Superior orders and the International Criminal Court: Justice delivered or justice denied

by
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On 17 July 1998, the Statute of the International Criminal Court was adopted in Rome. Nestled in Part 3, "General Principles of Criminal Law", was Article 33, entitled "Superior orders and prescription of law". Article 33 reads:

"1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

It has been argued by some that this is a dangerous withdrawal from the standards contained in the Charter of the International Military

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Tribunal at Nuremberg and followed in the Statutes of the ad hoc Tribunals for former Yugoslavia and Rwanda.[1] The following commentary will argue that, far from being a withdrawal, this article in fact reflects both the traditional understanding of the law and is entirely consistent with the intentions of the drafters of the Nuremberg Charter.[2]

Before Nuremberg

The issue of whether superior orders should provide any form of defence under international law has been controversial since the trial of Peter von Hagenbach in the fifteenth century.[3] It reflects the conflict between the requirements of military discipline that orders be obeyed and the requirements of justice that crimes should not go unpunished. Oppenheim, in the first edition of his standard work on international law published in 1906, stated: "In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy."[4]

The matter arose in the Leipzig Trials after the First World War. In the Llandovery Castle Case, the Supreme Court of Leipzig, in considering a similar provision in the German Military Penal Code, stated:

> "However, the subordinate obeying 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... 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 an order is universally known to everybody, including the accused, to be without any doubt whatever against the law."[5]

1 Paola Gaeta, "The defence of superior orders: The Statute of the International Criminal Court *versus* customary international law", *European Journal of International Law*, Vol. 10, 1999, pp. 172 ff.

2 Howard S. Levie, "The rise and fall of an internationally codified denial of the defense of superior orders", *Revue internationale de droit militaire et de droit de la guerre*, Vol. 31, 1991, pp. 183 ff.

3 For a fuller account of the trial see Edoardo Greppi, "The evolution of individual criminal responsibility under international law", *IRRC*, No. 835, September 1999, pp. 533 ff.

4 L. Oppenheim, *International Law: A Treatise*, Vol. 2, 1906, p. 264,

5 The Llandovery Castle Case, *Annual Digest 1923-1924*, Case No. 235, Full Report, 1921 (CMD. 1450), p. 45.

Despite this move away from the firm position adopted by Oppenheim in 1906, Oppenheim's treatise itself was not amended until 1940, by which time the Second World War was under way.[6] As early as 1941, consideration was already being given to trials at the conclusion of hostilities. When those trials came to fruition at Nuremberg, Article 8 of the Charter of the International Military Tribunal stated:

> "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."

The wheel had turned full circle since Oppenheim had written in 1906.

Yet an examination of the negotiating history of the Charter reveals a slightly different picture. In 1941, a committee had been established to draft rules of procedure for future war crimes trials. A subcommittee was formed to look at the issue of superior orders. They reported that:

> "Generally speaking, the codes of law of the respective countries recognise the plea of superior orders to be valid if the order is given by a superior to an inferior officer, within the course of his duty and within his normal competence, provided the order is not blatantly illegal. The conclusion reached was that each case must be considered on its own merits, but that the plea is not an automatic defence."[7]

A similar line was adopted by the Legal Committee of the United Nations Commission for the Investigation of War Crimes, established in 1943. However, this did not meet with unanimous support and by 1945, the Commission had to accept that it "does not consider that it can usefully propound any principle or rule." It did nonetheless state "that the mere fact of having acted in obedience to the orders of a superior does not of itself relieve a person who has committed a war crime from responsibility."[8]

6 L. Oppenheim, *International Law: A Treatise*, Vol. 2, 6th ed., 1940, pp. 453-455.

7 *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948, cited in Levie, *op. cit.* (note 2)

8 *Ibid.*

The United States draft which was included in the working paper for the London Conference read:

> "In any trial before an International Military Tribunal the fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute a defense *per se*, but may be considered either in defense or in mitigation of punishment if the tribunal determines that justice so requires."[9]

However, it should be noted that this proposal was designed for a tribunal that was being established specifically to try major German war criminals. This point was made in the discussions on superior orders at the London Conference when General Nikitchenko, representing the Soviet Union, asked: "Would it be proper really in speaking of major criminals to speak of them as carrying out some order of a superior? This not a question of principle really, but I wonder if that is necessary when speaking of major criminals."[10]

The discussion ended with agreement that superior orders should not form "an absolute defence" but that the Court should be able to consider it in mitigation. Article 8 was approved with all mention of superior orders as a defence, absolute or otherwise, deleted. A similar provision was subsequently inserted in Allied Control Council Law No. 10 providing for the trials in Germany of lesser war criminals.

Nuremberg and after

At Nuremberg itself, the crimes alleged were of such a magnitude that the absolute nature of the denial of the superior orders defence made little or no difference. However, subsequent tribunals had greater difficulty. They sought to resolve the matter by treating it as an issue of intent. For example, in the Hostage Case (*United States* v. *Wilhelm List* et al.), the tribunal held:

> "We are of the view ... that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected.

9 Report of Robert H. Jackson, United Nations Representative to the International Conference on Military Trials, 1949, pp. 22 and 24, cited in Levie, *op. cit.* (note 2).

10 *Ibid.*, pp. 367/8.

> But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice."[11]

In the Einsatzgruppen Case (*United States* v. *Otto Ohlendorf* et al.),[12] superior orders were considered as a form of duress. In the High Command Case (*United States* v. *Wilhelm von Leeb* et al.), dealing with the passing on of orders from higher commands, the Tribunal stated:

> "Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law."[13]

Since 1945, the international community has struggled to find a way of reconciling the strict Nuremberg standard with the realities of military life as reflected in the various Tribunal judgements. Different solutions have been examined. The International Law Commission, in seeking to encapsulate the principles of international law flowing from the Nuremberg Tribunal, suggested the test of whether "a moral choice was in fact possible."[14] This proved unacceptable. The International Committee of the Red Cross put forward a draft text to the 1949 Diplomatic Conference which produced the Geneva Conventions, but it was rejected with the comment: "The Diplomatic Conference is not here to work out international penal law. Bodies far more competent than we are have tried to do it for years."[15]

A similar fate befell a provision put before the Diplomatic Conference which produced the 1977 Protocols. The final draft text had an Article 77 which read:

> "The mere fact of having acted pursuant to an order of an authority or a superior does not absolve an accused person from penal respon-

11 *Trials of War Criminals*, Vol. XI, p. 1236.

12 *Ibid.*, Vol. IV, p. 411.

13 *Ibid.*, Vol. IX, p. 511.

14 See "Formulation of the Nuremberg Principles", *International Law Commission Yearbook 1950*, p. 374.

15 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. IIB, p. 115.

sibility, if it be established that in the circumstances at the time he knew or should have known that he was committing a grave breach of the Conventions or of this Protocol. It may, however, be taken into account in mitigation of punishment."[16]

Although the text attracted a majority, it did not reach the two-thirds required for inclusion in Additional Protocol I and thus failed.[17]

Academic opinion divided into two main schools. The first rejected any suggestion of superior orders as a defence and the second allowed the defence if the orders were not manifestly illegal.[18] The poisoned chalice of resolving this issue thus passed to the Diplomatic Conference on the Establishment of an International Criminal Court.

Statute of the International Criminal Court

Over fifty years had elapsed since the London Conference had drafted the Nuremberg Charter. The Rome Conference could not seek to duck the issue as in 1949 nor, as a result of the structure of the Statute, could they seek to restrict any provision to grave breaches. Furthermore, they were not looking back to crimes already committed but forward to conflicts not yet envisaged.

Many at the Conference wanted to retain the Nuremberg standard.[19] They cited the Statutes of the two ad hoc Tribunals for former Yugoslavia and Rwanda and argued that the sort of crimes that would be dealt with by the ICC would be such that any question of superior orders would be irrelevant. Others were more cautious.[20] The structure of the Conference meant that the general principles were being drafted at the same time as the crimes themselves were being elaborated. It was not clear whether the Court would be restricted to crimes "committed as part of a plan or policy or as part of a large-scale commission of such crimes" or whether individual crimes would be within the jurisdiction of the Court. The tension was in some ways similar to that to be found between the

16 *Official Record of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol. III, p. 331

17 *Ibid.*, Vol. VI., p. 308.

18 See A.P.V. Rogers, *Law on the Battlefield*, Manchester University Press, 1996, pp. 144/5.

19 Gaeta, *loc. cit.* (note 1), p. 188.

20 See the original proposal of the United States, A/CONF.183/C.1/WGCP/L.2, 16 June 1998.

jurisprudence of the Nuremberg Tribunal itself and that of the Tribunals established under Allied Control Council Law No. 10.

The decision that was taken to adopt Article 33 represented, in the view of most, a sensible and practical solution which could be applied in all cases. In particular, it was limited to war crimes, as it was recognized that conduct that amounted to genocide or crimes against humanity would be so manifestly illegal that the defence should be denied altogether in consistency with the Nuremberg standard. It would, of course, not prevent superior orders being raised as part of another defence such as duress.

Since the conclusion of the Rome Conference, it is possible to examine Article 33 against the list of crimes and also against the other provisions in the Statute dealing with the mental element (Article 30) and mistakes of fact and law (Article 32). It contains a high standard. The three requirements in Article 33, paragraph 1, are cumulative not disjunctive. For a start, the accused must be under a legal obligation to obey orders — a moral duty is not enough. Superior orders mean just that — orders. Thus the government official who carries out instructions which amount to war crimes is not protected unless he is subject to some legal compulsion. The fact that he might lose his job if he refused is, it is suggested, not sufficient.

Even if this first hurdle is overcome, the defence is made out only if the accused did not know that the order was unlawful AND the order was not manifestly unlawful. There is an uncertainty here in where the burden of proof lies. Article 67, paragraph 1(i), provides that the accused is entitled "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal." Although it would seem therefore that only an evidentiary burden can be placed on the accused, Article 67 begins with the words "having regard to the provisions of this Statute"; it could consequently be argued that in this case there is a greater burden placed upon the accused than merely evidentiary. This may become clearer when the Rules of Procedure have been drafted.

A study of the list of crimes contained in Article 8 reveals that this defence, if it is such, will be extremely limited in scope. The majority of crimes are so manifestly illegal that the issue would never arise. However, this may not necessarily be the case for all crimes and for all ranks. An example may suffice: Article 8, paragraph 2(b)(xix), provides that it is an offence to employ "bullets which expand or flatten easily in the

human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions." Few private soldiers are expert in the wounding effects of different types of ammunition and few could probably identify bullets to which this prohibition would apply. At present, it is unclear what mental element is required for this offence. Article 30 states that "unless otherwise provided", both intent and knowledge are required. Intent is defined as where:

> "(a) in relation to conduct, that person means to engage in the conduct;
>
> (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."

Similarly, knowledge is defined as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events." If this provision requires particular knowledge of the propensity of the bullet in question, then it sets a particularly high standard and attempts may be made to provide otherwise in the "Elements of Crimes" drafted in accordance with Article 9 of the Statute.[21] What that might lead to remains to be seen, but it would seem that the gravamen of this offence, taken of course from the 1899 Hague Declaration concerning Expanding Bullets, is in the issuing of such bullets rather than in the activities of the individual soldier who acts in good faith with ammunition issued to him. It may come down to an issue of intent, but to impose a strict liability test would seem to be somewhat harsh.

At the end of the day, the combination of the intent provisions of Article 30 and the "Elements of Crimes" may resolve these issues and render the provisions of Article 33 redundant. However, that is not yet clear and it is suggested that the text laid down in that article provides a satisfactory balance between the interests of justice and the obligations of a soldier. It does not provide, in itself, an escape to impunity but may, in those rare cases when it is likely to be invoked, provide justice to a soldier who finds himself carrying the responsibility for decisions made in good faith on the basis of orders given by others who had information, denied to the accused himself, which rendered the order illegal.

21 This text is still under discussion in the Preparatory Commission.

Conclusion

Justice is a two-way street. Soldiers are often as much victims of the decisions of their superiors as civilians. In the circumstances of Nuremberg, it was right to exclude any reference to superior orders as a defence. However, as General Nikitchenko realized, that was a decision based on specific circumstances. It is therefore argued that to do so in the International Criminal Court could itself lead to injustice in particular cases, an odd result for a Court whose Statute's Preamble includes the phrase: "Resolved to guarantee lasting respect for the enforcement of international justice".

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Résumé

Ordres supérieurs et Cour pénale internationale : justice rendue ou déni de justice

par CHARLES GARRAWAY

Sous le titre « Ordre hiérarchique et ordre de la loi », l'article 33 du Statut de la Cour pénale internationale règle la réponse à donner à celui qui, ayant commis un crime de guerre, invoque un ordre de son supérieur comme défense :

« 1. Le fait qu'un crime relevant de la compétence de la Cour a été commis sur ordre d'un gouvernement ou d'un supérieur, militaire ou civil, n'exonère pas la personne qui l'a commis de sa responsabilité pénale, à moins que :

a) Cette personne n'ait eu l'obligation légale d'obéir aux ordres du gouvernement ou du supérieur en question ;

b) Cette personne n'ait pas su que l'ordre était illégal ; et

c) L'ordre n'ait pas été manifestement illégal. »

2. Aux fins du présent article, l'ordre de commettre un génocide ou un crime contre l'humanité est manifestement illégal. »

L'auteur fait la démonstration que la solution du Statut de Rome est tout à fait compatible avec le droit international en vigueur et, notamment, avec la jurisprudence établie par le Tribunal de Nuremberg. Après avoir examiné le développement de la notion à travers l'histoire, l'article étudie de plus près les débats qui ont abouti à l'adoption de l'article 33 du Statut tel qu'il se présente aujourd'hui. De l'avis de l'auteur, cette solution est suffisamment restrictive pour permettre au juge de trancher d'une manière qui sera perçue comme juste et équitable.