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Mistakenly Obeying Unlawful Superior Orders

Abstract

A thorough analysis of the defence of superior orders reveals that it constitutes a plea of reasonably mistaken belief as to the lawfulness of an unlawful superior order. An exposition is made of the meaning of the expression 'manifestly unlawful' order contained in several statutory formulations of the defence. As for the common law, it is proposed that the High Court case of *A v Hayden* does not, contrary to popular opinion, deny the existence of a defence of superior orders. To further enhance our understanding of the defence, its statutory, and common law formulations are compared with the related plea of duress.

Keywords

defence of superior orders, *A v Hayden*

Cover Page Footnote

I am indebted to Stephen Odgers for his helpful comments on an earlier version of this article.

Articles

MISTAKENLY OBEYING UNLAWFUL SUPERIOR ORDERS

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Summary: A thorough analysis of the defence of superior orders reveals that it constitutes a plea of reasonably mistaken belief as to the lawfulness of an unlawful superior order. An exposition is made of the meaning of the expression 'manifestly unlawful' order contained in several statutory formulations of the defence. As for the common law, it is proposed that the High Court case of *A v Hayden* does not, contrary to popular opinion, deny the existence of a defence of superior orders. To further enhance our understanding of the defence, its statutory and common law formulations are compared with the related plea of duress.

The defence of superior orders has rarely been pleaded in Australia. This may be explained by the absence of any combat activity against alien military incursions into our territory; the possible cover-up of any appropriate instances by the military authorities; the exercise of prosecutorial discretion not to prosecute military personnel; and the ambiguities which surround the defence including whether it is recognised at all by the common law. This article attempts to clarify these ambiguities in anticipation of the time when the defence will be pleaded. That time may not be too long in coming in view of the growth of the police force as a para-military organisation.¹ We can envisage a member of a police tactical response unit claiming the defence in answer to a charge of injuring a civilian during a raid or while quelling a riot. Indeed, at a meeting of State police ministers in

* I am indebted to Stephen Odgers for his helpful comments on an earlier version of this article.

1 See Wardlaw, 'Police Tactical Units' in Swanton and Hanningan (eds), *Police Source Book*, Vol 2 (1986).

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May 1992, national guidelines proposed by the Federal Minister of Justice were adopted governing the use of firearms by the police.² One of these guidelines stipulates that police officers who use firearms to kill or maim suspects will be convicted of the relevant offence should the order complied with be manifestly unlawful and the police officers had a reasonable opportunity to reject it.

The nature of the defence will first be clarified since any misunderstanding at this basic level is bound to create misconceptions. This will be followed by a consideration of the elements of the defence as it appears in statutory form, notably, under the *Criminal Codes* of Queensland and Western Australia. It is here that the expression 'manifestly unlawful' comprises part of the defence definition, bringing with it a particular meaning which is not apparent from the expression alone. The common law position will then be discussed and the assertion made that the High Court has not, contrary to the opinion of leading commentators, denied the existence of a defence of superior orders. The article will conclude with several propositions and factors which make up the defence under both the Codes and the common law.

The Nature of the Defence

In this part, certain assertions will be made about the defence of superior orders. The relevant authorities supporting these assertions will be left to be discussed later.

The defence involves a reasonable mistake of law. The accused is pleading that he or she honestly and reasonably believed that the relevant order was lawful when, according to the ordinary laws of the land, it was unlawful. From this brief statement, we note that the defence is not concerned with a mistake of fact. While a mistake of fact may be relied upon to negative the mens rea of the offence charged, this is a separate plea from the defence of superior orders.³ Neither is the accused arguing that the order is lawful because it was given by a competent authority empowered to override the ordinary laws of the land. Put in another way, the defence is unavailable to a person who knows that the order was unlawful but believed that he or she was bound by law to obey it because it came from a superior authority.⁴

The preceding paragraph contains the central theme of this article. It is

2 23rd May 1992 in Melbourne. The adoption of the guidelines followed widespread community concern over the use of firearms by police in certain notorious cases. These guidelines were regarded by the meeting as laying down minimum standards which would have to be built upon by each State police force.

3 See Smith and Hogan, *Criminal Law* (6th ed 1988), p 249; Creighton, 'Superior Orders and Command Responsibility in Canadian Criminal Law' (1980) 38 *University of Toronto Faculty of Law Review* 1 at 6-7.

4 See Williams, *Criminal Law: The General Part* (2nd ed 1961), p 296-7. Contrast Creighton, *ibid* at 4-5.

that a distinction should be made between (a) a subordinate reasonably believing an order to be lawful according to the ordinary laws of the land, and (b) one who knows that an order was unlawful but who reasonably believed that it was legally justified because it emanated from a superior officer who was authorised to breach or override the ordinary laws. A defence is available to (a) but not to (b). The rationale for this distinction lies in the type of mistaken belief involved. In (a), the mistake is with respect to the ordinary laws, with the subordinate reasonably believing that the order complied with such laws when it did not. In (b), the mistake comprises a reasonable belief that the order was above the ordinary laws because it was authorised by an Executive power having constitutional backing to supersede those laws. The reason why (a) is defensible is because the ordinary laws of the land remain sacrosanct and envisages that the subordinate would have refused to obey the order had he or she known that it breached such laws. In contrast, to recognise (b) as a defence would be tantamount to making the Executive above the ordinary laws. Equipping the Executive with such an extensive power is an invitation to tyranny and runs counter to basic constitutional precepts.⁵

The focus of the defence is not on the order as such (the unlawfulness of which is not contested) but on the accused's belief as to its lawfulness. Viewed in this manner, the name 'superior orders' usually given to the defence is a misnomer as it conveys the idea that the accused is claiming to be exculpated because he or she obeyed an order which was superior to (or above) the ordinary laws of the land. Properly understood, the defence does not contradict the proposition that military-type personnel 'have a duty to obey lawful orders, and a duty to disobey unlawful orders'.⁶ The lawfulness or otherwise of the particular order is determined solely by the ordinary laws of the land and not by the Executive or its representatives. Consequently, the accused must desist from obeying an order which he or she reasonably believes to be unlawful. It will not assist such an accused to say that he or she thought that, although unlawful, the order was legally justified because it was given by a competent superior officer. All this explains the somewhat protracted title given to this article. It seeks to express the nature of the defence with greater precision than the term 'superior orders'.

By way of illustration, consider the case of a police constable who obeys his superior officer's command to force entry into premises to search for and seize certain goods. The superior knows that his order is unlawful as he lacks a search warrant to do so. Should the subordinate be charged with an offence, he will not be exculpated on the ground that he was simply obeying orders. Neither will he be acquitted should he claim that, while knowing the order to be unlawful under ordinary law, he believed that his superior was authorised to breach that law. However, the defence would be

5 See *A v Hayden (No 2)* (1984) 156 CLR 532 at 550 per Mason J; at 562 per Murphy J; and at 580 per Brennan J.

6 *Ibid* at 562 per Murphy J.

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available should the subordinate claim that the circumstances were such that he reasonably believed the order to be lawful according to ordinary law. For example, he might have been misinformed by the superior that a search warrant had been obtained.

The defence does not normally operate to negate the mens rea of the offence charged. This is because the vast majority of offences do not require an element of knowledge of the illegality of the conduct performed.⁷ Accordingly, there is no part of an offence which is negated by the accused's plea of mistaken belief in the lawfulness of her or his conduct. Under common law, were the defence to negate the mens rea of an offence, the accused's mistaken belief would only need to be honest (as opposed to reasonable as well) since such a belief renders absent a purely subjective guilty mental state.⁸ Under the Codes, such a belief would need to be both honest and reasonable.⁹

The defence functions more as an excuse.¹⁰ The accused acknowledges that the actus reus and mens rea for the offence are established but pleads that there exist certain extenuating circumstances which warrant exculpation from criminal responsibility. One such circumstance is the fact that military-type personnel are trained in automatic obedience and it would be unjust for the law to then penalise such personnel for acting in the way which the State itself has trained them to act.¹¹ In this regard, it is noteworthy that the defence is confined to those persons whose professions make them legally bound to obey their superior's orders.¹² Another extenuating circumstance is the difficulty confronting such personnel of having to decide, often within a very short space of time, whether the order was reasonably necessary and therefore lawful.¹³ Should the order turn out to be unlawful, the law should recognise both the training and dilemma of the subordinate by regarding the ensuing mistake as an excusing condition. The excusatory nature of the defence clarifies two matters. First, it explains why the defence contains an objective component of reasonable belief. Since all the offence elements have been established against the accused, conviction and punishment are

7 Creighton above n 3.

8 For a detailed judicial discussion of this proposition, see *DPP v Morgan* [1976] AC 182.

9 See *Criminal Code* 1899 (Qld), s 24; *Criminal Code Consolidation Act* 1913 (WA), s 24; *Criminal Code Act* (Tas), s 14; *Criminal Code Act* 1983 (NT), s 32. These provisions specify that all offences are subject to the Code defence of 'honest and reasonable mistake of fact' in the absence of legislative indications to the contrary.

10 Creighton above n 3 at 10-2.

11 Howard *Criminal Law* (2nd ed 1960) p 391.

12 Provided, of course, that the orders are lawful. In *Hunt v Maloney* (1959) Qd R 164 at 173, the Queensland Full Court, interpreting s 31(2) of the *Criminal Code Act* 1899 (Qld), gave as examples of professions covered by the defence soldiers, sailors, constables and gaolers.

13 See Waller and Williams, *Brett, Waller and Williams' Criminal Law: Text and Cases* (6th ed 1989), para 12.31.

warranted. In such a case, society is prepared to excuse the accused provided he or she held a belief which ordinary people could also have held.¹⁴ Secondly, the defence does not exculpate persons who blindly or unthinkingly obey orders.¹⁵ It is only available to persons who have deliberated upon the nature of the order and reasonably concluded that it was lawful according to the ordinary laws of the land.

The preceding discussion spells out the underlying rationale for the defence. It comprises the law's compassion towards subordinates who are in the difficult position of having to decide whether to comply with orders during military-type operations. Commentators have frequently cited the following comment by Dicey to illustrate the subordinate's dilemma: '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'.¹⁶ Another oft-quoted comment to the same effect is by Stephen.¹⁷ A closer analysis of these comments, however, reveals that they cloud rather than clarify the nature of the defence. They suggest that the defence is premised on the law taking into account the soldier's predicament of having to choose between obeying an order and suffering punishment from a criminal court and disobeying it and undergoing punishment imposed by a military court. This perpetuates the misconception that there are two conflicting sets of laws, one criminal and the other military, governing the lawfulness of a particular superior order. The correct position is that only the criminal law determines whether the order was lawful. Should a subordinate choose to disobey an unlawful order, neither a criminal court nor a military court will punish her or him. Conversely, should the subordinate obey an unlawful order knowing it to be so, he or she may be subject to punishment by both kinds of courts.

Statutory Formulations of the Defence

The Criminal Codes of Queensland and Western Australia provide for a defence of superior orders in the following terms:

A person is not criminally responsible for an act or omission, if he does or omits to do the act...[i]n obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful.¹⁸

The much more recent Northern Territory *Criminal Code* contains an almost identical provision.¹⁹ The Tasmanian *Criminal Code* has a similar

14 See further, Yeo, 'Private Defence, Duress and Necessity' (1991) 15 *Criminal Law Journal* 139 at 140-1.

15 See O'Connor and Fairall, *Criminal Defences* (2nd ed 1988) p 166.

16 Dicey, *The Law of Constitution* (10th ed 1959) at 303.

17 *History of the Criminal Law*, Vol 1 (1883) at 205.

18 *Criminal Code* 1899 (Qld), s 31(2); *Criminal Code Act Compilation Act* 1913 (WA), s 31(2).

19 *Criminal Code Act* 1983 (NT) s 26

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provision but in respect of the limited situation of military personnel acting in the suppression of a riot.²⁰ On its face, this statutory formulation seems to grant the defence to subordinates who knew the order to be unlawful provided the order was not manifestly unlawful. However, that this was not the legislative intention is borne out by an examination of the meaning of 'manifestly unlawful' order.

This expression appears in all these provisions. Given that there does not appear to be any Australian decision elucidating its meaning, resort may be had to common law authorities existing around the time when the Queensland Code was being drafted.²¹ This accords entirely with the way in which the draftsman, Sir Samuel Griffith, went about his task. He declared in a marginal note alongside the provision that it was a pronouncement of the common law.²² At the time, the leading English statement on the defence was by Willes J in *Keighly v Bell* and was to this effect:

an officer or soldier acting under the orders of his superior - not being necessarily or manifestly illegal - would be justified by his orders.²³

This statement was relied on by Solomon J in the South African Supreme Court case of *R v Smith* who concluded:

I think it is a safe rule to lay down that 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 they were unlawful, the private soldier would be protected by the orders of his superior officer.²⁴

The above comment in *Smith* can be compared with another statement by Willes J in a case called *R v Trainer*.²⁵ In *Trainer*, which was decided two years before *Keighly v Bell*, his Honour had this to say:

[I]n a criminal case an inferior officer must be justified in obeying the directions of a superior, not obviously improper or contrary to law - that is, if an inferior officer acted honestly upon what he might not unreasonably deem to be the effect of the orders of his superior, he would not be guilty of culpable negligence, those orders not appearing to him at the time, improper or contrary to law.²⁶

From these judicial statements, we observe that the defence is confined to

20 *Criminal Code Act 1924* (Tas), s 38. See also *Criminal Code 1899* (Qld), s 265; *Criminal Code Act Compilation Act 1913* (WA), s 265.

21 The Queensland Code formed the model for the Codes of the other Australian code jurisdictions.

22 *Journals of the Legislative Council of Queensland* Vol XLVII (Pt 1), CA 89-1897 at 16.

23 (1866) 4 F & F 763 at 790; 176 ER 781 at 793.

24 (1900) 17 SC 561 at 568 (Capetown) and approved of in *R v Celliers* [1903] High Court of the Orange River Colony 1; Cf *R v Werner* 1947 (2) SA 828 (AD) which criticised *Smith* for implying that a mistake of law could provide a defence.

25 (1864) 4 F & F 105; 176 ER 488.

26 *Ibid* 105 at 111-3; 488 at 491.

situations where the subordinate honestly and reasonably believed the order to be lawful when it was not. Some earlier authorities might have suggested that the defence was available to a subordinate who knew the order to be unlawful but who believed that her or his superior was legally authorised to breach the law.²⁷ However, this expression of the defence has been eclipsed by the later authorities.²⁸

Sir Samuel Griffith would probably have also relied on United States decisions in force around the time when the Queensland Code was being drafted. A leading case is *McCall v McDowell* where the court said:

Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law will excuse a military subordinate, when acting in obedience to the order of his commander.²⁹

This comment was regarded by the Supreme Court of Pennsylvania at the turn of the last century to be 'in entire accord with the long line of established authorities in England'.³⁰ Unfortunately, the court did not specify these authorities although it can be confidently assumed that *Trainer* and *Keighly v Bell* would have been amongst them.

In these cases, we note the use of expressions like 'manifestly illegal', 'obviously contrary to law' and 'apparent and palpable illegal order' which convey the same meaning as 'manifestly unlawful' found in the various Australian provisions. These judicial statements clarify the meaning of that expression by showing that it not concerned with the nature of the unlawful order *per se*, but with the accused's belief or perception of the unlawfulness of that order. As the judicial statements indicate, the adjective 'manifestly' relates to the reasonableness of such a belief, the notion being that if the order was palpably wrong, the belief would have been unreasonably held and, consequently, the defence would fail.

More recently, an instructive definition of 'manifestly unlawful' order was handed down by the Israeli Courts. That expression appears in a provision of the Israeli *Criminal Code* 1936 which is virtually identical to the Queensland and Western Australian defence of superior orders.³¹ In the course of its judgment, the Israeli Military District Court in *Chief Military Prosecutor v Melinki* noted the English case of *Keighly v Bell* where the expression 'manifestly unlawful' first appeared. The court went on to rule that:-

27 For example, *Kidd's case* (1701) 14 St Tr 147.

28 It will later be shown that the High Court in *A v Hayden (No 2)* (1984) 156 CLR 532 was only concerned with rejecting this expression of the defence.

29 (1887) 1 Abb 212 at 218 per Deady DJ.

30 *Commonwealth ex rel Wadsworth v Shortall* (1903) 55 Atl 952 at 957 per Mitchell J, after reviewing this and other passages from several American decisions.

31 Section 19(b). Having formerly been under British administration, much of Israeli law is based on principles of English common law.

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The distinguishing mark of a 'manifestly unlawful order' should fly like a black flag above the order given, as a warning saying 'Prohibited'. Not formal unlawfulness discernible only by the eyes of legal experts, is important here, but a flagrant and manifest breach of the law, definite and unnecessary unlawfulness appearing on the face of the order itself; the clearly criminal character of the acts ordered to be done, unlawfulness piercing to the eye not blind nor the heart stony and corrupt - that is the measure of 'manifest unlawfulness' required to release a soldier from the duty of obedience upon him and make him criminally responsible for his acts.³²

This definition was later endorsed by the Military Court of Appeal³³ and formally became part of Israeli criminal law when the Supreme Court adopted it in *Attorney-General of Israel v Eichmann*.³⁴

A variation of the 'manifestly unlawful' defence provision is contained in the *Defence Force Discipline Act 1982* (Cth). Section 14 provides that a person is not liable for a service offence

by reason of an act or omission that...was in obedience of...an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful.³⁵

This wording is to be preferred as it clearly expresses the crux of the defence which is the honest and reasonable mistaken belief of the accused as to the lawfulness of the order. Furthermore, the unlawfulness of the order is not left in any doubt. A suggestion has been made that the 'manifestly unlawful' formulation is more generous towards the accused than the one contained in the Commonwealth provision because the reasonableness of the accused's belief is gauged by the yardstick of manifest unlawfulness of the order.³⁶ That may be so, although when assessing the reasonableness of the belief under the Commonwealth formulation, account will doubtless be taken of the exigencies of the situation confronting the accused. To borrow from the law of self defence, when assessing whether the belief was reasonably held, the courts will take into account 'any excitement, affront or distress that the accused might have experienced'.³⁷ Given that the subordinate would be operating under this tense and emotionally charged state which would

32 *Jerusalem Post*, at 16-8, October 1958; at 22, 24, November 1959. For a full presentation of the case at trial and appellate levels, see Green, *Superior Orders in National and International Law* (1976) at 99-103.

33 Appeal Court Martial 1959.

34 (1961-1962) 36 International Law Reports 177 at 256-7.

35 This provision appears to have adopted the terminology of the United States' Army *Field Manual 27-10* (1956) para 509 of which states:

The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character as 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.

36 Fisse *Howard's Criminal Law* (5th ed 1990) at 555.

37 *R v Wills* [1983] 2 V R 201 at 211 per Lush J. See further, Yeo, 'Self-Defence: from *Viro to Zecevic*' (1988) 4 *Australian Bar Review* 251 at 263-5.

affect her or his assessment of the order, it may be that the effect would be the same as the manifestly unlawful formulation. That is, the courts would make a finding of reasonable belief only when the order was blatantly unlawful.

The point about attributing the accused with the emotional state experienced by her or him at the time of obeying the order leads us to a further clarification of the defence. When assessing whether there was a reasonable belief as to the lawfulness of the order, account should be taken of certain characteristics of the particular subordinate such as her or his training, experience and rank in the force. This accords with the development of the ordinary person test in the law of provocation. When determining whether an ordinary person might have lost self-control as a result of provocation, certain personal characteristics of the accused which affect the gravity of the provocation are attributed to the ordinary person.³⁸ Hence, the response, say, of a reasonable soldier to superior orders is subjectivised to the same extent as the reaction of an ordinary person to provocation. In the absence of Australian and English authorities on this point, reference may be made to the United States Military Appeal Court case of *US v Calley*.³⁹ Dealing with the defence of superior orders contained in the United States Army *Field Manual*, Darden CJ said:

the correct instruction for the jury when the defence of superior orders is in issue [is]... that, despite his asserted defence of superior orders, an accused may be held criminally accountable for his acts, allegedly committed pursuant to such orders, if the court members are convinced beyond a reasonable doubt (1) that almost every member of the armed forces would have immediately recognised that the order was unlawful, and (2) that the accused should have recognised the illegality as a consequence of his age, grade, intelligence, experience and training.⁴⁰

This is the sort of direction which the courts in the Code jurisdictions should adopt when instructing juries on the element of reasonable belief as to lawfulness of the order. And it should not be thought that such subjectivising of the reasonableness requirement creates a more lenient defence. To the contrary, the subordinate will be judged by the standards of the community plus the higher standards imposed on military personnel as a result of her or his being an official arms bearer of the State. As one commentator has put it, we 'would expect a soldier to know more about the Geneva Convention than a citizen'.⁴¹

The nature of the defence of superior orders may be further elucidated by comparing it with the closely related defence of duress, or compulsion as it is

38 The leading Australian decision is *Stingel v R* (1990) 171 CLR 312 See *Laws of Australia: Homicide* (Fisse ed) (1992) para 4-[18].

39 (1973) 1 Mil Law Reporter 2488.

40 Ibid at 2494.

41 Anderson 'The Defence of Superior Orders' (1981) 126 Royal United Services Institute Journal 52 at 54.

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known in some Code States. Compulsion under the Queensland and Western Australian Codes includes the following features: the accused had committed the act constituting the crime charged (i) under threat of immediate death or grievous bodily harm; (ii) the threat was made by a person actually present and in a position to carry out the threat; and (iii) the accused believed herself or himself to be unable to escape the carrying out of the threat.⁴² The defences of compulsion and superior orders both concern someone threatening the accused into committing an offence. In respect of compulsion, the threat is of physical violence while in relation to superior orders the threat takes the form of punishment imposed by a military court. Both defences make it crucial for the accused to have reasonably believed that the threat will be carried out. For compulsion, such reasonable belief is made out by requiring the threatener to have been actually present and to have threatened the accused with immediate violence.⁴³ While the third feature of the defence presented above involves a purely subjective belief, it concerns a duty to escape which is a separate matter to be considered after having concluded that the threat was reasonably believed to be real.⁴⁴ With regard to superior orders, the prospect of being punished by a military court can only arise in the accused's mind upon a belief that the order was lawful. This is because a court martial would only proceed should a lawful order be disobeyed. Here again, we note that the mistaken belief pertains to the lawfulness of an order; the defence is inapplicable in a case where the accused knows that the order was unlawful.⁴⁵ As with the defence of compulsion, the accused's belief as to the lawfulness of the order must be based on reasonable grounds. The similarities between the two defences has been succinctly stated thus:

The legitimacy of the perception that one must obey must be based on external facts, namely, an order not clearly illegal. Likewise, the legitimacy of a perception that one must commit an offence because of duress [ie compulsion]

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42. *Criminal Code 1899* (Qld) s 31(4); *Criminal Code Consolidation Act 1913* (WA) s 31(4). The provision on compulsion in the *Tasmanian Code* (s 20(1)) is similar. Contrast the defence of duress under the *Northern Territory Code* (s 40).
43. The *Tasmanian Code* speaks of the accused 'who believes that such threats will be executed'. However, like the Queensland and Western Australian provisions, it requires a person actually present to have threatened the accused with immediate death or grievous bodily harm. These other features inevitably inject the element of reasonableness into the accused's belief that the threat will be carried out.
44. The *Tasmanian* provision does not contain such a feature. However, it has been suggested that the requirement of the accused's belief that the threat will be executed (see *ibid*) has the same effect: see O'Regan, *Essays on the Australian Criminal Codes* (1979) at 119.
45. In this regard, the recently adopted national guidelines on the use of police firearms, above note 2, contain an incongruity. The guideline on superior orders states that the defence is unavailable should the order have been manifestly unlawful *and* there was a reasonable opportunity to reject the order. If a police officer honestly and reasonably believed the order to be unlawful, he or she should desist from complying with it, and it should be immaterial whether or not there was a reasonable opportunity to reject the order. This is because the order being unlawful and known to be so by the subordinate, no disciplinary action can be expected for disobeying it.

must be based on certain external facts, to-wit, a threat of serious bodily harm.⁴⁶

Hence, it is the external facts mentioned in this comment which give the accused's perception of the event the quality of reasonableness.

The Defence at Common Law

Many current commentaries opine that the defence of superior orders does not exist at common law.⁴⁷ However, the sources of authority for this opinion are suspect. Under English law, reliance is often placed on the 1944 edition of the British *Manual of Military Law* and its subsequent editions including the present. By way of criticism, Professor Glanville Williams has noted that the defence was recognised in the editions of the manual before 1944.⁴⁸ The alteration made that year was not on account of existing authority but specifically to avoid the incongruity between domestic military law and the Charter of the International Military Tribunal (the Nuremberg Charter). That Charter specifically prohibited Second World War criminals from relying on the defence. As for common law authorities supporting the position taken in the pre-1944 edition of the manual, we have already noted the cases of *Trainer*, *Keighly v Bell* and *Smith*. Unfortunately, present English courts have ignored these authorities.⁴⁹

Under Australian common law, the authority for not recognising the defence is said to be the High Court case of *A v Hayden (No 2)*.⁵⁰ It is submitted that the case does deny one possible expression of the defence but that it leaves unsaid another and more significant expression of the defence. The part which the case rejects is a plea by a subordinate that, while knowing the order to be unlawful under the ordinary laws of the land, he or she reasonably believed the superior to have been legally authorised to breach those laws.⁵¹ The High Court correctly observed that to allow such a plea would be tantamount to enabling the Executive and its representatives to transcend the ordinary laws of the land. As Murphy J declared:

[s]uch a proposition is inconsistent with the rule of law. It is subversive of the

46 Creighton above n 3 at 15.

47 For example, see Howard (5th ed) above n 11 at 555; O'Connor and Fairall above n 15 at 166; Smith and Hogan above n 3 at 249; Brownlee, 'Superior Orders Time for a New Realism?' (1989) *Criminal Law Review* 396 at 407.

48 Williams above n 13 at 299-300.

49 For example, in *R v Howe* [1987] 1 AC 417 at 426, Lord Hailsham LC simply declared that Article 8 of the Nuremberg Charter (which states that obedience to superior orders is not a defence) 'is an accurate statement of the common law both in England and the United States of America'. Contrast this with the opinion of the Supreme Court of Pennsylvania in *Commonwealth ex rel Wadsworth v Shortall* cited in the main text accompanying n 30 above.

50 (1984) 156 CLR 532. Hereinafter called 'Hayden'.

51 This was described as (b) at the outset of this article when the nature of the defence was presented.

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Constitution and the laws. It is in other countries, the justification for death squads.⁵²

The High Court did not consider a second expression of the defence. This involves the case of a subordinate who reasonably believes the order to have been in compliance with the ordinary laws of the land. Here, the subordinate is not claiming that he or she thought the order was unlawful but that the superior had authority to override it. Rather, the subordinate claims to have mistakenly believed the superior to have issued an order which was lawful according to ordinary law.⁵³ This is essentially the defence appearing in the Code jurisdictions and cases such as *Trainer, Keighly v Bell and Smith*. After *Hayden* then, the common law position on the defence of superior orders seems to be as follows: there can be no defence if a subordinate mistakenly believes, even reasonably, that the Executive has a prerogative 'dispensing power' to relieve persons of obligations under the ordinary laws of the land, whereas there can be a defence if the subordinate mistakenly believes on reasonable grounds that the ordinary laws of the land authorises the superior officer to make the order.

The misreading of *Hayden* as denying a defence altogether stems from a failure to differentiate the two expressions of the defence mentioned above. The judicial declaration that the Executive cannot be above the law is pertinent to the first expression of the defence but not to the second. Under the second expression, the subordinate's mistaken belief is not that the superior was above the law but that the subordinate reasonably believed the order to have been in accordance with the law. Such a misreading appears in the following comment by the Review Committee charged with codifying Commonwealth criminal law:

Although it seems harsh to punish a person for obeying an order which that person did not know, and could not reasonably have known, was unlawful, such situations are not likely to arise often. In any case, the Review Committee regards it as fundamental to the rule of law that neither the executive nor any superior officer can authorise a breach of the law.⁵⁴

Contrary to the Committee's view, the subject-matter contained in these two sentences are quite unrelated. The initial sentence covers the second expression of the defence which is basically the plea found in the Code jurisdictions and some common law cases. The latter sentence specifies the reason for refusing to exculpate persons who claim that the superior officer was authorised to breach the law. This has nothing to do with the second expression of the defence.

52 Ibid at 562. See also at 550 (per Mason J) and at 580 (per Brennan J). For a fuller discussion of the principles involved, see Brownlee above n 47 at 408-411.

53 This was described as (a) earlier on in this article when presenting the nature of the defence.

54 Interim Report, *Principles of Criminal Responsibility and Other Matters* (1990) para 13.7.

Another instance of the failure to appreciate the two expressions of the defence is to be found in *Howard's Criminal Law*.⁵⁵ In the following passage, Professor Fisse, the current editor, comments on the Queensland and Western Australian formulation of the defence:

[T]he section does not exculpate D if he obeys an order which he knows to be unlawful merely because it is not manifestly so. The assumption must be made that D either does not know of the unlawfulness of the order or does know but obeys nevertheless. If this is correct the effect of s 31(2) lays down a rule that D is excused for obeying an order which he reasonably believes to be lawful.⁵⁶

This comment is difficult to comprehend. It is incorrect in so far as it asserts that the defence applies to a case where D *knows* of the unlawfulness of the order but obeys it nevertheless.⁵⁷ The recognition of such a defence effectively empowers the Executive to override the ordinary laws of the land. But the comment is entirely right if it aims to confine the defence to cases where the accused *did not know* the order to be unlawful but reasonably believed that it was. Further along in the same discussion, Professor Fisse refers to the holding in *Hayden* and concludes by noting that no reference was made by the High Court to 'the contrary position' under the Queensland and Western Australian Codes.⁵⁸ This is inaccurate. Rather than taking a contrary position, *Hayden* was concerned with an expression of the defence which was separate or different to that contained in the Codes.

The distinction between the two expressions of the defence may be usefully borne out by the facts in *Hayden*. Several agents of the Australian Secret Intelligence Service (ASIS) participated in a training operation to rescue a 'hostage' held by other ASIS agents in a hotel room. In carrying out the operation, damage to property and assaults to hotel staff and guests occurred. There was evidence that the agents believed that sufficient legal authority would be provided by their superiors for what was done. On these facts, the High Court properly ruled that there was no defence of superior orders as such a defence would empower the Executive and its officers to breach the law. The High Court might have decided differently on another set of facts. Let us assume the rescue operation to have been a real one and the agents were pleading that they reasonably believed that the action taken to rescue the hostage was reasonably necessary and in accordance with ordinary criminal law. It turns out that, motivated by personal ill-will, their superior officer had directed them to a different hotel which would have rendered his order unlawful. Conceivably, on these facts, the High Court would have found in favour of recognising the defence and acquitting the agents. The defence would succeed had the agents, say, believed that they were involved in a genuine rescue operation, depended on their superior officer to direct them according to additional information which only he

55 Above n 11.

56 Ibid at 555. This passage also appears in the 4th edition.

57 This error is also made by Creighton above n 3 at 4-5.

58 Above n 11 at 555.

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possessed, and were unaware of their superior's bad intentions towards the particular hotel where the operation occurred.

Apart from *Hayden*, the only other consideration by a judicial officer of the defence under Australian common law was by Hope J. The learned judge considered the defence when he conducted an extensive review of domestic security laws on behalf of the Commonwealth government following the Sydney Hilton bombing and the deployment of troops in support of civil authorities thereafter.⁵⁹ Having noted its existence in the Code States, Hope J decided not to express a final opinion on the availability of the defence under common Law, preferring it to be developed further by the courts.⁶⁰ While *Hayden* was decided a few years later, we have already observed that the High Court did not really reject the defence in so far as it takes the form of a reasonably mistaken belief that the order was lawful.

How then might the common law defence of superior orders be expressed? One option would be to borrow the 'manifestly unlawful' formulation of the Code States. As we have noted, however, the meaning of the expression 'manifestly unlawful' is not apparent on its face and is wrongly focused on the nature of the order rather than on the accused's belief. Accordingly, the preferred option is to express the defence in terms of the accused's honest and reasonable belief as to the lawfulness of the order. This would also bring the defence into line with its close relation, the defence of duress at common law. In the English Court of Appeal case of *R v Graham*, the accused's belief as to the threat being carried out was stated in the following way:

Was the defendant, or may he have been impelled to act as he did because, as a result of what he reasonably believed [the threatener] to have said or done, he had good cause to fear that if he did not so act [the threatener] would kill him or...cause him serious physical injury?⁶¹

By recognising a defence of superior orders at common law, consistency in the law is achieved in another significant respect. Injustice would be avoided by ensuring that the defence is available in every Australian jurisdiction. The *War Crimes Act 1945* (Ch) illustrates this well.⁶² Under section 16 of the Act, it is not a defence for a person to assert that he or she acted under governmental or superior orders.⁶³ However, the section is subject to subsection 6(2) and subsection 13(2) which preserve the defences

59 *Protective Security Review Report* (1979).

60 *Ibid* at 168-9.

61 [1982] 1 WLR 294. The South Australian Court of Criminal Appeal in *R v Palazoff* (1986) 43 SASR 99 at 109 referred to *Graham* with approval but on another issue.

62 As amended by the *War Crimes Amendment Act 1988* (Cth).

63 The section reads: 'Subject to subsections 6(2) and 13(2), the fact that, in doing an act alleged to be an offence against this Act, a person acted under orders of his or her government or of a superior is not a defence in a proceeding for the offence, but may, if the person is convicted of the offence, be taken into account in determining the proper sentence.'

existing in the jurisdiction where and at the time when the alleged crime was committed. It follows that a person who has committed a war crime in Queensland would have the benefit of the defence under subsection 31(2) of the Queensland Code. The same person would be denied such a plea had the crime been done, say, in New South Wales should the defence not be recognised at common law. To circumvent this anomalous and unjust result, the defence should be recognised at common law as well. In line with the High Court's recent efforts at achieving consistency in the criminal law of Code and common law jurisdictions,⁶⁴ the court should emphatically recognise the defence of superior orders when the next opportunity arises, putting to rest any misconceptions arising from *Hayden*.

While on section 16 of the *War Crimes Act*, it is possible to argue that the provision only denies a defence which empowers the Executive and its officers to override the ordinary laws of the land. The section leaves untouched and unsaid the defence of reasonable mistake of law which is that the accused honestly and reasonably believed in the lawfulness of the order, not because it came from a superior whom he or she believed was authorised to breach the law, but because the particular circumstances made obeying the order reasonable. Hence, the section only covers that expression of the defence which was rejected by the High Court in *Hayden*.

Concluding Remarks

The greatest reservation to recognising a defence of superior orders is that it constitutes an exception to the general rule that mistake of law is not an excuse.⁶⁵ This exception may be justified on account of the peculiar position of those select categories of persons who can plead the defence. These persons belong to professions in which they are specially trained by the State to obey orders. In obeying what is perceived to be a lawful order, such persons honestly and reasonably believe that they are carrying out the will of the State and, consequently, the State should be solicitous of them. Furthermore, these persons would be operating under the belief that to refuse to obey a lawful order would subject them to punishment by a military court. Persons who do not belong to these special professions would not feel so bound to obey orders and would not contemplate the possibility of punishment for refusing to obey them.⁶⁶ Then, there is the particular context in which the orders are usually given - the situation would often be tense and dangerous, requiring an immediate decision to be made by the subordinate with little information to go on, coupled with a reasonable belief that the superior knows more about the situation than the subordinate does. As an American judge has said:

64 For example, see *Zecovic v DPP* (1985) 162 CLR 645 (on excessive self-defence); *Falconer v R* (1990) 171 CLR 30 (on automatism); *Stingel v R* (1990) 171 CLR 312 (on provocation).

65 See Smith and Hogan above n 3 at 250.

66 *Hunt v Maloney* (1959) Qd R 164 at 173 per Stanley.

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Between an order plainly legal and one palpably otherwise - particularly in time of war - there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions of which it cannot be expected that the inferior is informed or advised. In such cases, justice to the subordinate demands...that the order of the superior should protect the inferior; leaving the responsibility to rest where it properly belongs - upon the officer who gave the command.⁶⁷

The last point mentioned in the above passage concerning the responsibility of superior officers is a significant one and, indeed, some commentators have gone so far as to regard it as another ground for recognising the defence. The argument is that acquitting the subordinate results in the absence of a convenient scapegoat and thereby promotes an examination of the accountability of senior persons in the hierarchy of command.⁶⁸

In conclusion, there are sound reasons for retaining a defence of superior orders in the Code jurisdictions and for recognising the defence at common law. Given the existence of the 'manifestly unlawful' formulation in various Code jurisdictions, any development of the law in Australia would naturally be influenced by this formulation.⁶⁹ Accordingly, the following propositions utilise the formulation in presenting the salient features of the defence:⁷⁰

- (1) Should an order be unlawful and the subordinate *actually* knows it to be unlawful, he or she cannot rely on the defence regardless of whether the order is manifestly unlawful or not.
- (2) Should an order be unlawful but not manifestly so, the subordinate will be protected against charges if he or she honestly and reasonably believed the order to be lawful.
- (3) Should an order be manifestly unlawful but the subordinate believes it to be lawful, he or she cannot be protected by the defence as once the order is manifestly unlawful, the subordinate cannot have *reasonably* believed it to be lawful.

When deciding the reasonableness of the subordinate's belief that the order was lawful, the court should consider the following factors:⁷¹

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- 67 *McCall v McDowell* (1887) 1 Abb 212 at 218 per Deady DJ.
 - 68 Brownlee above n 47 at 409-10; Creighton above n 3 at 21.
 - 69 Although it has been suggested in this article that the defence should preferably be couched in terms of an honest and reasonable belief as to the lawfulness of an order.
 - 70 Adapted from Lee, *Emergency Powers* (1984) at 246 who reached a similar conclusion about the need for a defence at common law after examining the existing authorities.
 - 71 Some of these factors are derived from the Israeli case of *Chief Military Prosecutor v Melinki* as presented in Green above n 32 at 101-2. One factor of the Israeli court which has been omitted is: 'whether the subordinate was in fear of death or actual physical injury should he refuse to obey'. Should the source of the harm be the superior, the appropriate defence is duress. Likewise, duress should cover the incongruity pointed out in n 45 above, should the unreasonableness of rejecting the order be due to the superior threatening the subordinate with immediate violence.

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- (a) the relative ranks of the superior officer and the recipient of the order;
- (b) the age; rank, experience, intelligence and training of the subordinate;
- (c) whether the subordinate had good grounds to consider the order lawful, and whether he or she might consider that the superior had such grounds of which he or she was unaware;
- (d) whether the subordinate had time to clarify in his or her own mind, given the circumstances, whether the order was unlawful; and
- (e) whether there was a situation of emergency at the time when the order was given.