# Their's not to reason why - some aspects of the defence of superior orders in New Zealand military law

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*Obedience to superior orders is an aspect of international law that is of great political significance in that it strikes close to the heart of a nation. The right to maintain armed forces is jealously guarded, and any rule that purports to reduce a nation's control over its soldiers by limiting the nature of orders that may lawfully be obeyed is the subject of controversy. Tim Brewer here examines this problem is an attempt to ascertain the accepted rule of law on the topic and the application of that rule to New Zealand.*

It is recognised in every nation of the world that obedience to orders is essential in an Armed Force. In a situation where lives depend on obedience, that obedience must be immediate and unreservedly forthcoming. Military discipline ensures this. From the time he sets foot inside a military camp the recruit is moulded by a process that efficiently transforms him from civilian to soldier. Over a period of months his actions and thoughts are controlled and channelled so as to effect this transmogrification. The recruit learns the military skills and the military dodges, but above all he learns to obey. He is taught to have confidence and faith in the military ability of his superiors and to respond without hesitation to their instructions.

Necessity compels this. That recruit may one day have to follow his superiors under fire and victory will depend on the personal interaction between them. The training he has received will largely determine how he will react in a situation where grave injury and death are omnipresent.

In the New Zealand Army obedience is not unquestioning. The New Zealand soldier has a tendency to think for himself, and he knows in a general sort of way that his superior could give an order that should not be obeyed. It may be connected with a non-military matter — "Take my wife's poodle for a walk" — or it may be an order that is palpably unlawful — "Shoot those children". He would know that both those orders relate to spheres beyond the official competence of his superior.

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The lawfulness of the order is important. A soldier is still subject to domestic law and public international law; he is no less a citizen because he is a soldier and he is no less bound to obey the law. Yet he is also bound to obey all lawful commands and problems arise when the order in question is not decidedly outside the superior's competence. For the New Zealand soldier this creates a dilemma. As Dicey (rather drastically) puts it: "He may . . . be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it".[1]

There is no statutory provision on the question of superior orders. The question as to whether it is a defence to a criminal charge is left to the Common Law. The basic rule is that the fact that a soldier committed a criminal act pursuant to superior orders cannot be a defence *per se,* but may be taken as a plea in mitigation.

The weight that the Common Law will give to the plea in mitigation has been variously interpreted according to the standard of care that the soldier is expected to exercise. Stubbs[2] writes that the standard is very high[3]

> . . . a soldier must disobey any order to commit any offence punishable under the civil law of the land . . . or contrary to international law . . . the soldier is liable for any unlawful act carried out notwithstanding that he was ordered to perform it either in fact or by implication.

L. C. Green takes a different view. In his analysis of the law of superior orders he concludes that orders cannot be accepted as justifying an illegal act where the unlawful character of the act is palpable.[4] Stated positively this means the courts apply a "reasonable man" test to determine palpability, and if the act ordered was not palpably unlawful the soldier may be exonerated.

It is apparent that it is of some interest to the New Zealand soldier to know whether either of these views represents the law. Is he liable for the consequences of any unlawful order he carries out, or only for the consequences of those orders that he knew or reasonably should have known to be unlawful? Does the law lie somewhere between these formulations? This paper will examine these questions in an attempt to ascertain the law as it applies in New Zealand.

## I. INTERNATIONAL LAW AND DOMESTIC LAW

Stubbs based his opinion on the British *Manual of Military Law,* the relevant provisions of which he saw as reflecting the international law position. The *Manual* states:[5]

> 23. If a person who is bound to obey a duly constituted superior receives from the superior an order to do some act or make some omission which is manifestly illegal, he is under a legal duty to refuse to carry out the order, and if he does carry it out

1 Dicey, *The Law of the Constitution,* (10th ed., London, 1959) 303.
2 In 1971 W. E. Stubbs was Assistant Judge Advocate General (U.K.).
3 Stubbs, "Military Obedience in Internal British Penal Law and in the Law of War", (1971) 10 Revue de Droit Pénal Militaire et de Droit de la Guerre 283, 285-286.
4 Green, "Superior Orders And The Reasonable Man" (1970) 8 C.Y.I.L. 61, 103.
5 *Manual of Military Law* (1951 ed.) Part 1. Ch. VI, Para. 23.

> he will be criminally responsible for what he does in doing so. It has been suggested that if such an order is to do an act . . . which is not manifestly illegal a person who obeys it will not incur criminal responsibility by doing so, especially if he had little opportunity to consider the order before carrying it out. The better view appears to be, however, that an order to do an act . . . which is illegal, even if given by a duly constituted superior whom the recipient is bound to obey and whether the act . . . is manifestly illegal or not, can never of itself excuse the recipient if he carries out the order although it may give rise to a defence on other grounds . . . .

This paragraph was adopted by the *Manual* in 1944 and reflected the view expressed in the 1944 edition of Oppenheim's *International Law* which was prepared by Sir H. Lauterpacht. The hesitancy with which Lauterpacht expressed the "better view" reflects the fact that that view contradicted the earlier editions of both Oppenheim's text and the *Manual.*[6] Paragraph 23 was adopted when the Allies were contemplating the trial of the German war criminals and superior orders were not to be allowed, given the nature of the offences, to exonerate. The vagueness in the expression of the "better view" is indicative of its disputed validity. The "defence on other grounds" refers to general criminal law defences — coercion, lack of intent, mistake, etc. — that could arise from the fact that an offender was acting under superior orders. This aspect will be discussed later.

If W. E. Stubbs' interpretation of the *Manual* reflects the international law then, subject to certain qualifications, it also reflects the law in New Zealand. Under the rule of Common Law known as the doctrine of incorporation customary international law is a part of the Common Law. As Lord Chancellor Talbot said in 1735 in *Barbuit's Case;* "The law of nations in its fullest extent is and forms part of English law".[7] The doctrine was affirmed more recently by Lord Atkin in *Chung Chi Chung* v. *The King,*[8] a Privy Council decision:

> The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law . . .

It is, however, subject to certain qualifications. The one that most concerns the present topic is the effect of precedent. The traditional view has been that

6 The first edition of Oppenheim's *International Law* stated that " . . . in case members of forces commit violations ordered by their commanders, the members cannot be punished, for the commanders alone are responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy." (1906 ed.) vol. 2, s. 253. The 1935 edition, the first prepared by Lauterpacht, mentioned First World War cases that had appeared to dissent from the traditional view, but Lauterpacht did not consider that the view had been changed by those cases. The 1940 and 1944 editions, also edited by Lauterpacht, recorded a fundamental change in this position.

For a scathing commentary on this seeming about face by Lauterpacht see Schwarzenberger, *The Inductive Approach to International Law,* (London, 1965) 14-18. The earlier *Manuals* dealt with the question of superior orders thus: "If the command were obviously illegal, the inferior would be justified in questioning, or even in refusing to execute it, as, for instance, if he were ordered to fire on a peaceable and unoffending bystander. But so long as the orders of a superior are not obviously and decidedly in opposition to the law of the land, the duty of the soldier is to obey and (if he thinks fit) to make a formal complaint afterwards." (1939 reprint) para. 18.

7 *Barbuit's* case (1735) Cas. t. Talbot 281.

8 *Chung Chi Cheung* v. *R* [1939] A.C. 160, 168 and see *West Rand Mining Co.* v. *R* [1905] 2 K.B. 391.

since international law is part of the Common Law it is subject to the doctrine of precedent in the ordinary way; and the courts tend to favour local decisions over foreign ones.[9] This means that when the courts adopt a rule of international law precedent binds them to apply that rule until it is changed or disapproved by a superior court or by Act of Parliament. Thus the law applied by domestic courts would not necessarily follow the changing rules of international law.

This view has, however, been disapproved by the English Court of Appeal in the recent case of *Trendtex Trading Corporation* v. *Central Bank of Nigeria*[10]

> Seeing that the rules of international law have changed — and do change — and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court — as to what was the ruling of international law 50 or 60 years ago — is not binding on this court today.

The result is that domestic precedents at variance with international law should not be followed by the courts once that variance is established. A new rule of international law displaces the old. Shaw L.J. confirmed[11] this

> What is immutable is the principle of English law that the law of nations (not what was the law of nations) must be applied in the courts of England. The rule of stare decisis operates to preclude a court from overriding a decision which binds it in regard to a particular rule of (international) law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule.

It would seem therefore that the law in New Zealand must reflect the current international law position if it is to be good law. If Stubbs' strict interpretation of the *Manual* accurately represents the international law of superior orders, then it also represents the New Zealand law of superior orders.

To decide what the international law of superior orders is, and whether domestic New Zealand law accords with it, this paper will first examine domestic New Zealand law and then have regard to the pertinent rules of international law. In a sense this is impossible because, as has been seen above, these rules are presumed to be a part of New Zealand law. However, much of international law is customary and to determine what is "custom" it is relevant to refer to domestic codes.

## II. DOMESTIC NEW ZEALAND LAW OF SUPERIOR ORDERS

Attention here will be focussed on the Armed Forces Discipline Act 1971, the New Zealand Army Act 1950, and the New Zealand Army *Code Of Military Law*.

The Armed Forces Discipline Act 1971 is intended to bring all the Armed Services under one disciplinary statute. However, the Act will not come into force until a new *Code Of Military Law* has been compiled to interpret it for the military. Consequently the courts still apply the New Zealand Army Act 1950.

9 Brierly, *The Law of Nations,* (6th ed., Oxford, 1963) 92.

10 *Trendtex Trading Corpn.* v. *Central Bank of Nigeria* [1977] Q.B. 529, 554 per Denning M.R. (The case is currently under appeal to the House of Lords.)

11 Ibid., 579.

Neither statute mentions superior orders as a defence to a criminal charge, they merely provide that lawful orders must be obeyed. The Armed Forces Discipline Act 1971 states[12]

> Every person subject to this Act commits an offence, and is liable to imprisonment for a term not exceeding five years, who disobeys a lawful command of his superior officer by whatever means communicated to him.

The New Zealand Army Act 1950 though a little more elaborate is in essence no different[13]

> (1) Every person subject to military law who commits the following offence, that is to say, —
>
> Disobeys in such a manner as to show a wilful defiance of authority any lawful command given personally by his superior officer in the execution of his office, whether it is given orally, or in writing . . . —
>
> shall, on conviction by Court Martial, be liable to suffer imprisonment for a term not exceeding ten years . . . .
>
> (2) Every person subject to military law who commits the following offence, that is to say, —
>
> Disobeys any lawful command given by his superior officer,
>
> shall, on conviction by Court Martial, if he commits any such offence on active service, be liable to suffer imprisonment for a term not exceeding ten years . . . and, if he commits any such offence not on active service be liable to suffer imprisonment for a term not exceeding two years . . . .

Neither Act defines what is meant by a "lawful command", and neither positively defines the duty of obedience. It is left to the New Zealand Army *Code Of Military Law* to interpret the above section. The *Code* purports to interpret the New Zealand Army Act 1950 according to the Common Law. It is understood that the next edition of the *Code* which will deal with the Armed Forces Discipline Act 1971, will not substantially differ in this area.[14] The *Code* provides[15]

> "Lawful Command" means not only a command which is not contrary to the ordinary civil law but one which is justified by military law; in other words, a lawful military command to do or not to do or to desist from doing a particular act . . . .
>
> "Duty of Obedience" — If the command were obviously illegal the inferior would be justified in questioning, or even in refusing to execute it, as, for instance, if he were ordered to fire on a peaceable and inoffensive bystander. So long, however, as the orders of the superior are not obviously and decidedly in opposition to the law of the land, the duty of the soldier is to obey and (if he thinks fit) to make a formal complaint afterwards.

The *Code Of Military Law* is not definitive. It purports only to interpret the New Zealand Army Act 1950 according to the Common Law. It represents the law only in so far as the courts have approved its contents, though in a more practical context it largely governs the behaviour of the military. The above paragraphs were expressly approved by the Courts-Martial Appeal Court in an unreported

12 Armed Forces Discipline Act, 1971, s. 38.
13 New Zealand Army Act 1950, s. 29.
14 This was made clear to the writer in interviews with two officers who are concerned with preparing the next edition of the *Code*.
15 *Code of Military Law* paras. 12 and 13 respectively.

judgment delivered by that court recently,[16] and thus they may be seen as representing the Common Law in New Zealand. It will be noticed though that the paragraphs refer to the "ordinary civil law" and "the law of the land". Both these phrases must, according to the doctrine of incorporation, include international law. If the "law of the land", in its wider sense, makes it a soldier's duty to obey all commands unless that command is "obviously and decidedly in opposition to the law of the land", then the position of the New Zealand soldier is not as onerous as the British *Manual of Military Law* might suggest. Paragraph 23 of the *Manual* was couched in tentative terms that need not necessarily be interpreted narrowly.

It is pertinent to note here that paragraph 13 of the New Zealand Code is a re-statement of paragraph 18 of the 1939 reprint of the British *Manual* — a paragraph that was fundamentally changed in the 1944 edition because Lauterpacht considered that his "better view" then represented the international law.

As far as a Common Law basis for the statement made by paragraph 13 of the New Zealand *Code* is concerned the cases are few and far between.

In *R.* v. *Thomas*[17] it was held that a mistaken belief in the existence of orders could not justify an illegal act. In *Keighley* v. *Bell* Willes J. said:[18]

> If it were necessary to state any principle on which it would be competent to me to decide such a case it would be that a soldier, acting honestly in discharge of his duty — that is, acting in obedience to the orders of his commanding officers — is not liable for what he does, unless it be shown that the orders were such as were obviously illegal. He must justify any direct violation of the personal rights of another person, by showing, not only that he had orders, but that the orders were such as he was bound to obey.

From the context of the case and the words of Willes J. the above remarks are clearly obiter dicta. Moreover, in the same year he appears to contradict himself in *Dawkins* v. *Lord Rokeby*:[19]

> ". . . if the military should injure [ordinary citizens] in their person or their property not even the command of a superior officer will justify a soldier in what he does unless the command should turn out to be legal.

The two cases are, however, distinguishable in that the latter was a civil action.

In 1900 the case of *Smith* was tried in South Africa. Smith, a British soldier during the Boer War, on the orders of his commanding officer at a moment of

16 This was an application for leave to appeal by Warrant Officer Class Two, Vincent Lawrence. It was held before Mr Justice Ongley, Sir Hamilton Mitchell and G. E. Bisson Esq., on 7 April 1977. A District Court-Martial had found Lawrence guilty of disobeying a lawful command given by his superior officer (an offence under s. 29(2) N.Z. Army Act 1950), and of using insubordinate language to his superior officer (an offence under s. 28(b) N.Z. Army Act 1950). In dismissing the application for leave to appeal the court expressly approved paragraphs 12 and 13 of the New Zealand Army *Code of Military Law*.

17 (1816) 4 M. & S. 441.
Thomas was a Royal Marine in H.M.S. Achilles who had been posted as a sentry with orders to keep off all boats. When one boat approached in defiance of his warnings he shot and killed one of its occupants. The Court for Crown Cases Reserved unanimously held that his act was murder, but recommended that he be pardoned.

18 (1866) 4 F. & F. 763, 805.

19 (1866) 4 F. & F. 806, 831.

military stress, shot and killed a civilian farmer who failed to produce a bridle for a horse. He was found not guilty of murder. Solomon J. said:[20]

> After looking at the authorities . . . it seems to me that the rule laid down in the Manual Of Military Law is a reasonable and proper rule to apply in such a case as this. This states that if the commands are obviously illegal, an inferior would be justified in questioning or even refusing to execute such commands, but so long as the orders of a superior are not obviously and decidedly in opposition to the law of the land . . . so long must they meet with complete and unhesitating obedience. I think that if a soldier honestly believes that he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they are unlawful, the private soldier would be protected by the order of his superior officer.

The passage referred to by Solomon J. is the one appearing in the British *Manual* prior to 1944, and that restated by paragraph 13 of the New Zealand *Code.*

These four cases are representative of the pre-Second World War Common Law in this area. They show that the courts would grant a soldier protection for acts committed pursuant to superior orders provided that the orders were not "obviously" or "manifestly" illegal and that the soldier acted "honestly" in that he did not know that what he was doing was unlawful.

In 1944 the British changed their *Manual* as they felt that the law laid down by these cases was no longer in keeping with international law. New Zealand did not change its *Code,* and did not take the stricter view that Lauterpacht considered to be the better one. In order to see if this was justified international law must now be considered.

## III. INTERNATIONAL LAW OF SUPERIOR ORDERS

When the question of the trying of war criminals at the end of the Second World War arose, the London Agreement of 8 August 1945, signed by the Allies, established the Statutes of the Nuremberg International Military Tribunal. Article 8 of the Charter of the Tribunal provided:[21]

> The fact that the defendant acted pursuant to orders 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.

This seems to be a clear statement that precludes the fact of superior orders from exonerating an accused.

Article 8 appeared to express the international law authoritatively, especially since it was unanimously affirmed by a resolution of the General Assembly of the United Nations in 1946 that approved the principles laid down in the Nuremberg Charter and Judgment:[22]

20 (1900) 17 S.C. (Cape of Good Hope) 561. Cited by Green, op. cit., 79.
21 *Charter of the International Military Tribunal* (1945) art. 8.
22 *The Charter and Judgment of the Nürnberg Tribunal* (New York, 1949) 14-15.

> Affirmation of the principles of international law recognised by the Charter of the Nuremberg Tribunal.
> The General Assembly . . .
> Affirms the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;
> Directs the Committee on codification of international law established by the resolution of the General Asembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind . . . of the principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

However, the situation was not quite so clear cut. The judgments of various tribunals and further attempts at codification made the position seem more ambiguous.

The Nuremberg Tribunal had to reject the defence of superior orders, for this was clearly provided by its Charter[23]

> 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 . . . . Superior orders . . . cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification . . . .

This passage rejected the defence of superior orders where the mere existence of the order is relied upon. But it was qualified by bringing in the question of "moral choice". What does this phrase mean? Might it not mean that where a soldier did not know that the order was unlawful he could make no moral choice and should be exonerated unless the unlawful nature of the offence was manifest? The point of manifest illegality was never disputed in the trials, probably because, given the nature of the offences charged, there was no point to dispute. Throughout the trials the emphasis was on the "shocking and extensive" nature of the crimes committed. It was iterated and reiterated that superior orders could not mitigate such crimes, but the judgments left open the interpretation that superior orders could mitigate where the unlawfulness of the orders was not manifest. It is arguable, therefore, that a strict interpretation of article 8, similar to that taken in the British *Manual,* is not justified. This view may be supported by the *High Command Trial*[24] where the Tribunal said, in relation to the liability of a commander issuing illegal orders[25]

> He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions. It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal.

The meaning of article 8 was further mystified in the *Hostages Trial*[26] where the defence cited the earlier British Manuals in an attempt to prove that the Tribunal was applying *ex post facto* law. In refuting this the Tribunal stated:[27]

23 *The International Military Tribunal* (Nuremberg, 1947) Vol. 1, 224.
24 *Re Von Leeb* (1948) 15 Ann. Dig. 376.
25 Ibid., 385.
26 *Re List* (1948) 15 Ann. Dig. 632.
27 Ibid., 649-650.

> The rule that a superior order is not a defence to a criminal act is a rule of fundamental criminal justice that has been adopted by civilised nations extensively . . . .
> The municipal law of civilised nations generally sustained the principle at the time the alleged criminal acts were committed. This being true, it properly may be declared as an applicable rule of International Law . . . . Implicit obedience to orders of superior officers is almost indispensible to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's order be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime . . . . 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. 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.

The Tribunal restated the basic rule that superior orders *per se* cannot justify, but then qualified it by bringing in a mens rea stipulation. The final sentence of the passage further qualifies it by bringing up the manifest illegality principle. article 8 may have been affirmed by the General Assembly, but the meaning of that article is, at least, open to argument. It is arguable that "moral choice" goes to the unlawfulness of the order. If it was manifestly unlawful then the accused had a moral choice to make because it was evident that to obey the orders would be unlawful. If the order was less than manifestly unlawful, then the fact of the order may be absolving, depending upon the circumstances and upon the knowledge of the accused. If article 8 could be said to bear this interpretation, then the New Zealand position would be valid at law.

### *A. Mystification of International Law*

The General Assembly, it will be recalled, directed the committee on codification of international law to codify the principles laid down in the Nuremberg Charter and Judgment. The efforts of this Committee went further to mystifying, and perhaps destroying the principles of the Charter and Judgment. What was a subject of some ambiguity became one of dissension, and resulted in no-one knowing the international law position.

> What started out to be a "formulation" of the Nuremberg Principles became enmeshed in a number of other projects which . . . would have carried the international legal order too far and too fast . . . . The collapse of all the efforts that followed after the affirmation of the Nuremberg Principles has not only failed to advance international law but it has also set it back . . . . The shifting meanings given to obedience to superior orders . . . merely added more difficult choices to those which the lawyer was already called upon to make in extracting the "true" rule of law from the evidence available to him . . . . Ambiguity has been replaced by controversy and active opposition. The failure of an exercise in progressive development and codification has been no more and no less than law-destroying.[28]

In order to ascertain what interpretation of article 8 has survived this "law-destroying" process it is necessary to return to first principles.

28 Baxter, "The Effects of IU-Conceived Codification and Development of International Law" (1968) Recueil d'Etudes de Droit International en Hommage a Paul Guggenheim 146, 163-165.

International law is consensual. When nations evolve a clear and continuous habit which they come to regard as being obligatory or right, that habit becomes part of the customary international law. The nations have consented, in common, to be bound by that habit.

> 'Common consent' can therefore only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance as compared with the community viewed as an entity in contradistinction to the will of the single members. The question whether there be such a common consent in a special case is not a question of theory but of fact only . . . .[29]

To decide whether such an overwhelming consent has been given to the strict interpretation of article 8 it is now expedient to have regard to the domestic laws of some of the nations, for inasmuch as international law is customary that custom must be reflected by the common principles enunciated in domestic codes. Nations are not going to agree to be bound internationally by principles that they deny domestically.

Sahir Erman, Professor in criminal law and military criminal law at Istanbul University, collated the responses to a questionnaire on superior orders[30] that was sent to France, Belgium, West Germany, America, Italy, Britain, Israel, Greece, Denmark, Norway, Luxembourg, Netherlands, and Turkey.

Of these countries, only Britain appeared to have a code that interpreted article 8 strictly. Nearly all admitted that the duty to disobey orders only applied to those that were obviously illegal, and that orders not so unlawful could be absolutory. Erman summarised the position thus[31]

> A subordinate must in the first place refuse to obey orders unconnected with the requirements of military service. But leaving this aside, it is admitted almost unanimously that if the execution of the order obviously implies the commission of an offence, a subordinate must refrain from obeying the order and in case it is carried out superior orders in no way protect the subordinate from the penal consequences of his acts. It is therefore admitted that a duty of obedience yields to a duty of disobedience and the liability attaching thereto if the unlawfulness reaches such a point as to impart to the order a manifestly criminal element.

The West German provision is[32]

> If a subordinate commits an act subject to punishment upon orders, guilt shall devolve on him only if a major or minor crime is involved and he recognises this or if such fact is obvious under the circumstances as they are known to him.

This provision takes cognizance of the soldier's subjective knowledge of the lawfulness of the order. If he does not know a crime is involved he may be exonerated, unless it should have been obvious to him that a crime was involved.

The Israeli law is more objective.[33]

29 Oppenheim, *International Law*, (Lauterpacht ed.) (8th ed., London, 1955) Vol. 1, 17.
30 "Compliance with Superior Orders under Domestic Criminal Law and under the Law of War" (1971) 10 Revue de Droit Pénal Militaire et de Droit de la Guerre 371.
31 Ibid., 401.
32 *Criminal Code Ordinance* (1930) s. 19(b).
33 Erman, supra n. 30, 202.

> A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances, that is to say . . . (b) in obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful.

The United States view is also a liberal interpretation of article 8.[34]

> The fact that the law of war has been violated pursuant to the 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 defence 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.

The Turkish Criminal Code takes the view that liability depends on the subjective knowledge of the accused[35]

> It is clearly observed that the manifest unlawful character of an order, the existence of circumstances from which such a character would obviously be inferred, even a serious doubt, are not sufficient for a subordinate to be held liable; his knowledge of the criminal purpose of the order must be shown.

The Turkish position contrasts strongly with article 8 and provides an illustration of the point of this examination of the various criminal codes. That point follows on from the consensual nature of international law. With the affirmation of the principles of the Nuremberg Charter and Judgment, international law had an accepted base in this area. The exact nature of article 8 in the light of the "moral choice" of the Judgment may have been ambiguous, but it was not openly controversial. As Professor Baxter pointed out in his article,[36] the efforts of the various committees to codify the principles have led to dissension and disagreement. The exercise has been "law-destroying" in that the nations no longer purport to be agreed upon the nature of the defence of superior orders. As has been seen, the nations' customs differ in their expression, and article 8 of the charter can no longer be said to represent customary international law.

The law-destroying theory was further evidenced by the result of the Diplomatic Conference on the Reaffirmation and Development of International and Humanitarian Law applicable in armed conflict. At this conference the nations recently met to consider draft additional Protocols to the Geneva Conventions of 1949. The Third Session of the Conference (21 April—11 June 1976) considered the following draft article on superior orders[37]

> Article 77 (Superior Orders)
> 1) No person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, could constitute a grave breach of the convention or of the present protocol.
> 2) The fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from penal responsibility if it be established that, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the conventions or of the present protocol and that he had the possibility of refusing to obey the order.

34 Field Manual (U.S.) (1956) 27-10, 182. This view was reiterated at the Diplomatic Conference. See post. n. 42.

35 Erman, supra n. 30, 403.

36 Op. cit.

37 Draft additional Protocols to the Geneva Conventions of 12 August 1949, (Geneva, 1973) article 77 of Protocol I.

Paragraph (1) provides a counterpoint to article 8 in that it puts the onus on the state to ensure that orders do not require the commission of grave breaches of the Conventions or the Protocol. The draft would not have applied to customary war crimes or breaches of the Conventions that are not "grave". Paragraph (2) admits the possibility that a reasonable lack of knowledge and a lack of physical freedom to refuse the order might constitute a defence.

The article was much debated and an amended version was voted on by the Conference in its final session early in 1977. It gained majority support but not the two thirds vote necessary for adoption.

Article 77 was drafted by the International Committee of the Red Cross (I.C.R.C.) and was seen by them as embodying the principles of the Nuremberg Charter and Judgment.[38] The fact that it was not adopted reflects the wide interpretations that have been given to the principles and also the mystifying effects of the codification attempts.

Article 77(1) related solely to grave breaches of the provisions of the Geneva Conventions and Protocol 1. The reason given by the I.C.R.C. for restricting the scope of the absolutory plea to grave breaches was that the exigencies of military discipline could not permit soldiers to contest, in all circumstances, the orders of their superiors.[39] This view was contested by several nations, including the United States of America which proposed that the word "grave" be deleted. However the main ground of objection to paragraph (1) was its interpretation as " . . . an unwarranted intrusion into the criminal law of States".[40] It was seen as limiting the power of governments to control their soldiers and as a matter of practical politics many nations were not prepared to accept this.[41]

> It would be unrealistic to absolve from any penalty persons who refused to commit a grave breach of the provisions of the Convention or the Protocol, since that would enable a subordinate to disobey an order of his Government or of a superior . . . .

Paragraph (2) foundered on the inability of the nations to agree on the precise obligations of the soldier. The I.C.R.C. had included the phrase beginning "he should have reasonably known that he was committing a grave breach" to lessen the dilemma that the soldier faces when he is subject to regulations that compel him to obey orders. Reaction to this phrase varied according to the provisions of domestic codes. For example, the United States of America proposed the revision of paragraph (2) to read[42]

38 The I.C.R.C. said in Article 77: "This present article is based on the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, affirmed by the United Nations General Assembly in its resolutions 3(I) and 95(I) and subsequently formulated by the United Nations International Law Commision at the General Assembly's request." *Draft Additional Protocols to the Geneva Conventions of 12 August 1949,* (Geneva, 1973) 97.

39 *Summary Records of the Forty-Second to Sixty-Fifth Meetings,* (1976) Conference document CDDH/I/SR 42-65, 127. The I.C.R.C. said that the restriction was imposed on the advice of most of the experts consulted, but that other experts disagreed.

40 Ibid., 131 per Draper. Draper was a U.K. delegate.

41 Ibid., 128 per El-Fattal. El-Fattal was a Syrian Arab Republic delegate.

42 *United States of America: Proposed amendment of Article 77 — Superior Orders.* (1976) Conference document CDDH/I/308.

> The fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from responsibility if it be established that, in the circumstances at the time, he knew or should have known that he was committing a breach of the Conventions or of the Present Protocol. The fact that the individual was acting pursuant to orders may, however, be taken into account in mitigation of punishment.

This amendment deletes the word "grave", covers the case where the offender had actual knowledge of the unlawfulness of the order and allows for punishment to be reduced. It also follows closely the view expressed in the American *Field Manual*.[43]

From this discussion it can be seen that the international principles relating to superior orders have been very widely interpreted, and that that width is evidenced by the diversity of the national codes. The task of the Conference virtually was the standardising of the codes and that proved to be impossible. Indeed, it is arguable that in its reconciliation attempts the conference went beyond the topic of superior orders and into the difficult area of the basic principles of criminal liability.

The two implications of the I.C.R.C. text, and basically of the United States amendment as well are first, that a person who acted according to an order and who did not know or should not reasonably have known that his action was unlawful is absolved from responsibility, and secondly, that a person who acts according to an order and who did not have the possibility of refusing to obey the order is absolved. However, acting according to an order is irrelevant to those two defences. Lack of knowledge or mistake of fact or lack of intent are separate general defences. If they are lacking in a case, then an essential general element of the offence is absent.

### *B. Alternative Interpretations*

The above argument has been extended to contend that all qualifications to the basic rule (that the fact of superior orders is not a defence *per se*) have been irrelevant incursions into the ordinary defences of criminal law. The circumstances surrounding the issuing of orders may give rise to a defence in so far as they relate to the general defences of coercion, mistake of fact, and the lack of the necessary intent specific to many offences.

The validity of this argument is readily apparent. If a soldier commits murder because he is ordered to and in circumstances where he could not have known that his act was murder, then his lack of knowledge or intent might constitute a defence to a charge of murder. But that defence owes nothing to the defence of superior orders.

This is the position taken by W. E. Stubbs, and in his opinion nothing more is needed to protect the soldier.[44] However these general defences are limited in

43 Supra, n. 39, 128.

44 Stubbs sees the strict interpretation of the British *Manual* as compensating for the readiness of military tribunals to acquit an accused soldier: "My experience of courts-martial is that in the majority of cases they will lean over backwards to acquit an accused of a serious charge. Indeed I am often tempted to believe that they have studied to acquire the ability of the Queen in *Alice through the Looking Glass* to believe six impossible things before breakfast." Comment, (1971) 10 Revue de Droit Pénal Militaire et de Droit de la Guerre 417, 418.

scope and do not satisfactorily relate to the position of the soldier. The Codes of the nations cited make special provisions for the soldier because it is recognised that his is a special case. The unsuitability of these general defences will be apparent from a brief consideration of some of them as they apply in New Zealand.

1. *Coercion*

At Common Law a person is not criminally liable for acts which he is physically made to perform. The law in New Zealand is to be found in section 24(1) of the Crimes Act 1961:

> (1) Subject to the provisions of this section, a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he believes that the threats will be carried out and if he is not a party to any association or conspiracy whereby he is subject to compulsion.

However subsection 2 provides inter alia that subsection 1 does not apply where the offence committed is murder, attempted murder, wounding with intent, injuring with intent to cause grievous bodily harm, abduction, kidnapping, robbery or arson.

This very much limits the defence, especially so far as a soldier is concerned. Disobedience to superior orders ordinarily does not raise the fear of "immediate death or grievous bodily harm". Even if it did, the statutory qualifications remove much of the exonerating solace of the defence.

2. *Mistake*

The mistaken belief that an order is lawful may operate as a defence if the mistake is one of fact and not of law. In some cases an honest belief in the validity of certain facts will operate so that the accused will be judged as though those facts were valid. Whether the mistake was one of law or of fact will be a matter for the tribunal to decide.

> At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defence.[45]

Mistake may also operate as a defence if the offence is one requiring a specific intention. It may negative the mens rea necessary to constitute some specific offence. "Thus a soldier unlawfully seizing property in obedience to an order which he believed to be lawful would have a good defence to a charge of theft."[46]

However, lack of intent cannot assist the soldier where the offence committed is one where it is not necessary to establish a mental element to prove the offence. In other words a strict liability offence.

This is illustrated by the case of *R.* v. *Ball and Loughlin.*[47] Ball was the driver of an army scout car whose range of vision was so limited that he was required to rely on the orders of Loughlin as to when he must start, turn or stop. At a road junction Ball turned to follow another road on Loughlin's directions. The scout

45 *R* v. *Tolson* (1889) 23 Q.B.D. 168, 181 per Cave J.
46 Stubbs, supra n. 3, 290.
47 (1966) 50 Cr. App. Rep. 266

car struck and killed a motorcyclist. Because of his restricted vision Ball was in no position to have seen the motorcyclist, he was relying solely on Loughlin's orders. Ball was found guilty of causing death by dangerous driving and Loughlin of aiding and abetting him.

Here the soldiers were treated as civilians and no heed was taken of Ball's position as a soldier under orders. In this situation a civilian could, if he wished, have got out to check the road for himself; he could have required a civilian Loughlin to confirm that the road was clear. As a soldier Ball could do neither of these things; as a soldier he lacked the freedom of action that a civilian would have had in the same position.

The New Zealand soldier has the same general defences to criminal charges as any civilian, and superior orders may form a part of such a defence to the extent that they evidence, for example, coercion, mistake, lack of intent. That this is so has never been doubted, for the soldier is as much subject to the law as any other citizen. The problem is that because of his position the soldier lacks the freedom of action enjoyed by his civilian counterpart. The military ethos to a very real extent dictates his actions and his responses to the orders of his superiors. This fact makes it unrealistic to apply to him the rules of justification and excuse in the same manner as they are applied to civilians.

The special position of the soldier has been recognised by most of the codes of the nations surveyed. The basic rule that superior orders per se do not constitute a defence is recognised in these codes, but it is qualified by a provision that takes into account the circumstances relevant to the accused's status as a soldier. It is submitted that international law has always recognised the special position of the soldier, and some general absolving principle to soften the basic rule must be included in whatever law survives the present controversy.

## III. SUPERIOR ORDERS EXTANT

The basis of the law of superior orders is the principle that if an unlawful act is committed pursuant to superior orders, the fact of those orders will not constitute a defence per se. This was the principle clearly stated by article 8 of the Nuremberg Charter, affirmed by the General Assembly, and incorporated into the domestic codes of most of the nations surveyed. The principle was not seriously challenged at the recent Diplomatic Conference and it is submitted that it survives as a valid principle of international law.

What has been confused is the extent to which the principle may be qualified by the circumstances surrounding the issuing of the orders. The domestic codes of nations vary, and the Diplomatic Conference failed to produce a standard formulation. However, from the codes and cases surveyed it is apparent that in many nations superior orders may exonerate so long as they are not "palpably"[48] or "manifestly"[49] or "obviously"[50] unlawful. They may also be pleaded in mitigation if the circumstances so warrant.[51]

Given the diversity of the various national systems it is submitted that inter-

48 Green, supra n. 4, 290.
49 Erman, supra n. 30.
50 Per Willes J. in *Keighley* v. *Bell* (1866) 4 F. & F. 763, 805.
51 As in the United States. See supra n. 34.

national law lays down no firm rule or guideline as to the permissible extent of the qualifying provision. The basic principle of international law enunciated above remains, but within it there is no specific rule of international law.

Where there is no specific rule of international law sovereign states are responsible for devising whatever regulations seem to them to be the most equitable in the circumstances. As sovereign entities the jurisdiction of states is not to be limited except by express provisions of international law, provisions which in themselves represent the will of the states. The Permanent Court Of International Justice considered this point in *The S.S. Lotus*.[52] This case dealt with the question of the limits of the territorial jurisdiction of nations. The majority of the court ruled that before the sovereignty of nations could be limited there must be an express rule of international law to that end. In the absence of such a rule every state is free to adopt whatever principles it regards as most suitable provided they do not contradict international law[53]

> In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.

The responsibility of nations to adhere to the rules of international law that apply in time of war was admitted and adopted by the Diplomatic Conference.

> Article 41 — Organisation and Discipline
> Armed forces, including the armed forces of resistance movements covered by Article 42, shall be organised and subject to an appropriate internal disciplinary system. Such disciplinary system shall enforce respect for the present rules and for the other rules of international law applicable in armed conflicts.[54]

Thus it is submitted that even in time of war nations have a responsibility in international law to ensure that their domestic law does not contradict the basic principle of superior orders. Within the scope of this principle they may require their soldiers to adhere to whatever standard they think desirable.

However, in view of the doctrine of incorporation, the nature of the basic principle needs to be further examined. If a rule of international law is purely permissive — a rule enabling states to enact legislation taking advantage of the permission — until domestic legislation has been enacted the rule may not be pleaded by a state as justifying action falling within the scope of the permission. The state must indicate its intention to exercise the permission, and to what extent it will do so. This would appear to limit the doctrine of incorporation. Under that doctrine the permissive rule would be incorporated into domestic law, but until the state accepted the rule, defining how far it intended to exercise its right, the rule could have no effect.

In the present case there is a basic principle that provides the ultimate limits to a broad discretion. It is submitted that this broad discretion is not the result of a permissive rule of international law, but rather the result of there being no rule of international law at all. Thus a state need not enact legislation defining how far it will exercise its discretion unless it feels compelled to do so in the interests of certainty.

52 P.C.I.J., Ser. A, No. 10 (1927). 53 Ibid., 35.
54 Draft Additional Protocols to the Geneva Conventions of 12 August 1949, (Geneva, 1973) Article 41 of Protocol I.

A permissive rule of international law is still a rule, it grants a right that must be accepted before it can be exercised. A discretion that exists because of the absence of a rule differs in that the sovereignty of a state in that area is unfettered and is not to be presumed to be limited unless its practice infringes a definite rule of international law.

The position is that so long as a state does not infringe the basic principle that superior orders per se do not excuse, it is unfettered in practice and its sovereignty unlimited.

## IV. CONCLUSIONS

Paragraph 13 of the New Zealand *Code of Military Law* embodies the principle that a soldier is bound to obey all orders that are not obviously and decidedly in opposition to the law of the land. That this principle is part of the law of New Zealand has already been seen, and it is submitted that its validity is not impaired by any contrary rule of international law.

If a New Zealand soldier should commit an unlawful act pursuant to an order that was not obviously and decidedly in opposition to the law of the land, then the nature of that order may, depending upon the circumstances,[55] provide a defence at Common Law. The circumstances that the court will have regard to are not clear, but from the discussion above it would seem that an important consideration will be the soldier's knowledge, actual or constructive, of the lawfulness of the order. From this it can be seen that the New Zealand law does not follow the strict interpretation of article 8 of the Nuremberg Charter, but places a lesser burden on the New Zealand soldier.

The international law of superior orders is in a state of flux and the full extent of the defence has yet to be formulated. As Dinstein[56] concludes: one thing that may be said is that the old doctrine that superior orders absolve absolutely has become discredited. The other extreme, that of absolute liability for one's actions, orders notwithstanding, is also being rejected. The final result may well be a positive rule of international law that takes into account the practical position of the soldier.

> If international law continues to develop in that direction, one may hope that in the not too distant future the cascading flow of the demands of life will sweep away dogmatic barriers and clear the path for pragmatic solutions.

However, until such a pragmatic solution is reached it is the responsibility of the individual nations to enunciate their own rules within the framework of the existing international law. In this respect the New Zealand position on superior orders as a defence to a criminal charge may be said to be valid at law.

56 Dinstein, *The Defence of Obedience to Superior Orders in International Law,* (Leyden, any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence . . . except so far as they are altered by or are inconsistent with this Act or any other enactment." Thus the defence of superior orders may be raised as a defence in a New Zealand court to the extent that the defence is recognised by the Common Law. For a comprehensive review of the law on this point see the article by Green, supra n. 4.

56 Dinstein, *The Defence of Obedience to Superior Orders in International Law,* (Leyden, 1965).

57 Ibid., 253.