague Regulations and other enactments, international law relies heavily on military discipline for the enforcement of its rules.

Professor Green explains that the Queen's Regulations and Orders in Canada are silent on the point of what is to happen if the order which the subordinate is eventually ordered to carry out turns out to be illegal. He is, however, inclined to the view that, under Canadian military law, a soldier is only required to obey "lawful commands".

In fact, Professor Green is also inclined to the view that, both in Great Britain and in the United States, the duty of soldiers to obey has always been confined to lawful orders only, and that it was simply defective drafting of the military manuals which failed to make that point clear. If that be so, the amendments to the British and American manuals which took place in 1944 can be seen in a rather better light and not represented, as of course they have been, as a cynical exercise to impose standards on an enemy, who was about to be defeated, stricter than the victors were prepared to accept for themselves.

Professor Green quotes, for instance, the American writer, Hare, as saying in 1889 that "if the circumstances are such that the command may be justifiable, he [a soldier] should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, *unless the case is so plain as not to admit of reasonable doubt. A soldier consequently runs little risk in obeying an order which a man of common sense so placed would regard as warranted by the circumstances.*"[25] He quotes also the English judge, Willes J, as saying in 1866, "an officer or soldier, acting under the orders of his superior — *not being necessarily or manifestly illegal* — would be justified by his orders".[26] However, on the other side of the line, Professor Green refers to the views expressed by the Judge Advocate in the case of *Wirz,* which arose out of atrocities commited against Federal prisoners of war during the American Civil War. Commenting on the defence of superior orders, the Judge Advocate said: "A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey such an order and disastrous consequences result, both the superior and the subordinate must answer for it. General Winder could no more command the prisoner to violate the laws of war than could the prisoner do so without orders. The conclusion is plain, that where such orders exist, both are guilty". The court, being a military court, gave no judgment, but, since it found Wirz guilty, it must be presumed that it accepted the views of the Judge Advocate and that for it the conclusion was plain.[27] In other words, the various tests discussed by the judges

25. Hare, *Constitutional Law* (1889) 920.
26. *Keighley* v *Bell* (1886) 4 F and F 763, 790.
27. HR Exec Do No 23, 40th Cong 2nd Sess 764. Another case cited by Professor Green is *R* v *Smith* (1900) 17 SC 561 (Cape of Good Hope). Here Solomon J said: "it is monstrous to suppose that a soldier would be protected where the order is *grossly illegal*" although he described as "an extreme proposition", and unacceptable, the view that a soldier is responsible simply because he obeys an order "*not strictly legal*" (in both cases italics added). The learned judge added: "Especially in time of war immediate obedience . . . is required . . . I think it is a safe rule to lay

in the United States Court of Military Appeals in *Calley*, and by the Israeli military courts in *Kafr Kassem*, with a view to determining the limits of the defence of superior orders, have a long history behind them.

Professor Green also points out that in the *Hostages Trial*[28] the United States Military Tribunal was confronted with the fact that the defendant German officers relied heavily on the statements in the British and American Manuals and in the earlier editions of Oppenheim's *International Law*. The Tribunal began its discussion of the problem by proclaiming that "the rule that superior order is not a defence to a criminal act is a rule of fundamental criminal justice that has been adopted by civilised nations extensively". It went on to maintain that the municipal law of civilised nations generally sustained that principle and, "this being true, it properly may be declared as an applicable rule of international law".[29] The Tribunal conceded that "implicit obedience to orders of superior officers is almost indispensable to every military system" but maintained that "this implies obedience to lawful orders only". Professor Oppenheim was charged with having "espoused a decidedly minority view" and the fact that the British and American armies had adopted his view "for the regulation of their own armies" did not have the effect of "enthroning it as a rule of international law". Army regulations, according to the Tribunal, were "not a competent source of international law", and above all they were not competent for determining "whether a fundamental principle of justice has been accepted by civilized nations generally". It was convenient for the Tribunal that the Army regulations of other countries — including Germany[30] — had framed the rule differently, and this enabled the Tribunal to say that, since the Army regulations

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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 . . . " It is curious that the draftsmen of the 1914 edition of the British *Manual of Military Law* took no account of a case such as this.

28. *In re List*, (1948) 15 AD 632.
29. Presumably by reference to the fact that Article 38.1 (c) of the Statute of the International Court of Justice includes as a source of international law "the general principles of law recognized by civilised nations".
30. In the *Llandovery Castle* case (above fn 17) the Reichsgericht said "Patzig's order does not free the accused from guilt. It is true that according to para 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable the superior office issuing such an order is alone responsible. According to No 2, however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law".
Paragraph 330(b) (1) of the *Law of Naval Warfare* issued by the Chief of Naval Operations, United States Navy, in 1955 is very similar to the long-established German rule. After stating that belligerent States have *the obligation* under customary international law to punish their own nationals who violate the law of war and *the right* to punish enemy nations, whether members of the armed forces or civilian persons, who fall under their control, it provides as follows: "The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law but may be considered in mitigation of punishment. To establish responsibility the person must know, or have reason to know, that an act he is ordered to perform is unlawful under international law."
See Kunz JL, "The US Army Field Manual on the Law of Land Warfare", (1957), 51 AJIL 388. In this Note, the author comments on the fact that the United States, having recently published new instructions on the *Law of Naval Warfare*, has now added to that a *Field Manual on the Law of Land Warfare*. Referring to the latter he says that it "is in every point, and particularly in regard to fundamental problems, in harmony with the *Law of Naval Warfare*". He adds the caution, however, that these manuals, though official publications, "are neither statute nor treaty and should not be considered binding upon courts and tribunals applying the laws of war, although such provisions are of evidentiary value".

of different countries differed on the point, "the basis does not exist for declaring superior orders to be a defence to an international law crime", although it was prepared to consider the plea "in mitigation of punishment".

Concluding his survey, Professor Green indicated a preference for the "palpable illegality" test, as followed, for example, by the United States Army Board of Review in *US* v *Kinder*,[31] a Korean War case, and in *US* v *Keenan*,[32] an early Vietnam war case. In the latter case, which involved a charge of unpremeditated murder in compliance with orders, what was referred to as "Marine Corps Training" was submitted as a defence. The defence was rejected, the Board saying that an act done in good faith in compliance with the orders of a superior 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". As for "Marine Corps Training", the Board said:

> "A Marine is a reasoning agent, who is under a duty to exercise judgment in obeying orders to the extent that when such orders are manifestly beyond the scope of the authority of the one issuing the order, and were palpably illegal upon their face, then the act of obedience to such orders will not justify acts pursuant to such illegal orders."

If, however, orders are not to be obeyed when they are "palpably illegal" or "manifestly beyond the scope of the authority" of the persons giving them, then there has to be agreement on the standard that is to be applied in determining such matters. All sorts of standards have been suggested; e.g. "a man of ordinary sense and understanding" (*US* v *Keenan*; Quinn J in *US* v *Calley*; paragraph 216(d) of the *Manual for Courts Martial*, United States); "palpable illegality to the commonest understanding" or to "persons at the lowest end of the scale of intelligence and experience in the services", or to "the unsophisticated soldier and those of somewhat limited intellect who nonetheless are doing their best to perform their duty" or "almost every member of the armed forces would have immediately recognized that the order was unlawful" (Darden CJ in *US* v *Calley*); or honest belief that the orders were "not so manifestly illegal" that the accused "ought to have known they were unlawful" (Solomon J in *R* v *Smith*); or "if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law" (Reichsgericht in *the Llandovery Castle*).

In *US* v *Kinder*, where the Board of Review applied the test of "so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding", such factors as the distance from the battle line where the offence was committed and the age, formal education and military experience of the accused were taken into account. In this context the *War Crimes (Preventative Murder) (Germany)* case,[33] is of exceptional interest as being a

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According to Greenspan, *The Modern Law of Land Warfare* (1959), 491, the position in the Soviet Union is that "a soldier carrying out the unlawful order of an officer incurs no responsibility for the crime, which is that of the officer. If, however, the order is "clearly criminal", then "the soldier is responsible together with the officer who issued the order".

31. (1954) 14 Court-Martial Reports [United States] 742.

32. (1969) 39 Court-Martial Reports [United States] 108.

33. 32 ILR 563.

decision of the Federal Supreme Court of the Federal Republic of Germany in 1960. The appellant, a soldier in the German armed forces, was accused of shooting foreign nationals employed in Germany as forced labourers towards the end of the Second World War and was convicted of murder. He pleaded (i) that the killing of the foreign nationals was justifiable under international law as a reprisal for the illegal acts of warfare against Germany by States at war with that country, and (ii) that the conviction could not stand unless there was a finding that the superior officer who had given the order knew that it was unlawful. The court dismissed the appeal, holding (i) that the killing was not a legitimate reprisal but a common crime punishable by municipal law; (ii) that it was irrelevant whether or not the superior officer knew that the order was unlawful; (iii) that the appellant must have known that to carry out the order was unlawful. From the evidence it appears that the superior officer was a divisional commander who gave the order for fear that the foreign workers might become a danger to the German population after the departure of the Division. The Court added: "Such ignorance of the law as a superior may be guilty of does not free the person who has received the order which he himself knows to be criminal. This applies all the more where, as here, the divisional commander was an engineer and the accused a lawyer".

Conclusion

It is now time to bring this discussion to an end, and to formulate some recommendations, albeit tentatively. From what has been said above, and from what was discovered by Professor Dinstein in his extensive research, it seems that two extreme solutions of the problem are both unacceptable. These are (i) that obedience to superior orders shall always be regarded as a defence to a charge of war crimes, and (ii) that obedience to superior orders shall never be regarded as a defence to a charge of war crimes. It is quite clear that, if the first of these solutions were adopted, much, possibly even most, of the law of war would become unenforceable and the effort to establish a viable system of international humanitarian law would be frustrated.

The rejection of the principle that obedience to superior orders shall never be regarded as a defence to a charge of war crimes may be more controversial. After all that principle was laid down in Article 8 of the London Charter establishing the International Military Tribunal at Nuremberg; it was accepted by the Tribunal; and it was affirmed by the General Assembly of the United Nations in resolution 95(I) adopted on 11 December 1946. But subsequent experience has shown an unwillingness, at least on the part of certain military establishments, to accept as a general rule what may have been thought appropriate to the particular case of the Nazi defendants.

It will be objected of course that the military establishments in question are seeking to put their own interests before the supremacy of international law. This objection is not sustainable since military establishments themselves have an interest in ensuring that the laws of warfare shall be observed and that armed conflict shall not degenerate into uncontrolled barbarism. The objection to the principle of absolute liability, as applied to a person who obeys a superior order, is that it conflicts with a basic principle of criminal law, that of *mens rea*. As Lauterpacht himself put it in his 1944 article:

> "In view of the substantial diversity, both apparent and real, in the judicial and legislative practice of various States, it is necessary to approach the subject of superior orders on the basis of general principles of criminal law, namely, as an element in ascertaining the existence of *mens rea* as a condition of accountability".[34]

Lauterpacht went on to indicate that there could be no liability, or at any rate diminished liability, "if the accused acted in the legitimate belief that he was proceeding in accordance with law, both municipal and international. In his estimate of the legal position, the circumstance that he has received orders to act in a certain way must be regarded, prima facie, as creating in the accused the conviction of the lawfulness of the action as ordered. By the same token, the clearly illegal nature of the order — illegal by reference to generally acknowledged principles of international law so identified with cogent dictates of humanity as to be obvious to any person of ordinary understanding — renders the fact of superior orders irrelevant."[35]

Finally Lauterpacht saw the possiblity of "a variety of intermediate situations" between on the one hand that of "a person obeying an obviously unlawful order the refusal to obey which would put him in immediate jeopardy" and that of "a person obeying, in an isolated case, an unlawful order which is not on the face of it unlawful and disobedience to which would expose him to the full rigours of summary military discipline."[36] Although expressed in a different form, this is an approach very similar to that proposed by Professor Dinstein to the effect that, while not constituting a defence *per se,* obedience to superior orders should be regarded as "a circumstance that may be taken into account for purposes of discharge from responsibility, within the scope of a defence based on compulsion or mistake, namely, on lack of *mens rea,*"[37]

For his part Professor Green seems basically content with the criterion that superior orders should free a member of the armed forces from responsibility unless the order is "palpably unlawful" and would so appear to "a man of ordinary sense and understanding", although he would add the qualification that the "man of ordinary sense and understanding" in this case is not that mythical figure, "the man on the Clapham omnibus", but possibly "young soldiers whose experience in warlike conditions has been gained under conditions that were completely unknown when their judges were serving personnel". In other words his position is not unlike that later adopted by Darden CJ in the *Calley* trial. Thus Professor Green would allow attention to be paid to such factors as "the general conditions in which the accused found himself, the length of time he had been in action, the nature of the hostilities, the type of enemy confronting him, and the methods of warfare employed against him" and also to "the casualties borne by the accused's comrades as a result of illegal methods of warfare", although he would be careful "not to allow resentment, hatred, anger or sorrow to overcome even a soldier's reasonable understanding of right and wrong".

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34. (1944) 21 BYBIL 73.
35. Ibid.
36. Ibid.
37. Op cit, 252.

If the laws of war are to be effectively observed, it is obviously desirable that there should be international agreement concerning the extent to which obedience to superior orders should free the members of armed forces from responsibility for committing illegal acts. From what has been said above, it is quite clear that the rule laid down in Article 8 of the London Charter of 1945 is in itself not adequate for today's conditions. Would it therefore be useful to convoke an international conference with a view to trying to get agreement on a new formula, such as permitting superior orders to be taken into account within the scope of a defence based on compulsion or mistake (Professor Dinstein), or adopting the test of "palpably unlawful" as appearing to "a man of ordinary sense and understanding", such as recommended by Professor Green and subject to the qualifications appended by him?

The answer, unfortunately, is in the negative because the situation is more complicated than just arriving at a form of words which would cater for the various views that have been expressed. The basic problem lies in the nature of international criminal law itself, and in the nature of the jurisdiction over war crimes. Notwithstanding the continuing controversy over the question of whether a sovereign State can commit a crime and the continuing lack of an international criminal court, it is now generally accepted that certain acts can be designated as international crimes and that these acts can be committed by individuals. Such acts include the various acts listed in the London Charter of 8 August 1945, namely crimes against peace, war crimes and crimes against humanity; piracy; and more recent additions such as genocide, hijacking and unlawful interference with aircraft, grave breaches of the Geneva Conventions of 1949 and Geneva Protocol I of 1977, and possibly certain acts connected with the *apartheid* system. There remains, however, no international jurisdiction over these so-called "international crimes", and specifically the International Court of Justice lacks power to exercise criminal jurisdiction over States, organizations or individuals.

Even the so-called International Military Tribunal at Nuremberg was not a truly international court. Certainly it was established by international agreement, and it was composed of judges from four different powers. But, as Professor Schwarzenberger has pointed out, the real basis of the jurisdiction of the Nuremberg Tribunal was "the inter-Allied *co-imperium* in Germany"; and, in the case of the Tokyo Tribunal, it was "the Japanese unconditional surrender".[38] As the same author explains, "members of the armed forces and civilians who fall into enemy hands are in principle entitled to the protection of the applicable customary rules of warfare and conventions"; but, if these persons have violated these rules, "the enemy is entitled to retaliate and, by way of reprisal, deny them the protection of the law which they themselves have violated". According to this view, "it is entirely in the discretion of a belligerent whether he wishes to

38. *International Law as Applied by International Courts and Tribunals*, Vol 2, *The Law of Armed Conflict* (1968), 526. The case of the International Military Tribunal for the Far East is particularly striking. This Tribunal was set up by a Proclamation issued by the Supreme Commander for the Allied Powers in the Pacific, General D MacArthur, on 19 January 1946. Article 2 of this Proclamation state: The Constitution, jurisdiction and functions of the Tribunal are those set forth in the Charter of the International Military Tribunal in the Far East, *approved by me* this day" (emphasis is supplied). The judges, drawn from the various nations represented, were also appointed by General MacArthur.

hold prisoners responsible for the war crimes", but, "if he decides to proceed against them, he must accord them some form of trial and may then impose any penalty that fits the crime".[39] Thus, although jurisdiction over war crimes may result in the enforcement of rules of international law, the process is normally a purely national one and derives its legal efficacy from the fact that "the home State of war criminals is estopped from intervening on their behalf".[40] The process applied to war criminals is thus similar to that applied to pirates.

In fact the Nuremberg and Tokyo trials were an exception to the normal practice whereby jurisdiction over war crimes is exercised by purely national courts. The Nuremberg and Tokyo tribunals were established to deal with accused persons whose alleged crimes were on such a vast scale that they had no specific location. Most of the war crimes trials carried out after the Second World War were conducted by the military tribunals of a single nation or by the courts of the countries which German, or Japanese, forces had occupied. As Sir Hersch Lauterpacht explained in his 1944 article, "the territorial principle — the principle that a State is entitled to punish unlawful acts committed within its territory — supplies a substantial, though not the only and not the most important, explanation of the existing rule authorizing a belligerent to punish war crimes committed against the enemy". The other principle much relied on after the Second World War was the principle that "the belligerent may, *in applying his municipal law to war criminals* rely on the rule, which many States have adopted and which general international law has not stigmatized as illegal, that a State may punish criminal acts committed by foreigners abroad against its own safety or against its nationals". The important point about this passage, however, is that Lauterpacht recognized that, although, as he said, "war crimes are crimes against international law", the process involved in the punishment of these crimes is one of municipal law.[41]

If then the process involved in the punishment of war crimes is one of municipal law, this means that all matters relating to evidence, procedure, sentencing and so on in war crimes trials come within the ambit of municipal law. Even more relevant from the point of view of this paper, it means that the precise definition of the crimes, and also of the excuses that may be advanced for the commission of the crimes, come within the ambit of municipal law. Persons such as Dithmar and Boldt, in the *Llandovery Castle* case, were not found guilty

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39. Schwarzenberger, G, and Brown, ED, *A Manual of International Law* 6th ed (1976), 76.
40. Ibid.
41. In 1982, after a lengthy period of preparation and discussion, the Commonwealth Parliament passed the Defence Force Discipline Act (No 152 of 1982), which contains the following sections:

"14. A person is not liable to be convicted of a service offence by reason of an act or omission that —
(a) was in execution of the law; or
(b) was in obedience to —
(i) a lawful order; or
(ii) an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful.

62. A defence member who commands or orders the commission of a service offense is guilty of an offence punishable on conviction —
(a) if the first-mentioned offence is punishable by a fixed punishment -- by that fixed punishment; or
(b) in any other case — by a punishment that is not more severe than that maximum punishment for the first-mentioned offence."

of war crimes in a general or abstract sense. They were convicted for "having taken part in homicide", a crime defined by German law. The Reichsgericht found, however, that "a direct act of killing, following a deliberate intention to kill, is not proved against the accused, They are, therefore, only liable to punishment as accessories". Similarly, Lieutenant Calley was not convicted simply of war crimes. He was convicted of "premeditated murder" and "assault with intent to murder" — crimes under United States law. It therefore follows that since it is the municipal system which defines the crime, it is also the municipal system which prescribes the possible excuses for committing the crime, such as infancy, insanity, mistake, compulsion, duress, misadventure, self-defence, necessity and others, including the relevance of superior orders. Moreover, it also falls to the municipal system, to draw the boundary between the responsibility of principals and the responsibility of accessories. What the London Charter of 1945 did, therefore, was to lay down a special international rule relating solely to the plea of superior orders. This may have been understandable at the time, especially for a trial involving the major war criminals. But, as subsequent events have shown, the principle laid down in Article 8 of the London Charter is not of itself viable as a general rule to be applied in all war crimes trials. Nowhere is this more clearly illustrated than in the British *Manual of Military Law,* Part III, which, after setting out the Article 8 rule in paragraph 627, follows this up with paragraph 628 dealing with physical compulsion, paragraph 629 dealing with duress and paragraph 630 dealing with necessity.

The conclusion must therefore be that, so long as the process of exercising jurisdiction over war crimes is left to municipal law, it is not feasible for international law to single out the plea of superior orders as a case suitable for the formulation of a special rule. The plea of superior orders is just one of many factors which the municipal court should take into account in assessing guilt or innocence. It is not sufficient to relegate the plea simply to the area of mitigation of punishment. Even if the plea is taken into account in an appropriate case, and punishment is mitigated, conviction on a charge of committing a war crime is a serious stigma which ought not to be imposed on any individual unless it is really deserved. As against that, the wide support given to the Nuremberg principles testifies to the strength of the feeling that the efficacy of the laws of warfare must not be compromised by abuse of the plea. At the beginning of this paper reference was made to certain statements which make it quite clear that the political and legislative organs of a State cannot invoke their own procedures and regulations as an excuse for breaching rules of international law. The same standard is to be expected of military establishments. National courts trying personnel of their own armed forces accused of war crimes have the heavy responsibility of ensuring that, while every accused person must receive a fair trial, the State as a whole conforms in all respects to the standards prescribed by international law.