The Defence of Superior Orders in the International Criminal Court

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Introduction

At its forty-sixth session, the International Law Commission drafted a Statute creating an International Criminal Court. In article 20 of the Statute, the Commission articulated the crimes falling under the Court’s jurisdiction, including genocide, aggression, violations of the laws and customs of armed conflict, crimes against humanity, and crimes under specified treaties currently in force. However, the Commission chose not to delineate any defences which may be invoked against these crimes. Specifically, the Statute does not address the validity or extent of the defence of superior orders with respect to these crimes. As a result, under article 33, the Court must consider applicable treaties, principles and rules of general international law, and rules of national law in evaluating the efficacy of this defence. Because none of the applicable treaties address this defence, the Court must resort to “the whole corpus of criminal law, whether found in national forums or in international practice,” as well as to national law not in conflict with international law.

This paper will examine the extent to which the International Criminal Court should recognize the defence of superior orders. Thus, for purposes of clarification, Part I defines the defence of superior orders in a general manner. Then, Part II explores the extent to which the defence is recognized in the rules and principles of general international law. Under customary international law, there has been no consensus on the extent to which the defence of superior orders should be recognized. In some contexts, the defence incorporates only the principle of moral choice and is limited to use in mitigation of punishment. In other international situations, superior orders includes the principle of manifest illegality, as well as that of moral choice, and serves as a complete defence to the crime at issue.

Due to a lack of universality under this system, Part III examines the defence under the rules of national law, primarily that of the United States. The treatment of the defence of superior orders by national systems has changed somewhat over time, but some consistency has developed in recent
years. Under American military law, superior orders includes a “mistake of law” aspect and is recognized as a complete defence.

Finally, Part IV compares both of these systems and suggests the proper approach for the International Criminal Court. Because this defence is such an important aspect of military law, the Court should accept superior orders as a complete defence. However, the Court should limit this defence based on the widely accepted principle of moral choice. Additionally, the defence should be limited by recognizing the principle of manifest illegality. Nonetheless, because of the serious nature of the crimes over which the Court has jurisdiction, both restrictions should be strictly interpreted.

I. Superior Orders as a Defence to International Crimes

The defence of superior orders has long been a part of the law of war. Because this defence has no universal application, this section will describe the different aspects of the defence in general terms. The superior orders defence requires a direct order from a superior to commit the crime in question, and it is characterized by two significant requirements, each of which is only variably applied and articulated.

First, the defendant must have no knowledge, either express or implied, of the order’s illegality. Even though every military system demands that inferior military personnel obey the orders of superior officers, this practice developed such that those orders which are illegal may be disobeyed. Thus, in order to claim the defence, the subordinate must have a good faith, reasonable belief that the superior’s order did not violate the law. This aspect of the defence resembles the defences of mistake of fact and mistake of law: either the subordinate was unaware of the factual circumstances causing the order to be illegal, or the subordinate was unaware of the international law which was being violated. Whereas “it is generally accepted that ignorance of the law is no defence” in non-military contexts, a military subordinate has a legal obligation to obey superior orders under penalty of military law and should presume that an order is lawful. “The law of armed conflict recognizes the reality of field situations and that . . . the recipient of an order is unlikely to know the minutiae of the law and may be under a great deal of pressure when the order is given.” Additionally, subordinates are not often in a position to evaluate the lawfulness of a command due to the existence of antecedent facts unknown and unknowable to the subordinate.

As a result, the concept of superior orders as a defence has been recognized if the subordinate had no actual knowledge of the order’s illegality and if the order was not manifestly illegal. A manifestly illegal order is one