

## AGORA

### SUPERIOR ORDERS VS. COMMAND RESPONSIBILITY

If we examine the well-known doctrines under the laws of war of "command responsibility" and "superior orders is no defense," we find that their combination leads to an unexpected conceptual paradox. Suppose that *A*, a military commander, issues an order to his subordinate *B* that is clearly illegal under the laws of war. (For example, the order may be to execute prisoners of war, or to kill civilians in the absence of military necessity.) If *B* carries out the order, *B* is criminally liable under the Nuremberg precedents and humanitarian law as the perpetrator of a criminal act. Should *B* attempt to defend his action on the ground that he was following orders, the tribunal will respond that the order was illegal and hence should not have been obeyed. Now suppose, however, that *A* is accused of issuing the order that was in fact obeyed and that in fact resulted in the commission of the war crime by *B*. Under the applicable precedents regarding command responsibility, *A* would be held criminally liable. But herein lies the paradox: *A* can contend that the order was concededly illegal, that it should not have been carried out and that the situation is thus equivalent to there having been no order at all. Indeed, *A* argues, if *B* was denied the defense of superior orders because *A*'s order was illegal, then the responsibility for the criminal act was entirely *B*'s. No additional responsibility should be attributed to *A*.

In brief, the conceptual paradox lies in finding both *A* and *B* responsible for the war crime. If *B* is wholly responsible as the perpetrator of the crime, then how could *A* be held responsible for issuing an order that legally was required to be ignored by *B*? *A*'s contention seems compelling on logical grounds. Yet we know that, under the law, both *A* and *B* will be held responsible. Our task, therefore, is to analyze more closely the related concepts of command responsibility and superior orders to see if it is possible to account for the legal results without doing violence to language or engaging in conceptual confusion.

#### I. THE SPLIT-RESPONSIBILITY SOLUTION

One possible approach to the paradox would be to take the conventional view of superior orders as a plea of mitigation of punishment. Under this view, *B* has not been held 100 percent liable for the war crime; the fact that he was ordered to commit the crime is allowed in mitigation of his responsibility, though not in exoneration of it. It would then appear to follow logically that the portion of the responsibility for the crime that is not attributed to *B* must be attributed to someone else, namely *A*. Hence, if there is *some* responsibility attributable to *A*, *A* should not be exonerated.

A minor objection to this solution is to argue that, under the applicable precedents, *A* is typically convicted for the entire crime and not just for a

portion of it. To put the matter in crude percentage terms, suppose *A* is assigned 30 percent of the responsibility (for giving the illegal order) and *B* is assigned 70 percent (for committing the war crime). Under the mitigation approach to the doctrine of superior orders, *B* might very well have his punishment reduced by 30 percent—that is, a reduction equal to the percentage of responsibility attributable to *A*. But when *A* is sentenced, *A* will typically be punished for the entire crime, and not just for 30 percent of it, under the doctrine of command responsibility. Thus, *A*'s punishment of 100 percent plus *B*'s of 70 percent adds up to 170 percent, which seems unreasonable.

Unreasonableness, however, is not the same thing as incoherence. On the assumptions given, *A* is 30 percent culpable and thus his punishment beyond 30 percent is not illogical even if it is harsh.

But there is a major objection to the split-responsibility solution. *A*'s orders were either illegal or they were legal. They were not 70 percent illegal. As completely illegal orders, they should not have been obeyed. Indeed, the humanitarian rules of warfare require that they be disobeyed. Nothing in the humanitarian rules suggests that illegal orders should be partially obeyed. Indeed, I submit that this is the reason why the so-called defense of superior orders is not a defense at all; although it may be pleaded in mitigation of punishment, it does not go to the determination of guilt. Hence, we should not confuse its use in mitigation of *punishment* with any notion that it requires the splitting of responsibility. Rather, *B* remains 100 percent responsible for the commission of the war crime (even though his sentence might, in the tribunal's discretion, be reduced in light of his superior's orders). As a result, the paradox remains: why are both *A* and *B* responsible for the crime?

## II. THE DUALIST SOLUTION

Another possible approach to solving the paradox would be to refer to two different legal systems that are implicated in the relation between *A* and *B*. Under the international legal system, as we have seen, *A*'s order is illegal. But under the domestic legal system that regulates the military relationship between *A* and *B*, *A*'s order is the legitimate command of a military superior. Therefore, we argue that *B* finds himself in a dilemma resulting from his subjection to the concurrent jurisdiction of two separate legal systems. Under the international system, he must disobey the order because it is illegal; whereas under the domestic military system, he must obey the order because it is legal. When *B* is prosecuted, his plea of superior orders is allowed in mitigation of his punishment because the international legal system recognizes the pressure upon *B* from the domestic legal system. However, the duality of legal systems does not exonerate *A*, because *A* was not caught in a similar dilemma. The orders *A* gave were illegal under the international system, but there was no requirement under the domestic legal system that he give those orders. Hence, *A* is guilty under the doctrine of command responsibility.

This manner of resolving the paradox has superficial appeal. Instead of the first approach, which was to split the responsibility between *A* and *B*,

this second approach bifurcates the legal systems impinging upon *A* and *B*, and seeks resolution of the paradox in the conflicting obligations of concurrent jurisdiction.

As before, there is a minor objection that can be made to this way of resolving the paradox. It consists of pointing out the exception built into many domestic legal systems for the laws regulating military forces. Such laws often provide that superior orders need not be obeyed if they violate the laws of war. Sometimes the provision is couched in terms of a requirement that a soldier must obey the *lawful* orders of his military superiors, and other regulations define military conduct that would be unlawful under the international laws of war. Domestic legal systems that contain provisions along these lines thus recognize the dilemma for *B*. They remove *B* from the impossible position of having to obey the illegal orders of a superior and incur liability for the commission of war crimes. They constitute, in effect, an exception to concurrent jurisdiction; they elevate the international legal system (insofar as it pertains to war crimes) to a position of superiority with respect to the domestic military legal system. Such domestic legal systems, therefore, fail to solve our paradox; they leave us in the same original position of confronting the paradox under the international legal system of the conflict between superior orders and command responsibility.

However, the foregoing objection to the dualist resolution of the paradox suffers from being a contingent, and not a necessary, objection. It depends on the contingent fact that some, but not all, domestic legal systems have provisions in their military law excusing soldiers from complying with orders that violate international law. Therefore, the dualist solution is not defeated as a matter of principle; it merely does not obtain in some domestic legal systems.

Yet there is a deeper, and conclusive, objection to the dualist resolution of the paradox. It utilizes the contingent objection just given, but argues that the notion of concurrent jurisdiction in this case is logically incoherent.

Consider the situation from the standpoint of the international legal system (what, in Kelsen's terminology, might be called the "monist" perspective). Certain acts, constituting grave war crimes, must be prohibited. No legal excuse can be permitted that would allow the wanton murder of prisoners of war or harmless civilians. Thus, the international legal system cannot recognize any concurrent jurisdiction over such matters by domestic legal systems; it cannot countenance a legal privilege under domestic law to commit an act that would violate international humanitarian law. Specifically, it cannot allow *B* to raise the military order of his superior officer as a defense to the international crime. As a matter of logic, there cannot be a prohibitory law under one legal system that recognizes a legal exception under a different legal system; if there were, it would not be a prohibitory law, but rather a law that contains a built-in exception. Since we know that the international humanitarian laws do not contain a built-in exception for a military superior's orders, but rather provide that when they call for the commission of an international crime, such orders are flatly illegal, we must rule out the dualist resolution of the paradox.

This analysis has an important byproduct. It reveals that the plea of superior orders in international law in mitigation of punishment does not and cannot rest on the "legality" of the orders under the domestic legal system. Suppose that *B* is indicted for committing a war crime, and he attempts to defend on the ground that he was ordered to commit it by his military superior. His argument that he found himself in a legal dilemma will not be persuasive. Irrespective of the military law of his own country, he was not in a *legal* dilemma, because under international law the order of his military superior was illegal and hence should not have been obeyed. But he was in fact in a dilemma, and he would be well advised to argue that the dilemma was psychological. Faced with an order to commit a war crime, he reasoned that if he disobeyed it, he might be subjected to disciplinary action by his own military hierarchy. Any such disciplinary action, of course, would be illegal under international law, but it might take place anyway. Hence, *B* can argue that in fact, although not in law, he was coerced and therefore should not be held fully accountable for his actions. I think that this line of reasoning is actually what is implied when it is said that there is no defense of superior orders but that superior orders can be taken in mitigation of punishment. It is up to the defendant to prove the *facts* of coercion *given* his superior's orders; it is not enough simply to recite the orders themselves as a matter of legal justification.

### III. RESOLVING THE PARADOX

Logical paradoxes are best resolved not by quarreling with the logic, but rather by accepting the full logical consequences and proceeding to a closer analysis of the premises upon which the argument is based. Accordingly, let us accept for the moment the logical consequence of total exoneration for the issuer of the illegal order. In other words, let us accept *A*'s contention that the illegality of his order both exonerates him and fully implicates *B* who carried out the order. This is a tough-minded consequence of the illegality of the order under international law; it is as if *A*'s order were never given, and *B* simply committed a war crime on his own initiative.

However, we know as a fact that under international humanitarian law, *A* will be held responsible under the doctrine of command responsibility. Therefore, we must conclude that *A*'s guilt cannot consist of having issued the order! The order was itself invalid; hence, *A*'s responsibility cannot be based on the order, but must be based on something else.

If we look at the concept of command responsibility as it has been developed through multilateral conventions and in customary law as recognized by the Nuremberg and Far East tribunals, we find that it contains two necessary elements: (1) that the commander knew or should have known of the commission of the war crime, and (2) that he was capable of inhibiting or preventing it.<sup>1</sup> Under these rules, let us again suppose that *A* issues an

<sup>1</sup> I have couched this second requirement in terms of capability rather than the mere fact of being a commander, for at the Far East tribunals it was established that mere nominal command, when conditions were such that the commander was unable to control or discipline his troops,

order to *B* to commit a war crime. The order itself, as we have seen, is illegal and hence invalid. But it nevertheless has evidentiary value under the first of the two elements of command responsibility: the fact that he gave the order means that *A* knew or should have known of the commission of the war crime.

However, *A*'s order does not prove the second of the two elements of command responsibility—that *A* was capable of preventing or inhibiting the commission of the war crime. Does the fact of the order estop *A* to defend on the ground of incapability? The answer must be negative, because capability is a function of the military command structure and the military context, factors that are not necessarily within *A*'s control. The question, in short, is not whether *A* wanted or did not want *B* to commit the war crime, but whether *A* could have stopped or hindered *B* from doing so. The prosecutor's burden of proof on this latter issue is not discharged by simply introducing *A*'s order into evidence; rather, facts must be adduced about *A*'s actual power to affect *B*'s actions.

The initial paradox is thus resolved. The doctrines of "command responsibility" and "no defense of superior orders" are not incompatible with the results of actual cases, and they are not mutually inconsistent. But the liability of the military commander cannot be predicated upon his illegal order alone, for what this analysis has shown is that the element of capability of controlling subordinates must be proven independently.

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### SOME COMMENTS ON PROFESSOR D'AMATO'S "PARADOX"

When I read Professor D'Amato's Comment the first time, my immediate impression was that it had been written with tongue in cheek. When I read it again, I was even more convinced that such was the case! While Professor D'Amato and I rarely agree with respect to applicable rules of the law of war,<sup>1</sup> I have heretofore always found his arguments to have some merit. In this case, I do not.

The two doctrines at issue—the "command responsibility" of the superior under certain circumstances for offenses against the law of war committed by his subordinates, and the denial of the subordinate's right to assert the defense of "superior orders" in a trial for offenses against the law of war allegedly committed pursuant to such orders—had been the subject of con-

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was insufficient to sustain the prosecutor's burden. See Parks, *Command Responsibility for War Crimes*, 28 MIL. L. REV. 1, 33 (1973). Despite the conclusions of R. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* 141 (1982), General Yamashita's case met both elements of command responsibility with respect to some of the war crimes committed in the Philippines in 1944. See 4 UNITED NATIONS WAR CRIMES COMMISSION, *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 1 (1948) (Trial of General Tomoyuki Yamashita). In one of the Far East cases, Admiral Toyoda was acquitted on the ground that he lacked the capability of control. See Parks, *supra*, at 23.

<sup>1</sup> See, e.g., P. TROBOFF, *LAW AND RESPONSIBILITY IN WARFARE* 176-84 (1975).