

Alternatives to Obeying Superior Orders; A Question for the International Criminal Court

by Rajeev Purohit*

The formation of a permanent International Criminal Court (ICC) before the turn of the century is very likely (see *The Brief*, Winter 1997). A considerable amount of work has been, and continues to be undertaken, by many different bodies to ensure the establishment of the ICC. Governments, International Organizations, and Non-Governmental Organizations (NGOs) have worked together to develop the law that will govern a permanent ICC.

The Proposed Provision

The signatory states to the International Criminal Court Statute shall enact provisions in their domestic legislation to ensure:

- 1) that an individual, whether a civilian or a member of the armed forces, has a suitable forum in which to obtain an opinion concerning the legality of orders he has received from a member of the armed forces,
- 2) that such a forum is readily available, is independent from the armed forces, has sufficient legal competence and authority to carry out its tasks,
- 3) that a suitable review process exists,
- 4) that, in accordance with the spirit of this provision, the individual has all additional safeguards necessary to ensure that he is not forced, or coerced, to commit an act that he believes to be illegal.

This article will examine the "Superior Orders Defense," one key aspect of the proposed legislation. Jurisprudence in this area would benefit from the development of additional subordinate protection. This article seeks to show how the addition of a provision to an ICC statute on the impermissibility of "Superior Orders Defense," is required.

Military law is based on a hierarchical system which requires obedience by subordinates to the orders of a superior. This approach, from the perspective of preventing violations of law, is predicated on the assumption that the superior can be deterred from wrongful

conduct by the imposition of criminal responsibility for unlawful commands. The logic of such an approach, however, does not always work in practice.

Crimes against Humanity, for example, are crimes usually requiring the participation of the organs of the state, thereby exonerating subordinates who carry out orders, which in turn, reduce the deterrent factor. The goal of

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Humanitarian law is to prevent certain forms of harm to protected classes. Accomplishment of this goal requires a broad base of responsibility.

Legal developments after the Second World War made clear that holding only superiors responsible would not create a sufficient deterrent effect. The Nuremberg Charter, in Article 8, articulated this position. "The fact that the defendant acted pursuant to an 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."

Although the defense of superior orders is impermissible, it must also be recognized that the individual subordinate needs greater protection. Whether the impermissibility of the superior orders defense will be addressed in the main text of the statute of the ICC, or in the rules of procedure is unclear. NGOs involved in the process of developing the statute of the ICC recognize that it will be included in some form.

The following scenario illustrates what may occur if the ICC is formed without

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Military students salute their commanding officer.

any alternative to obeying superior orders.

Scenario

An internal armed conflict occurs. A private in the army of the group claiming to be the legitimate government of the State is ordered to commit certain legally questionable acts. The private believes that if he commits these acts he will have breached international law. The private realizes that there is a risk that he will be indicted by the ICC for his conduct. Furthermore, he is aware that if he commits such violative acts, the order of a superior is irrelevant. Under the ICC statute, which embodies customary international law, the defense of superior orders is impermissible. The private will be held individually responsible for the acts he commits, when they violate international law.

The private does not have a forum within his country in which questions regarding the legitimacy of superior orders can be heard. The domestic legislation of the country regulates military conduct by the "due obedience code," which does not have provisions, such as those found in the U.S. government Field Manual on the Law of Land Warfare. The private then has the choice of obeying the orders of the

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superior, breaking international law, in the process making himself individually liable for his actions; or he may disobey the orders of his superior, and thus possibly be prosecuted for breach of the domestic law of his country.

Scenario Analysis

A scenario such as the one described above is certain to occur, unless a provision similar to the one provided in this article is added to the current proposed statute of the ICC. It is equitable to say that if individuals are to be held to a standard which does not allow them to claim the superior orders defense, domestic provisions must exist to address the concerns of the individual. The forum created must legitimately allow for questions regarding whether a proposed course of action would breach international law. This domestic

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The necessity of such a provision is not based solely on the question of fairness. One of the functions of the ICC would be to act as a deterrent. For the ICC to be an effective deterrent, it must make individuals fear punishment to a degree that will prevent illegal action. In the situation described above, the individual is faced with certain prosecution at the domestic level and probable prosecution at the international level. It

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is possible that the individual will consider following the order of a superior as the 'safer' option from a personal perspective. If there is an alternative available, such as the one suggested above,

the individual can follow his initial belief and avoid acting on the orders that would cause him to breach international law.

The issue of sovereign decision making, *vis-à-vis* the armed forces of a nation, will be raised as a barrier to such a proposal. However, many countries already have provisions in their domestic law addressing these issues. One such example is the U.S. law governing a soldier's right to refuse to obey an illegal order. The law in the United States is a unilateral attempt to address this vital issue. It has been recognized in the United States, especially in light of the facts surrounding *United States v. Calley*, that the subordinate must have the right to question orders. In *Calley*, a group of soldiers refused to follow Calley's orders in the massacre of villagers in the My Lai incident during the Vietnam War. Soldiers have a duty to question illegal orders and to refuse to obey them. The U.S. law in this area is an excellent example of a country beginning to address the need for protection for subordinates.

There is, admittedly, no guarantee that such a provision will ensure a state's compliance with the requirements outlined in an ICC treaty. There is the possibility, however, that the real-

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ization that the state is a signatory party will influence governmental policy and facilitate domestic legislation. Domestic legislation provides a needed counter-weight to the superior orders defense. A provision, such as the one under discussion, will allow individuals to avoid committing illegal acts while further solidifying the premise that a superior order does not legitimize illegal acts. ☉

* Rajeev Purohit graduated from the Washington College of Law, with an LL.M. in International Legal Studies in May 1997. He completed his LL.B. at the University of Sussex in 1995. He is presently working for the National Interreligious Service Board for Conscientious Objection (NISBCO) as the Director of Legal Services.

The program sought to impress upon the participants that these rights are an international obligation. The participants also tried to formulate solutions to the most common stumbling blocks to judicial access and judicial remedy, namely a lack of resources and inefficiency.

Wednesday: The trainees were involved in examining due process rights such as the right to a lawyer, the right to present a defense, the right to cross-examination, the right to appeal, the right to liberty, and prisoners' rights. They examined international legal texts and engaged in more role-playing exercises.

Thursday: This session focused on economic, social, and cultural rights. For instance, the participants explored issues concerning women's rights and environmental rights. Human rights experts from the Americas presented the importance of these topics to the training members. An IDB panel also discussed the role of financial institutions in judicial reform. Also on Thursday, a panel of federal judges from North America and supreme court judges from Latin America discussed the independence of the judiciary.

Friday: This session focused almost exclusively on freedom of the press and freedom of information (which includes freedom of expression, assembly, religion, and the right to conscientious objection). Many Central and Latin American countries have been gradually adopting a standard of *real malicia* or "reckless disregard" to be proven in civil or criminal cases brought by public officials against journalists. Such a standard protects journalists because it requires more than a mere showing of negligence on the part of the journalist when publishing articles about public officials. The Inter-American Court and Commission have relied on this standard in their decisions and writings. The importance of *real malicia* will be impressed upon the participants, particularly on those from new democracies. The press has an important role to play because it sometimes acts in the place of the judiciary in exposing corruption. Freedom of press and information, moreover, have the highest stature of all international human rights provisions in the American Convention.

One exciting aspect of the project is the creation of a network that will provide judges with access to materials on international and fundamental human rights. The network, through the use of e-mail and the Internet, will enable judges to exchange judicial decisions. Most importantly, if the project is ultimately a success, it can easily be replicated in other parts of the world. ☉