University of Richmond Law Review

Volume 7 | Issue 3 Article 7

1973

The Defense of Superior Orders

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Introduction

THE court-martial and premeditated murder conviction of First Lieutenant William L. Calley, Jr., for his participation in the My Lai Massacre on March 16, 1968, was one of the most controversial criminal trials, either military or civilian, in the history of this nation. Although the trial brought to the surface many troubling aspects of this country's conduct of the Vietnam War, the primary focus of the controversy centered on the question of whether an American soldier should be held criminally accountable for his participation in the mass execution of unarmed and unresisting men, women, children and babies taken captive by him during the course of a military operation, if he did so in obedience to orders from a superior officer. Highlighting the issue, one writer who covered the trial wrote:

> Hovering over the My Lai Massacre cases is a storm cloud of menacing implications from a question that many professional soldiers would just as soon ignore:
>
> Is the modern-day GI supposed to be an unquestioning myrmidon to his leaders—or a reasoning individual with an obligation, and the guts, to disobey an order he decides is illegal.
>
> Until My Lai publicly revived the question, it was widely assumed that the Nuremberg Trials after World War II had issued the universal answer and finally put the matter to rest. The principles of Nuremberg which were adopted by the United Nations, gave international recognition to the concept that an individual may be held responsible for a war crime even if he committed it under orders from his superior or his government.
>
> Yet it's become increasingly clear that a lot of Americans either are not aware of that principle of international law, do not agree with it,

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†I would like to gratefully acknowledge the extremely competent and diligent assistance of Mr. David Zisser, a second-year law student at the Georgetown University Law Center, in the research and preparation of this article.

> or fail to see in it any relevance to what happened at My Lai 4 on March 16, 1968.[1]

In defense of his conduct in the village of My Lai 4, Lieutenant Calley testified:

> Well, I was ordered to go in there and detroy the enemy. That was my job on that day. That was the mission I was given. I did not sit down and think in terms of men, women, and children. They were all classified the same, and that was the classification we dealt with, just as enemy soldiers.
>
> . . . .
>
> I felt then and I still do that I acted as I was directed and I carried out the orders that I was given, and I do not feel wrong in doing so, sir.[2]

When the military court rejected this plea and sentenced Lieutenant Calley to life imprisonment, the American public reacted in overwhelming opposition to the conviction. This resulted in President Nixon's intervention on April 1, 1971, and his order to release Lieutenant Calley from confinement one day after the sentence had been imposed.[3] At

[1] Green, *In the Heat of Battle, Orders Are Orders, But When Can a Soldier Say No?*, The National Observer, January 18, 1971, at 24.

[2] Testimony of Lieutenant William L. Calley, Jr., Ft. Benning, Georgia, February 22, 1971.

Based on the testimony of Lieutenant Calley and other evidence concerning the orders for the operation, the military judge instructed the jury on the defense of obedience to orders. His instructions on this issue are set out in full in an Appendix to this article and are discussed more fully at p. 504 *infra*.

Lieutenant Calley's conviction was affirmed by a panel of the United States Court of Military Review on February 16, 1973. CM 426402, Calley, — C.M.R. — (1973). The court found the trial judge's instructions on obedience to orders to be entirely correct and further observed, after a thorough examination of the evidence of the orders given, that if the jury found that Calley had fabricated his claim, their finding had abundant support in the record.

[3] A poll was taken by George Gallup to assess the public's reaction. The questions and answers were as follows:

Do you approve or disapprove of the court-martial finding that Lt. Calley is guilty of premeditated murder?

Approve 9%
Disapprove: 79%
No opinion: 12%

Do you disapprove of the verdict because you think what happened at My Lai was not a crime or because you think others besides Lt. Calley share the responsibility for what happened?

least part of the reason for the public response was evidenced by the poll conducted by Louis Harris in January of 1970, which sought to determine the public's attitude toward the defense of superior orders. Those questioned were asked to put themselves in the positions of soldiers ordered to shoot old men, women and children. When asked if they would consider it "more right" to follow the orders or "more right" to disobey them, 37 percent selected the first alternative and 45 percent the latter. Two-thirds of those sampled thought soldiers who participated in the massacre "should be let off if they proved they did the killing under orders." The sample's attitude toward the Nuremberg principle of individual culpability was equally divided, with 39 percent agreeing and 39 percent in disagreement. This represents a dramatic change in public opinion on this issue since 1947, the year the Nuremberg Trials were held, when the vast majority of the public felt that the Nazi war criminals should not escape punishment because of obedience to orders.[4]

[Based on those who disapproved]
Not a crime: 20%
Share responsibility: 71%
No opinion: 9%

Do you think Lt. Calley is being made the scapegoat for the actions of others above him, or not?
Yes: 69%
No: 12%
No opinion: 19%

Do you approve or disapprove of President Nixon's decision to release Lt. Calley pending appeal of his conviction?
Approve: 83%
Disapprove: 7%
No opinion: 10%

Do you think the incident for which Lt. Calley was tried was an isolated incident or a common one?
Isolated: 24%
Common: 50%
No opinion: 26%

New York Times, April 4, 1971, at 56, col. 3, Gallup.

[4] On April 27, 1947, a poll was conducted in which the sample was asked,

> After the war, what do you think should be done with members of the Nazi party who defend themselves by claiming that they committed crimes under orders of higher-ups in the Party?

The following responses were obtained:

None of our affair	2%
Trials	19%
Re-educate	3%

It is not the purpose of this article to undertake an in-depth analysis of the reasons for this change in attitude or the public's reaction to the Calley verdict, but rather, in light of the case and the interest it has aroused, to examine the historical development and precedent for the defense of superior orders in American jurisprudence, and to discuss some of the practical problems involved in the application of that standard.

Historical Development of the Standard

Despite an apparent popular belief, the defense of obedience to superior orders, *i.e.*, that the acts charged to a defendant were committed pursuant to orders from military or civilian superiors to whom a duty of obedience was owed, was not first raised and litigated at the Nuremberg Trials, and is not only a principle of international law but a recognized principle of American jurisprudence. The effect of superior orders on an individual's responsibility for his conduct, and the moral question implicit within that concept, *i.e.*, under what circumstances will an individual be deemed to be an unthinking instrumentality of the state, relieved of his normal obligation to exercise individual thought and make appropriate moral decisions, is one that has been debated for centuries. The earliest articulations of views came not from courts of law, but from philosophers. Saint Augustine observed:

> [A]n unjust order may perhaps render the king responsible, while the duty of obedience preserves the innocence of the soldier.[5]

Others were less willing to allow individuals to avoid the consequences of their acts. Grotius observed:

Imprisonment	42%
Kill them	19%
Other answers	15%

AIPO Poll, quoted in W. BOSCH, JUDGMENT ON NUREMBERG, 91-92 (1970). Compare also Bosch's study showing that 75% of the American public, 69% of the newspaper columnists, 73% of the newspapers and 75% of the periodicals approved of the Nuremberg trials. *Id.* at 109.

[5] Quoted in Marcin, *Individual Conscience Under Military Compulsion*, 57 A.B.A.J. 1222 (1971).

To the same effect, the Municiple Law of Rome: "He does the injury they say who orders that it be done; there is then no guilt on him that has to obey," and Tacitus: "To the Prince the gods have given the supreme right of decision; for a subject there remains the glory of obedience." *Id.* at 1222-23.

> If those under the rule of another are ordered to take the field, as often occurs, they should altogether refrain from so doing if it is clear to them that the cause of the war is unjust.[6]

As the philosophers have been unable to agree on the superior-orders defense, so too have the courts been of differing minds. The earliest decisions had little difficulty in finding that obedience to superior orders was not a defense; however, these cases did not deal exclusively with military considerations, and political circumstances surrounding the trials doubtlessly influenced the decisions. For example, in 1474 Peter von Hagenbach, a German governor, tried for perpetrating a reign of terror in the name of Duke Charles "The Bold" of Burgundy, raised the plea: "Is it not known that soldiers owe absolute obedience to their superiors?" [7] The plea was not successful and von Hagenbach was beheaded.

And, in *Axtell's Case*,[8] Axtell, the commander of the guards at the execution of Charles I, was tried for and convicted of murder and treason despite his plea that all "he did was as a soldier, by the command of his superior officer, whom he must obey or die." In rejecting this defense, the court reasoned that:

> his superior was a traitor, and all that joined him in that act were traitorous and did by that approve the treason; and where the command was traitorous, there the obedience to that command is also traitorous.[9]

Although not expressed in these terms, the principle underlying the *von Hagenbach* and *Axtell* decisions is that while it is the soldier's duty to obey *lawful* orders, the soldier also has a duty to disobey unlawful orders, and his failure to do so *ipso facto* will subject him to criminal

[6] *Id.* at 1223. Also, Francisci de Victoria, a Sixteenth Century Spanish theologian and professor, wrote, "if a subject is convinced of the injustice of the war, he ought not to serve in it, even on the command of a prince." VICTORIA, ON THE LAW OF WAR, 173 (Classics of International Law ed., 1917).

[7] 1 SCHWARTZENBERGER, INTERNATIONAL LAW, 308-10 (2d ed., 1949).

[8] 84 Eng. Rep. 1060 (1660). *See also* Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (C. P. 1774), where Lord Mansfield recalled a case in which a Naval Captain had been found civilly liable for following the orders of the Admiral when he pulled down the houses of some settlers on the coast of Nova Scotia, noting that the representatives of the Admiral defended the cause and paid the damages; and Keighly v. Dell, 176 Eng. Rep. 781 (C.P. 1866).

[9] 84 Eng. Rep. 1060 (1660).

accountability. This statement of the legal standard is expressive of the standard as it was first adopted in American jurisprudence soon after the birth of the nation. The earliest American decision involving the defense of superior orders was a civil case, *Little v. Barreme*,[10] which arose out of the hostilities between France and the United States at the end of the eighteenth century. Congress had passed a non-intercourse act that authorized the President to order the Navy to seize any American vessel bound *to* a French port. The President implemented the act by an executive order that exceeded the Congressional grant of authority by ordering Navy captains to seize American vessels bound *to* and *from* French ports. Captain Little, relying upon the executive order, seized a Danish ship not bound to a French port, and was subsequently sued for damages by the ship's owners. Little attempted to rely on the President's orders in defense of his action. Chief Justice Marshall, in rejecting the orders as a defense, confessed that his initial bias was that the orders of the executive, while not giving a right, might provide Captain Little with an excuse, because

> [i]mplicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appears to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them.

However, he rejected his initial bias and held, as a matter of law, that

> the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass.[11]

Chief Justice Marshall of course recognized, in wrestling with the question, the inherent problem with deciding whether a superior order should provide an absolute defense. That is,

> when a soldier is confronted with an [illegal] order to perform an act constituting a criminal offence, the demands of military discipline, as

[10] 1 U.S. (2 Cranch) 465, 467 (1804).

[11] *Id.*

> 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 proscriptions of criminal law: military discipline requires unflinching compliance with orders; the supremacy of law proscribes the commission of criminal acts.[12]

The rule of *Little v. Barreme* was first applied in a criminal case in *United States v. Bright*,[13] where a state militiaman, pursuant to orders from the Governor of Pennsylvania, interfered with a federal marshal in the performance of his duties. The court rejected the militiaman's defense of superior orders, citing *Little v. Barreme* and saying:

> In a state of open and public war, where military law prevails, and the peaceful voice of military law is drowned in the din of arms, great indulgences must necessarily be extended to the acts of subordinate officers done in obedience to the orders of their superiors. But even there the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against a charge of murder or trespass, in the regular judicial tribunals of the country.[14]

As one can see, these early decisions dogmatically rejected the superior-orders defense if the order on which the subordinate relied was illegal in the abstract sense, without regard to the order's appearance of legality to the subordinate. The first decision to include within the standard a consideration of the state of mind of the actor and the reason-

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[12] Y. DINSTEIN, THE DEFENSE OF OBEDIENCE TO SUPERIOR ORDERS IN INTERNATIONAL LAW 6.

[13] 24 F. Cas. 1232 (C.C.D. Pa. 1809).

[14] United States v. Bright, 24 F. Cas. 1232, at 1237-38 (1809). Other cases, along with *Bright*, recognized that some sort of indulgence should exist for the military, given the exigencies of the military. *See* Martin v. Mott, 25 U.S. (12 Wheat) 537 (1827). In United States v. Bevans, 24 F. Cas. 1138 (C.C.D. Mass. 1816), the court recognized the importance of discipline and the fact that civilian tribunals could not fully understand military needs, and felt therefore that courts should not apply too exacting a standard to military orders. But, the court further said:

> [T]his can only be when those rules and orders are consistent with law, and not when they are against the express provisions of law, and against natural justice. *Id.* at 1140.

However, many cases did not even give lip service to special rules for the military. United States v. Jones, 26 F. Cas. 653 (C.C.D. Pa. 1813):

> No military or civil officer can command an inferior to violate the laws of his country; nor will such a command excuse, much less justify the act. *Id.* at 657;

and Hyde v. Melvin, 11 Johns (N.Y.) 521 (1814).

ableness of his reliance upon the order was *United States v. Jones*.[15] In *Jones*, the crew of an American privateer was charged with piracy for stopping a neutral vessel, assaulting her captain and crew, and stealing certain merchandise. The court rejected the claim that the crew acted pursuant to the orders of the captain:

> This doctrine, equally alarming and unfounded, . . . is repugnant to reason, and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify, the act. . . . We do not mean to go further than to say, that the participation of the inferior officer in an act which he knows, or ought to know to be illegal, will not be excused by the order of his superior.[16]

Unlike the standard enunciated in *Little v. Barreme* and *United States v. Bright*, here the court enunciated what is, in effect, the recognized standard today, *i.e.*, that obedience to a superior order is not a defense if the subordinate knows or ought to know it is illegal. *Jones* considered not only the order in terms of its abstract legality, but the order in relation to the act it commanded as viewed by the subordinate. By focusing attention on the state of mind of the actor and the surrounding circumstances, a reasonable belief in the legality of the orders would exculpate the defendant by negating the requisite *mens rea*.[17]

Later, in *Mitchell v. Harmony*,[18] another civil case, the Supreme Court followed the rule enunciated in *Little v. Barreme*, that an order to do an illegal act was an illegal order and would not excuse the subordinate's performing the act. However, the Court recognized that, depending on the circumstances, military necessity might purge the act of its illegality.

As one might expect, the Civil War prompted consideration of the problems involved with the superior-orders defense. At the outset of the

[15] 26 F. Cas. 653 (C.C.D. Pa. 1813).

[16] *Id.* at 657-58.

[17] The doctrine of *Jones*, was later reaffirmed in Despan v. Olney, 7 F. Cas. 534 (C.C.D. R.I. 1852). The case involved an action for false arrest brought by a civilian against a soldier who had arrested him pursuant to the orders of a superior. The court instructed the jury:

> I do not think the defendant was bound to go behind an order, thus apparently lawful, and satisfy himself, by inquiry, that his commanding officer proceeded upon sufficient grounds. To require this, would be destructive of military discipline, and of necessary promptness and efficiency of the service. *Id.* at 535.

[18] 13 How. 115 (1851).

Civil War, President Abraham Lincoln approved the promulgation by the War Department of "Instructions for the Government of the Armies of the United States in the Field," by Francis Leiber, a professor of law and political science at Columbia University. Leiber's "Instructions" represent the first codification of international law relative to prisoners of war ever issued by a government as a directive to its armed forces in the field.[19] Although the regulations did not deal expressly with the question of superior orders, Dr. Leiber recognized the underlying principle:

> Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.[20]

Several cases arose out of the Civil War that underscored Dr. Leiber's statement of individual accountability. In one of the most articulate and frequently cited cases of this period, the court found no error in a lower court instruction that:

> Any order given by an officer to a private, which does not expressly and clearly show on its face or in the body thereof its own illegality, the soldier would be bound to obey and such an order would be a protection to him.[21]

Another case of the same vintage worthy of consideration, both for reasoning and result, is *State v. Sparks*,[22] an action for contempt of court against Major Sparks, who, pursuant to orders, ignored a writ of habeas

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[19] This was published as General Order No. 100 of the Union Army on April 24, 1863, and it is reproduced in JAGS Text 20-7, *Law of Land Warfare* (The Judge Advocate General's School, U. S. Army, 1943), 155-86.

[20] T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 41 (1970).

[21] Riggs v. State, 3 Coldwell 85, 91 Am. Dec. 272, 273 (1866). The charge went on to say:

> But an order illegal in itself and not justified by the rules and usages of war, or in its substance being clearly illegal so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that such order was illegal, would afford a private no protection for a crime committed under such order. *Id.* at 273.

The court in *Riggs* also held that a soldier who was ordered to join a detachment would not be vicariously liable for a crime committed by another member of the detachment, as a co-conspirator or as an aider or abettor. *Id.* at 275.

[22] 27 Tex. 627 (1864).

corpus and removed two individuals from the custody of the court. The court stated that:

> [T]here is nothing better settled, as well by the military as the civil law, than that neither officers nor soldiers are bound to obey any illegal order of their superior officers; but on the contrary, it is their bounden duty to disobey them. The soldier is still a citizen, and as such is always amenable to the civil authority. We are of the opinion, therefore, that the orders of Major General Magruder can furnish the defendant, Major Sparks, no justification for his forcible interference with the jurisdiction of this court, and settling at naught its lawful order.[23]

But the court also said that if Sparks were acting under orders, that fact would go far to excuse him, and therefore Major General Magruder would be the principal offender.

In *McCall v. McDowell*,[24] the defendant soldier was sued for false imprisonment for having arrested and imprisoned the plaintiff as part of an effort to quell an outbreak of riots in California following President Lincoln's assassination. The defendant pleaded in his defense that he had acted pursuant to a general order from his commanding officer. The court held for the defendant, saying:

> Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the laws should excuse the military subordinate when acting in obedience to the orders of his commander.[25]

The court would accept the superior order as a defense except where the order is

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[23] *Id.* at 633. To get a sense of the confusion of the cases, compare Commonwealth v. Holland, 1 Duv. (Ky.) 182 (1864) with Jones v. Commonwealth, 1 Bush (Ky.) 34 (1866). In *Holland*, the issue was whether the taking of a civilian's horses by the military, in execution of a military order, was a crime. The court said that it was, noting that "[a]rgument to prove this would be superfluous," and gave no citations. In *Jones*, the defendant took slaves belonging to a civilian to another town, where they subsequently became lost to the owner. The court found against the defendant, citing *Mitchell* for the propositions that: 1) because an order to do an act forbidden by statute is an illegal order, there is no defense of superior orders; and 2) property may be converted for the military, but there must be an emergency. Commonwealth v. Holland was not cited.

[24] 15 F. Cas. 1235 (C.C.D. Calif. 1867).

[25] *Id.* at 1240.

> so palpably atrocious as well as illegal, that one must instinctively feel that it ought not to be obeyed, by whomever given.[26]

The most famous case of the period was the trial of Major Henry Wirz, the commandant of the Confederate prisoner-of-war camp at Andersonville, Georgia, who was brought to trial for the inhumane conditions that existed at Andersonville. Wirz raised the defense of obedience to superior orders, claiming that he suffered the conditions at the prisoner-of-war camp to exist pursuant to the orders of John H. Winder, the officer in charge of Confederate prison camps. The court-martial rejected Wirz's claim, found him guilty, and sentenced him to hang.[27]

By the turn of the century, the courts, with increasing frequency, began using the standard of apparent illegality, first held out in *United States v. Jones*, where actual knowledge of illegality was lacking, to judge the legality of the order followed in determining whether the order would exonerate the defendant.[28] In *In re Fair*, where a soldier shot another soldier escaping from custody, the court said:

> While I do not say that the order given by Sergeant Simpson to petitioners was in all particulars a lawful order, I do say that the illegality of the order, if illegal it was, was not so much so as to be apparent and palpable to the commonest understanding. If then, the petitioners acted under such orders in good faith, without any criminal intent, but with an honest purpose to perform a supposed duty, they are not liable to prosecution under the criminal laws of the state.[29]

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[26] *Id.* at 1241.

[27] G.C.M.O. 607 of 1865. Ex. Doc., No. 23, H.R. 40th Cong., 2d Sess. The Wirz trial is discussed in depth in CHIPMAN, THE TRAGEDY OF ANDERSONVILLE, TRIAL OF CAPTAIN HENRY WIRZ, THE PRISON KEEPER (1911).

[28] This was not a unanimous view, however. In Franks v. Smith, 142 Ky. 232, 134 S.W. 484 (1911), the court said that although the general rule was that orders reasonably believed to be legal would be a defense,

> we cannot consent that all military orders, however reasonable they may appear, will afford protection in the civil or criminal courts of the state. *Id.* at 490-91.

[29] 100 F. 149, 155 (1900). In a case with almost identical facts as *Fair*, United States v. Clark, 31 F. 710 (1887), the court said:

> As there is no reason in this case to suppose that Clark was not doing what he conceived to be his duty, and the act was not so cruelly illegal that a reasonable man might not suppose it to be legal . . . and as there was an entire absence of malice, I think he ought to be discharged. *Id.* at 717.

Another case of this period, Commonwealth *ex rel.* Wadsworth v. Shortall, 206 Pa. 165 (1903), arose out of a United Mine Workers strike, which was accompanied by much violence, and resulted in the calling out of the National Guard. Wadsworth, on sentry

While by this time the law seemed well established in the civilian courts that, although it was a soldier's duty to obey lawful orders, he was under a duty not to obey orders he knew to be unlawful or that were apparently unlawful, a dramatic change took place in military law with respect to the individual soldier's responsibility for violations of the law of war. In 1914 the Army published its successor to the Leiber "Instructions," the *Rules of Land Warfare*, which expressly placed the responsibility for violations of laws of war on those giving the illegal orders, not on the subordinates who carried them out:

> Individuals of the Armed Forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.[30]

Thus, obedience to orders became an absolute defense.

This provision remained in effect throughout World War I, a war in which there is an absence of any record of the prosecution of American military personnel for the unlawful execution or maltreatment of prisoners of war or for any other violations of the law of war.[31] One

duty with orders to shoot to kill, shot one Durham, who did not obey several commands to halt. The court quoted with approval from Hare, *Constitutional Law:*

> A subordinate stands as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, as we have seen, had the accused reasonable cause for believing in the necessity of the act which is impugned, and in determining this point, a soldier or member of a *posse comitatus* may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well-informed; and if the circumstances are such that the command may be justifiable, he 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 a reasonable doubt.

[30] *Rules of Land Warfare*, USA, Chapter X, Section 366 (1914). This change apparently resulted from a similar change in the BRITISH MILITARY MANUAL, which, in 1913, incorporated a similar provision. EDMONDS AND OPPENHEIM, BRITISH LAND WARFARE, AN EXPOSITION OF THE LAWS AND USAGES OF WAR ON LAND FOR THE GUIDANCE OF OFFICERS OF HIS MAJESTY'S ARMIES (1913). At the time this change was put into effect, British case law paralleled American decisions on this subject. *See, Ensign Maxwell*, 2 BUCHANAN, REPORTS OF REMARKABLE TRIALS, 3, 58 (1813); Regina v. Smith, 17 Cape Reports 561 (South Africa, 1900).

[31] While a review of the court-martial orders at the National Archives fails to reveal any prosecutions of American personnel for the killing or maltreatment of German soldiers, Private Leo Renn was tried and acquitted for killing Edmond Poldus, a Belgian

can only speculate whether this was the result of the provisions of the 1914 *Rules of Land Warfare* then in effect, or if in fact there were simply no incidents that would have justified prosecution.

When World War II began, the law of superior orders in this country was in a state of confusion as a result of the conflict between the 1914 *Rules of Land Warfare* and the rule recognized in the civilian courts.[32] The military rule was changed, however, on November 15, 1944, by a revision to the *Rules of Land Warfare*, by adding Section 345(1):

> Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to the order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.[33]

This change in the standard from recognizing obedience to orders as an absolute defense to letting it be considered a factor in determining in-

stevedore who failed to stop when Renn, while on guard duty in France, ordered Poldus to halt. The basis for the acquittal was that he had acted in "obedience to lawful orders." G.C.M.O. No. 2, August 17, 1917; Court-Martial Record No. 105620.

32 The applicable rule as enunciated in the 1914 *Rules of Land Warfare* was republished in the 1940 edition and remained unchanged. BASIC FIELD MANUAL (FM27-10) § 347 (1940). It is uncertain how many prosecutions of American soldiers for unauthorized killing of aliens arose out of World War II, but there were at least two courts-martial for the killing of enemy prisoners by American GI's, who claimed they were acting pursuant to the orders of General George S. Patton, Jr., in the "Massacre of Scoglitti" during the invasion of Sicily in 1943, discussed more fully at p. 498, *infra*.

33 Change 1, 15 November 1944, to the *Rules of Land Warfare*, ¶ 345.1. As in 1914, the British took the lead in this change and amended their Field Manual in April 1944 to provide:

> The fact that a rule of warfare has been violated in pursuance of an order of the belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it in principle confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore 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. Amendment No. 34, *British Field Manual*. 1 WAR CRIMES TRIALS, Appendix II, at 150 (1948).

dividual responsibility was the first step in a return to the standard that had existed in the military prior to the adoption of the 1914 *Rules of Land Warfare*. The conclusion seems inescapable that this change was brought about, at least in part, by the Allied attitude toward the Nazi atrocities and the anticipated prosecutions for those violations of the laws of war.

At Nuremberg, the world's attention focused on the issue of the defense of superior orders in a way that was unprecedented in history; and Nuremberg produced the most stringent standard to which American jurisprudence has ascribed since *Little v. Barreme*. While the 1944 *Rules of Land Warfare* provision permitted the fact of obedience to superior orders to be considered as a defense, the War Crimes Tribunal specifically rejected obedience to superior orders as a defense, and made a subordinate absolutely liable for his actions. The Charter of the International Military Tribunal provided in Section II, Article 8:

> 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.[34]

In light of the sheer magnitude of the atrocities reviewed at Nuremberg, it is not surprising that the Tribunal made an attempt to cut through the abstract legalisms surrounding all the defenses raised and focus on what was really at issue: under what circumstances should those who participated in the Nazi atrocities be relieved of responsibility for their actions? The Tribunal stated:

> 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.[35]

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[34] Charter of the International Tribunal, I Trials of War Criminals at XII. The provision for the military tribunals trying the Japanese war criminals was essentially the same.

Charter of the International Military Tribunal for the Far East, April 26, 1946:

> Section II, Article 6. Responsibility of the Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires. Reprinted at R. MINEAR, VICTOR'S JUSTICE, THE TOKYO WAR CRIMES TRIAL 187 (1971).

[35] United States v. Ohlendorf (the Eisensatzgrupen Case) 4 N.M.I. 470.

This test of "moral choice" led to the requirement of duress as a necessary part of the defense of superior orders.[36] However, it was clearly pointed out that if duress was pleaded, the accused must establish that he had a reasonable fear of immediate death or serious bodily harm. It was not enough for the accused to claim that the coercion inherent in an order, and in the superior-subordinate relationship, even in the military, left him without a moral choice:

> Superior means superior in capacity and power to force a certain act. It does not mean superiority only in rank. . . . The test to be used is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order.[37]

Clearly, the Nuremberg standard of obedience to superior orders is a much stricter standard than any applied by American courts since *United States v. Jones* allowed an apparently legal, though actually illegal, order to be a defense. The original American position on the defense of obedience to orders before the adoption of the Charter and Article 8 was much closer to the traditional American view. In his report to the President just prior to the Nuremberg Trials, Justice Robert H. Jackson wrote:

> There is doubtless a sphere in which the defense of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out. . . . An accused should be allowed to

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[36] Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious bodily harm in order to avoid committing a crime which he condemns. *Id.* at 480.

The plea of duress, while seemingly a natural companion to the plea of obedience to superior orders, has not been raised often in the obedience to superior orders cases. Although there is undoubtedly some coercion inherent in the mere giving of an order by a superior to a subordinate, it is necessary, to make out a defense of duress, that there be sufficient coercion to put the actor in a reasonable apprehension of immediate death or serious bodily harm. *E.g.*, United States v. Fleming, 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957), United States v. Olson, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957). Since an officer cannot summarily execute a subordinate for failure to obey an order, the mere fact of an order, without more, would not seem to meet the duress standard. Although a fact situation could certainly arise where the subordinate is put in a reasonable fear of immediate death, such as where an order is given at gunpoint, the defense of duress would be made out without reference to the giving of an order. Therefore, although the two defenses may *theoretically* overlap, in reality duress must be seen as a separate defense which requires its own special fact situation.

[37] United States v. Ohlendorf, 4 N.M.I. at 480.

> show the facts about superior orders. The tribunal can then determine whether they constitute a defense or merely extenuating circumstances, or perhaps carry no import at all.[38]

The principle of a defense to superior orders was included in the American drafts of Article 8 as a "defense per se" and not merely as a factor that would mitigate punishment. However, the Soviet Union opposed the use of the defense of obedience to orders even in mitigation, and the United States withdrew its proposal for the "per se defense" under Soviet pressure.[39]

Thus, the international law rule, as expressed by the Nuremberg standard, was quite different from and much stricter than the existing American rule.[40]

Following World War II, Congress enacted the Uniform Code of Military Justice, which became effective on May 31, 1951.[41] While none of its provisions deal with the defense of superior orders as such, the *Manual for Courts-Martial*, United States, 1951, which contains the rules of procedure and evidence in court-martial proceedings, contained a specific provision relating to the defense of orders, providing that:

> [T]he acts of a subordinate done in good faith compliance with his supposed duties or orders are justifiable. This justification does not exist, however, when those acts are manifestly beyond the scope of authority, or the order is such that a man of ordinary sense and understanding would know it to be illegal.[42]

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[38] Report of Robert H. Jackson to the President, released by the White House on June 7, 1945, Department of State, *Trials of War Criminals*, Publication 2420 (1945) at 3-4.

[39] Y. DINSTEIN *supra* note 10, at 116-17. Dinstein calls this withdrawal "remarkable."

[40] Universal application of the Nuremberg rule of absolute liability would totally ignore the interest that a state has in maintaining a military that can expect immediate obedience of at least apparently legal orders, which is essential to the efficient functioning of the military. The present American rule of manifest illegality, bottomed in the principle of lack of *mens rea*, accommodates both society's interest in controlling individual action and the interest of having an effective military, and seems to be a more reasonable, though less strict, standard.

[41] Act of May 5, 1951, Pub. L. No. 81-506, Ch. 169 § 1, 64 Stat. 108 (codified at 50 U.S.C.) §§ 551-736. It should be noted at this point that through this enactment Congress established the military judicial system providing for an intermediate tribunal for each service, designated Boards of Review, and the United States Court of Military Appeals. Decisions of these tribunals have since been published in the Court-Martial Reports.

[42] MCM, USA, 1951 ¶ 197b. Substantially similar provisions appeared in the MCM, USA, 1928 ¶ 148a and MCM, USA, 1949, ¶ 179a. When the *Manual for Courts-Martial*

The Korean War, which closely followed the adoption of the Uniform Code of Military Justice, once again gave rise to consideration of the defense of superior orders in the case of *United States v. Kinder*,[43] probably the leading reported military case on the issue of superior orders. Airman Thomas F. Kinder, while on sentry duty at an ammunition dump 300 miles south of the battle line, captured a Korean intruder. Kinder transferred custody of the Korean to Corporal Robert C. Toth, who, while taking the Korean to the guard house, pistol-whipped him, rendering him unconscious. Upon their arrival at the guard house, the matter was reported to Lieutenant George C. Schreiber, the officer in charge. Kinder came in shortly after Toth, and Lieutenant Schreiber ordered him to take the Korean out and shoot him. Kinder carried out the order while Toth waited in a jeep. Kinder was tried and convicted of premeditated murder and conspiracy to commit murder. On appeal his counsel raised in oral argument the contention that obedience to a superior order was a defense, regardless of the legality of the order. In an opinion containing a thorough consideration of the civilian authority, the Air Force Board of Review rejected Kinder's contentions, holding that obedience to superior orders is no excuse when a man of common understanding would know an order to be unlawful, and saying further:

> [O]f controlling significance in the instant case is the manifest and unmistakable illegality of the order.[44]

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was revised in 1969, the subject was covered under the general category of "Special Defenses" and provided:

> *Obedience to apparently 'lawful' orders.* An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable. MCM, 1969 (Rev.) ¶ 216d.

[43] A.C.M. 7321, 14 C.M.R. 742 (1953).

[44] *Id.* at —, 14 C.M.R. at 774. For his part in ordering the shooting, Lieutenant George C. Schreiber was convicted of premeditated murder by general court-martial. United States v. Schreiber, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955). The other participant, Robert W. Toth, was charged with murder and conspiracy to commit murder in violation of Articles 118 and 81 of the UNIFORM CODE OF MILITARY JUSTICE, 64 Stat. 140, 134, 50 U.S.C. §§ 712 and 675, after he was honorably discharged from the Air Force, Toth was arrested and returned to Korea to stand trial. The Air Force asserted court-martial jurisdiction under Article 3(a), UNIFORM CODE OF MILITARY JUSTICE, 64 Stat. 109, 50 U.S.C. § 553, which provided:

> Subject to the provisions of Article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or

Kinder brought into the stream of reported military authority both the reasoning and language from the early development of the rule in civilian courts, quoting quite liberally and with approval from *State v. Riggs* and *Commonwealth ex rel. Wadsworth v. Shortall.*

Following the Korean War, the law governing superior orders as a defense to violations of the law of war was further clarified in 1956, when the Army published Field Manual 27-10, *The Law of Land Warfare,* July 1956, which provided:

> a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.
>
> b. In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time, it must be borne in mind that members of the armed forces are bound to obey only lawful orders. Paragraph 509.[45]

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of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

Toth's sister brought habeas corpus proceedings in the District of Columbia, Toth v. Talbott, 113 F. Supp. 330, 114 F. Supp. 468 (D.C.D.C. 1953). The case was ultimately decided by the Supreme Court, which held in one of the leading decisions on the scope of military jurisdiction that Article 3(a) of the UNIFORM CODE OF MILITARY JUSTICE was unconstitutional. Toth v. Quarles, 350 U.S. 11 (1955). The military courts thus being deprived of jurisdiction, Toth was released and never stood trial for the offenses, because the federal courts were also without jurisdiction.

[45] There is an apparent difference of opinion among the commentators as to the import of the 1956 revision. Wilner, *Superior Orders as a Defense to Violation of International Criminal Law,* 26 MD. L. REV. 127, 141-42, is of the opinion that it reflects a softer position than that enunciated in 1944, by leaving "open the loophole of evading punishment for acts represented by superior officers as reprisals." He further charac-

Since *Kinder* was decided, reported military cases dealing with the superior-orders defense have arisen out of the Vietnam War. Vietnam has, based on available records, produced more prosecutions of American military personnel for killing foreign nationals than any previous conflict, and consequently has produced more cases in which the issue could be raised.[46]

The reported Vietnam decisions have reaffirmed the principle that obedience to orders that are manifestly illegal is not a defense. In *United States v. Keenan*,[47] the Court of Military Appeals approved an instruction that stated that the justification for acts done in compliance with an order did not exist if

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terizes the provision as an equivocal statement which can serve as authority for the commission of almost every type of atrocity against the military forces of a belligerent nation, as well as, in many cases, against civilians. On the other hand, T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY, is of the opinion that the principles contained in the 1956 provision are sound and must be assessed in all cases involving the defense of superior orders, regardless of the circumstances.

[46] NUMBER OF MILITARY PERSONS TRIED AND CONVICTED OF MURDER OR LESSER INCLUDED OFFENSES OF VIETNAMESE NATIONALS

	Tried	Convicted	Acquitted	Lesser Included Offenses
1965	0			
1966	7	4	1	2—Manslaughter
1967	16	10	3	2—Manslaughter 1—Negligent homicide
1968	15	3	3	4—Manslaughter 3—Negligent homicide 1—Assault 1—Willfully discharging firearm so as to endanger life
1969	18	11	6	1—Willfully discharging firearm so as to endanger life
1970	22	7	10	5—(not enumerated)
1971*	25	4	15	3—Manslaughter 2—Negligent homicide 1—Aggravated assault

Information obtained from the Office of the Clerk, United States Army Judiciary

* Includes through October 31, 1972.

[47] 18 U.S.C.M.A. 108, 39 C.M.R. 108 (1969).

> the order was of such a nature that a man of ordinary sense and understanding would know it to be illegal.[48]

In *United States v. Griffin*,[49] an Army Board of Review, in approving a finding of manifest illegality as a matter of law used this language:

> [W]e view the order as commanding an act so obviously beyond the scope of authority of the superior officer and so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding.[50]

And in *United States v. Schultz*,[51] the Court of Military Appeals, in approving the denial of any instruction on the obedience to orders defense, said the order in that case

> would have been palpably unlawful. See United States v. Kinder, 14 CMR 742, and the abundant authority contained in that case.[52]

Thus, the standard of the defense of obedience to superior orders in American military jurisprudence has been settled for the last twenty years and can be traced in civilian law to the time of the Federalists in *Jones*, and not to the Nuremberg Trials.

Applying the Standard

Despite the myriad factual situations in which superior orders have been raised as a defense, and the apparent simplicity and clarity of the rule, it has posed difficult problems in application since Chief Justice John Marshall struggled with the issue in *Little v. Barreme*. A number of writers have analyzed the standard as it exists in international law.

Dr. Yoram Dinstein, author of *The Defense of 'Obedience to Superior Orders' in International Law*, the leading work on the subject,

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[48] *Id.* at —, 39 C.M.R. at 117, n.3 (1969). The order that Keenan was given was to shoot an elderly Vietnamese. It is interesting to note that the man giving Keenan the order, Corporal Luczko, for his part in the slaying, was acquitted by reason of insanity.

[49] C.M. 416805, 39 C.M.R. 586 (1969).

[50] *Id.* at 590. Sergeant Griffen had been ordered to shoot a Vietnamese who was bound with his hands behind his back.

[51] 18 U.S.C.M.A. 133, 39 C.M.R. 133 (1969).

[52] *Id.* at 136. Corporal Schultz entered the house of a Vietnamese family, took the male of the house outside, and shot him. Schultz was at that time on a patrol to ambush Vietcong, but his assignment did not contemplate any action such as he took.

after an exhaustive analysis of the literature in the area, concludes that the proper rule should be:

> [T]he fact of obedience to orders constitutes not a defense *per se* but only a factual element that may be taken into account in conjunction with the other circumstances of the given case within the compass of a defence based on lack of *mens rea*, that is, mistake of law or fact of compulsion. Only lack of *mens rea*, of which obedience to orders constitutes circumstantial evidence, serves to protect from criminal responsibility in this case.[53]

Under Dinstein's rule, the manifest illegality of the order is an objective criterion that should be treated as a rule of evidence. This rule of evidence would facilitate the task of proving the subordinate's knowledge of the illegality of the order by creating a presumption of actual knowledge where proof of knowledge is lacking.[54]

Telford Taylor, author of *Nuremberg and Vietnam: an American Tragedy*, notes that the "lack of knowledge of an order's unlawfulness is a defense, and fear of punishment for disobedience a mitigating circumstance." Thus, Taylor's view is similar to Dinstein's in that he also recognizes that the crux of the defense is lack of *mens rea*, but Taylor does not see obedience to orders merely as an element showing lack of *mens rea*, but under certain circumstances, as a complete affirmative defense. This view is embodied in the Army's current standard as set forth in Par. 509, FM27-10, *The Law of Land Warfare*, and in Par. 197 of the *Manual of Courts Martial*.[55] Regardless of whether one views obedience to orders as an independent defense or as an evidentiary fact, there are practical problems that face the court and counsel in applying the standard in a given case. Taylor accurately observes that:

> [T]he language [of Par. 509, FM27-10] is well chosen to convey the quality of the factors, imponderable as they are, that must be assessed in a given case. As with so many good rules, the difficulty lies in its application—in weighing evidence that is likely to be ambiguous or conflicting. Was there a superior order? Especially at the lower levels, many orders are given orally. Was a particular remark or look intended as an order, and if so what was its scope? If the existence and meaning

[53] Y. DINSTEIN, DR. YORAM, THE DEFENSE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW 88.

[54] *Id.* at 29.

[55] *See supra* note 45 and accompanying text.

> of the order are reasonably clear, there may still be much doubt about the attendant circumstances—how far the obeying soldier was aware of them, and how well equipped to judge them. If the order was plainly illegal, to what degree of duress was the subordinate subjected? Especially in confused ground fighting of the type prevalent in Vietnam, evidentiary questions such as these may be extremely difficult to resolve.[56]

While it may be belaboring the obvious, the threshold question in establishing the obedience to superior orders defense is determining whether there was an order from a superior to the defendant.[57]. The defendant facing trial who intends to rely on an order from a superior in justification for his act has the burden of going forward with evidence of the order, because the plea is an affirmative defense—essentially, one of confession and avoidance. And once the prosecution has presented a *prima facie* case of the crime charged, the defendant has the burden of going forward with the evidence of his affirmative defenses.[58]

The existence of the order in the first instance is obviously a question of fact and may be proved by any competent evidence, *i.e.*, necessarily, the testimony of the defendant plus any corroborating evidence he might present. Suffice it to say that the order relied upon could be either written or oral, but, depending upon the circumstances of the case, it may raise serious problems of proof, and require the resolution of conflicting testimony and the interpretation of ambiguous language. One of the more interesting examples of this problem arose during the Second World War, and involved the disputed interpretation of statements made by General George S. Patton on June 27, 1943, in a speech to the officers and men of the 45th Infantry Division just prior to their embarkation for the invasion of Sicily in Operation Husky. The controversy arose over Patton's prepared remarks, which included these statements:

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[56] T. TAYLOR, *supra* note 20, at 51-52. For the purpose of this discussion, I will treat obedience to orders as an affirmative defense, which is the present military rule, and not under Dinstein's "*mens rea* principle." In addition, while under the military judicial system trials by courts-martial are presided over by a "military judge," and the equivalent of the civilian jury are "the members of the court-martial," I shall refer to them by the equivalent civilian terms of "judge" and "jury."

[57] In some cases there may be insufficient evidence of the existence of the order to require an instruction on the defense of obedience to orders. *See* United States v. Schultz, *supra* note 52.

[58] *See* A.C.M. 7321, Kinder, 14 C.M.R. 742.

> The fact we are operating in enemy country does not permit us to forget our American tradition of respect for private property, non-combatants, and women.
>
> . . . .
>
> Attack rapidly, ruthlessly, viciously and without rest, and kill even civilians who have the stupidity to fight us.[59]

Several days after the operation began, during which time the fighting was extremely fierce, a Captain Compton, who had lost several of his men, lined up forty-three captured Germans, some of whom were wearing civilian clothes, and had them executed by machine gun. At about the same time and in the same general location, a Sergeant West (of another company) shot and killed thirty-six Germans whom he was escorting to the prisoner-of-war cage in the rear.

When General Patton learned of these incidents, he ordered both men court-martialed on charges of pre-meditated murder. At their trials, the two men asserted as a defense the orders issued by General Patton on June 27, 1943 in his preparatory speech. According to the defense, Patton had instructed the men that:

> If the enemy resisted until we got to within 200 yards, he had forfeited his right to live.

As for ambushes, General Patton was alleged to have said:

> When you are sniped at, especially from the rear, the snipers must be destroyed.

The defense's assertions prompted a subsequent inquiry into the speech given by Patton, in which he was ultimately exonerated after producing the prepared text of the speech and delivering it orally to a board of investigating officers. Captain Compton and Sergeant West, however, were convicted as charged.

Similar problems of interpretation of general pre-operation addresses were involved in the *Calley* trial. In addition to the testimony of Lieutenant Calley and Captain Ernest Medina, approximately seventy-five witnesses testified concerning not only the orders given by Captain Medina

[59] Ladislas Farago, author of PATTON: ORDEAL AND TRIUMPH, provided the information concerning these trials, which were not recorded in any of the combat narratives of World War II. Letter from Ladislas Farago to the author, April 8, 1971.

to the Company on March 15, 1968, but also to the entire development of the plans including the briefings given at the Brigade level and by the other company commanders who were involved in the same operation but not in the assault on My Lai 4.

Assuming that the defendant has presented sufficient evidence to establish a reasonable inference of the existence of an order, the next question to be decided is whether the order relied upon by the defendant was lawful in the abstract, which must be determined by the judge purely as a matter of law, and is not within the province of the jury.[60] If the judge determines that the order relied upon was lawful, and the defendant's conduct did not exceed the scope of his authority under the order, then necessarily there would be a directed verdict in his behalf because his actions would not have constituted a crime. If, however, the order was unlawful, the next questions to be resolved are whether the defendant had actual knowledge of its illegality, or whether the superior's order was manifestly illegal, *i.e.*, one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful. Proof of the subordinate's actual knowledge of the illegality of the order is difficult to establish, and absent a judicial admission or a lawfully obtained confession, it would be a question of fact for the jury to decide. While it is unlikely that a defendant would attempt to plead superior orders as a defense while at the same time admitting knowledge of the order's illegality, in such a case the judge should decide as a matter of law that obedience to the order is not a defense.[61]

The most difficult problem, of course, is the question of the manifest illegality of the order, *i.e.*, its apparent illegality to a reasonable man under the circumstances. In the usual case, direct evidence of the defendant's actual knowledge of the illegality of the order would not be present, and it becomes necessary to examine the "manifest illegality" of the order. Although the present military standard recognizes superior orders as an independent affirmative defense and has not expressly adopted Dinstein's "*mens rea* principle," Dinstein's analysis of the manifest illegality principle as a rule of evidence and aid in proof to establish knowledge of illegality is helpful in understanding the rule. However, the question that apparently has not been thoroughly analyzed, and one

[60] *E.g.*, United States v. Carson, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965).

[61] *See* CM 417153, Figueroa, 39 C.M.R. 494 (1968), where the Board of Review rejected the accused's defense of superior orders to a larceny charge when the accused admitted knowing that his order to steal was an unlawful one.

on which judges appear to be divided is when, if ever, after having determined that an order is unlawful, should the judge decide it is "manifestly illegal" as a matter of law.

Wilner alluded to this question when he observed that the problem with the standard in international criminal law is

> the failure to create a solid and unimpeachable basis for rejecting the defense as a matter of law—and not for reasons of political or emotional expedience....[62]

The problem is illustrated by the difference in the approaches used by the judges in the *Griffen* and *Calley* cases, both of which involved prosecutions of premeditated murder for the summary executions of unarmed and unresisting captives, and conflicting evidence of the orders.

In *Griffen,* the judge instructed the jury that if the defendant received an order to kill the helpless Vietnamese prisoner, such an order would have been "manifestly illegal" as a matter of law. On appeal, the Army Board of Review sustained the judge's instruction, holding that an instruction is not required unless there is some evidence that will allow a reasonable inference that a defense is in issue. Under the facts of the case, they found

> no evidence which could provide an inference suggestive of self-defense, or that the killing was to prevent the escape of the prisoner, or for that matter, any other justification or excuse for the killing.[63]

The Board added:

> As there was no evidence which would have allowed a reasonable inference that the accused justifiably killed the prisoner pursuant to the order of a superior officer, it follows, as a matter of law, that this defense was not in issue, the law officer did not err by refusing to give an instruction on it, and that the law officer properly instructed the court that such an order would have been manifestly illegal.[64]

In *Calley*, however, the judge, while instructing the jury that an order to kill unresisting Vietnamese within his control would be illegal as a matter of law, left for the jury to decide the question of "manifest il-

[62] Wilner, *Superior Orders as a Defense to Violations of International Criminal Law,* 26 MD. L. REV. 127 (1966).

[63] *Supra* note 50, at 590.

[64] *Id.*

legality" by having them determine whether a man of ordinary sense and understanding would know the order to be illegal.[65]

While convictions resulted in both the *Calley* and *Griffen* cases and the defense was rejected despite the differences in the instructions, this nevertheless could make a significant difference in the outcome of a given case.

Although it is always difficult to analyze and fathom the reasons for a jury's verdict without actually questioning them, in another case arising out of the My Lai Massacre, where the judge left it to the jury to decide the question of manifest illegality, an acquittal did result where the evidence seemingly dictated a conviction. The case involved the prosecution of Sergeant Charles Hutto, a machine gunner, for assault with intent to commit murder. At the trial the prosecution introduced a statement made by Hutto that he had shot at a group of My Lai villagers who had been taken captive and had killed perhaps eight to ten of them. Hutto described this as "murder" in the statement, but testified at his trial that he was following Captain Medina's orders, which he believed to be lawful. If one views the evidence in a light most favorable to the accused, the evidence of Hutto's actual knowledge of the illegality of the order was conflicting; nevertheless, had the judge instructed the jury that such an order would have been "manifestly illegal" and therefore no defense, the result might well have been different.

The question of "manifest illegality" should be decided as a "matter of law" in those extreme cases involving the summary execution of an unarmed and unresisting prisoner, because the United States is committed to the protection of prisoners both morally and legally through long-standing treaty obligations.[66] Indeed, under her present treaty obligations, the United States is required to disseminate in time of peace and war this portion of the text of the conventions, affording protection

> as widely as possible . . . , and in particular, to include the study thereof in their programmes of military and if possible, civil instruction, so

[65] See the instructions to the court-martial in the *Calley* case included in the Appendix.

[66] WINTHROP, MILITARY LAW AND PRECEDENTS 788-96 (2d ed. 1921); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, T.I.A.S. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949, T.I.A.S. 3363; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, T.I.A.S. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, T.I.A.S. 3365. These treaties were ratified by the United States on February 2, 1956.

> that the principles may become known to all [its] armed forces and to the entire population.[67]

Moreover, the United States has an obligation "to search for persons alleged to have committed, or to have ordered to be committed" the willful killing, torture or inhumane treatment of persons taken captive and to bring them to trial.[68]

While it may be argued, and not without some basis, that in light of the public's reaction to the *Calley* verdict the United States has failed to fully implement its treaty obligation to educate the public and the members of the Armed Forces, it would also seem, in light of the public's awareness and concern for the treatment of our own prisoners of war by the North Vietnamese, that there should not be any question about any American citizen or soldier knowing that it is morally wrong to summarily execute helpless captives. Consequently, at this point in our history, it would seem that a judge should unquestionably and without hesitation determine the "manifest illegality" of such orders as a matter of law, and not permit them to be used as a defense, but only as a matter in mitigation.

Conclusion

Mr. Justice Robert H. Jackson observed prior to his appointment as Prosecutor for the International Military Tribunal at Nuremberg that

> the chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and the moral judgments of history.[69]

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[67] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Article 47, T.I.A.S. 3362; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Article 48, T.I.A.S. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Article 127, T.I.A.S. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 144, T.I.A.S. 3365.

[68] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Article 49, T.I.A.S. 3362; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Article 50, T.I.A.S. 3363, Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Article 127, T.I.A.S. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 146, T.I.A.S. 3365.

[69] Korematsu v. United States, 323 U.S. 214, 248 (1944) (dissenting opinion).

If one views the rejection of obedience to orders as a defense to the summary execution and inhumane treatment of persons taken captive by our forces as a restraint on our physical forces, which clearly one must, then in light of the public reaction to the *Calley* trial, one must wonder how quickly the military will emphasize the importance of compliance with this moral and legal commitment. For the sake of our own prisoners now and in possible future wars, which hopefully will not occur, one would hope that the *Calley* verdict will serve a useful purpose in educating the citizenry of this country, and will act as a deterrent to future My Lai's. But if similar cases should occur in the future involving our own troops, hopefully obedience to superior orders will be rejected as a defense as a matter of law, and once again emphasize that a soldier is not an automaton but a reasoning agent who is under a duty to make appropriate moral judgments.

APPENDIX

We next come to the area of acts done in accordance with the order of a superior. If, under my previous instructions, you find that people died at My Lai (4) on 16 March 1968, as charged—which would include a finding that Lt. Calley caused their deaths—you must then consider whether Lt. Calley's actions causing death were done pursuant to orders received by him. There is considerable evidence in the record on this point.

Captain Medina, you will recall, testified that he told his assembled officers and men the C Company had been selected to conduct a combat assault on My Lai (4), which intelligence indicated was the current location of the 48th VC Battalion; that they would probably be outnumbered two to one; that they could expect heavy resistance; that they would finally get an opportunity to engage and destroy the battalion which they had been chasing unsuccessfully, and which was responsible for all the mines, booby-traps and sniper fire they had received. He recalled telling his personnel that "innocent civilians or non-combatants" would be out of the village at market by the time of the assault; and that they had permission to, and were ordered to destroy the village of My Lai (4) by burning the houtches, killing the livestock, destroying the food crops, and closing the wells. He testified that he recalled being asked whether women and children could be killed, and that in response to that question he instructed his troops to use common sense, and that

engagement of women and children was permissible if women or children engaged or tried to harm the American troops. He denied saying that everything in the village was to be killed.

Lt. Calley testified that he attended the company briefing and that Captain Medina instructed the company to unite, fight together, and become extremely aggressive; that the people in the area in which they had been operating were the enemy and had to be treated like enemy; that My Lai (4) was to be neutralized completely; that the area had been prepped by "psy war" methods; that all civilians had left the area and that anyone found there would be considered to be enemy; that everything in the village was to be destroyed during a high speed combat assault; and that no one was to be allowed to get in behind the advancing troops. Subsequent villages, through which they would be maneuvering enroute to the primary assault on the 48th VC Battalion at Pinkville or My Lai (1), were to be treated in the same manner. He testified that at a platoon leaders' briefing after the company briefing, Captain Medina reemphasized that under no circumstances would they allow anyone to get behind them, and that nothing was to be left standing in these villages. Lt. Calley also testified that while he was in the village of My Lai (4), on the eastern side, he twice received orders from Captain Medina: first to "hurry and get rid of the people and get into position that [he] was supposed to be in;" and thereafter, to stop searching the bunkers, to "waste the people," and to move his troops out onto the defensive perimeter as Captain Medina had ordered. Captain Medina denied giving any such orders.

A number of other witnesses have also testified about the terms used by Captain Medina in issuing the assault order to his platoon leaders and troops on 15 March; about their actions done in response to these orders; about radio transmissions remembered—and not remembered—occurring during the operation; and about other matters that may have a bearing on what orders, if any, were issued Lt. Calley. I have not summarized all this evidence, but you should consider it all. As I have previously stated, it is your recollection of the evidence, not mine, that governs. On the basis of all the evidence you have heard, you should determine what order, if any, Lt. Calley acted under when he caused the deaths of any or all of the alleged victims, if he did cause their deaths. As I previously stated, you do not reach the question of orders unless you have found one or more of the charged victims dead

—or in the case of specification 2 of the Additional Charge, have found the charged victim to be dead or to have been assaulted—*and*, under my previous instructions, have found the deaths to have been caused or assault to have been committed in that one case, by Lt. Calley. As I also previously instructed you, for the death of an individual to be termed murder or manslaughter under our law, the killing must have been done without justification or excuse. To convict Lt. Calley, you must also reach that conclusion. Thus you must consider the legality or illegality of any acts done by Lt. Calley resulting in the death of charged victims, and the legality or illegality of any order which you find him to have been acting pursuant to and in accordance with, during your deliberations on guilt or innocence. I will again give you the law. You must apply it to the facts.

The conduct of warfare is not wholly unregulated by law. Nations have agreed to treaties limiting warfare; and customary practices governing warfare have, over a period of time, become recognized by law as binding on the conduct of warfare. Some of these deal with the propriety of killing during war. The killing of resisting or fleeing enemy forces is generally recognized as a justifiable act of war, and you may consider any such killing justifiable in this case. The law attempts to protect those persons not actually engaging in warfare, however; and limits the circumstances under which their lives may be taken.

Both combatants captured by and noncombatants detained by the opposing force, regardless of their loyalties, political views or prior acts, have the right to be treated as prisoners until released, confined, or executed, in accordance with law and established procedures, by competent authority sitting in judgment of such detained or captured individuals. Summary execution of detainees or prisoners is forbidden by law. Further, it is clear under the evidence presented in this case, that hostile acts or support of the enemy North Vietnamese or Viet Cong forces by inhabitants of My Lai (4) at some time prior to 16 March 1968, would not justify the summary execution of all or a part of the occupants of My Lai (4) on 16 March, nor would hostile acts committed that day, if, following the hostility, the belligerents surrendered or were captured by our forces. I therefore instruct you, as a matter of law, that if unresisting human beings were killed at My Lai (4) while within the effective custody and control of our military forces, their

deaths cannot be considered justified, and any order to kill such people would be, as a matter of law, an illegal order. Thus if you find that Lt. Calley reecived an order directing him to kill unresisting Vietnamese within his control or within the control of his troops, that order would be an illegal order.

The question does not rest there, 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. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, 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. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.

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.

To reach this issue of "superior orders" during your deliberations, you must first have concluded, as I have outlined above, that one or more of the charged victims died, or that the alleged victim in Specification 2 of the Additional Charge was assaulted, as a result of the accused's actions. You must next determine whether the actions which you have found Lt. Calley to have committed, if any, were done in accordance with and pursuant to the orders which he testifies that he received from Captain Medina.

The record contains substantial evidence bearing on the question of the order given. You have heard the testimony of Lt. Calley, Captain Medina, and others as to the orders that Lt. Calley was given. I have recounted part of this previously. There is also circumstantial evidence that you may find relevant. For example a number of witnesses have testified that there were bodies scattered throughout the village, from west to east. Other witnesses testified that when they discovered that there was light or no resistance, they ceased firing and began to gather and move the occupants of the village as on previous search and clear

operations. There is evidence that this was labeled a search and destroy operation. There is evidence also that artillery was to be placed close to or on the villege. Other witnesses have testified about the actions of the gunships, and of the members of all three platoons and the headquarters element. Various radio-telephone conversations on the day of the assault have been recounted, and you have heard testimony from all of Captain Medina's RTO's and from Mr. Sledge, who was one of Lt. Calley's RTO's. Lt. Calley's other RTO, whom Lt. Calley has testified was carrying the company-push radio, was later killed in combat. You have also heard Lt. Calley's testimony that Captain Medina's two radio calls, on which he testified he acted, were transmitted to him while he was on the eastern side of the village, and that he was never south of the village at the area that has been referred to here as the intersection of the North-South and East-West trails.

As I have mentioned a number of times, I am only calling your attention to some of the evidence to give you an indication of the variety of matters you might consider in resolving these questions. The evidence, as we are all aware, is voluminous; and you must decide what portions of it are relevant and credible to determine the issues presented to you. In determining what order, if any, Lt. Calley acted under, if you find him to have acted, you should consider all the matters which he has testified reached him and which you can infer from other evidence that he saw and heard. Then, unless you find beyond a reasonable doubt that he was not acting under orders directing him in substance and effect to kill unresisting occupants of My Lai (4), you must determine whether Lt. Calley actually knew those orders to be unlawful.

Knowledge on the part of any accused, like any other fact in issue, may be proved by circumstantial evidence, that is, by evidence of facts from which it may justifiably be inferred that Lt. Calley had knowledge of the unlawfulness of the order which he has testified he followed. In determining whether or not Lt. Calley had knowledge of the unlawfulness of any order found by you to have been given, you may consider all relevant facts and circumstances, including Lt. Calley's rank; educational background; OCS schooling; other training while in the Army, including Basic Training, and his training in Hawaii and Vietnam; his experience on prior operations involving contact with hostile and friendly Vietnamese; his age; and any other evidence tending to prove or disprove that on 16 March 1968, Lt. Calley knew the order was

unlawful. If you find beyond reasonable doubt, on the basis of all the evidence, that Lt. Calley actually knew the order under which he asserts he operated was unlawful, the fact that the order was given operates as no defense.

Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, a man of ordinary sense and understanding would have known the order was unlawful. Your deliberations on the question do not focus solely on Lt. Calley and the manner in which he perceived the legality of the order found to have been given him. The standard is that of a man of ordinary sense and understanding under the circumstances.

Think back to the events of 15 and 16 March 1968. Consider all the information which you find to have been given Lt. Calley at the company briefing, at the platoon leaders' briefing, and during his conversation with Captain Medina before lift-off. Consider the gunship "prep" and any artillery he may have observed. Consider all the evidence which you find indicated what he could have heard and observed as he entered and made his way through the village to the point where you find him to have first acted causing the deaths of occupants, if you find him to have so acted. Consider the situation which you find facing him at that point. Then determine, in light of all the surrounding circumstances, whether the order, which to reach this point you will have found him to be operating in accordance with, is one which a man of ordinary sense and understanding would know to be unlawful. Apply this to each charged act which you have found Lt. Calley to have committed. Unless you are satisfied from the evidence, beyond reasonable doubt, that a man of ordinary sense and understanding would have known the order to be unlawful, you must acquit Lt. Calley for committing acts done in accordance with the order.

UNIVERSITY OF RICHMOND

LAW REVIEW

VOLUME 7 SPRING 1973 NUMBER 3