OBEYING ORDERS: Atrocity, Military Discipline, and the Law of War

By Mark J. Osiel
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Reviewed by Col. Charles J. Dunlap, Jr., USAF

In many respects, Professor Mark Osiel’s book could not be more timely. It seems that almost daily we are seeing new reports of appalling atrocities being committed somewhere in the world by members of uniformed organizations of some sort. Even though virtually every military code extant criminalizes such behavior (and often provides draconian penalties for breaches), armed conflicts from Rwanda to the Balkans to Chechnya are increasingly characterized by horrific crimes against noncombatant civilians, prisoners of war, and others.

Legal responses to such atrocious conduct have met with mixed success. Indeed, it is melancholy to note that the enactment of the Geneva Conventions of 1949 — the most comprehensive set of agreements aimed at preventing atrocities ever attempted — has not stopped the slaughters; in fact, civilians in contemporary conflicts are statistically more at risk than soldiers. Nearly 90% of those killed in today’s wars are reportedly noncombatant civilians. Moreover, while international tribunals convened to address offenses occurring in Rwanda and in the former Yugoslavia have managed to bring to justice a few war criminals, the worst culprits have thus far escaped accountability.

In truth, dealing with atrocities is a difficult issue that can transcend law. Despite the publicity associated with the Nuremberg and Tokyo war crimes trials after World War II, most experts agree that a relatively small number of those likely responsible for serious offenses were ever prosecuted. Given the astonishing numbers of people involved in some atrocity cases today — thousands in Rwanda and the Balkans for instance — one might validly inquire whether any court of law can hope to be effective or comprehensive. A non-traditional solution outside of the judicial process — such as South Africa’s Truth and Reconciliation Commission1 — may well be a more realistic way of addressing cases of pervasive atrocity.

Professor Mark Osiel, a distinguished law professor at the University of Iowa, is not deterred by the Sisyphean nature of the atrocity problem writ large. Rather, he chooses to approach the issue by examining the impact of military disciplinary codes on the thought processes of individual combatants. In his estimation the legal rules concerning a soldier’s obligation to obey orders can allow those who commit war crimes to wrongly escape the courtroom. Specifically, he critiques the legal regime found in most military codes — including that of the U.S. — that holds that a superior’s orders “may be inferred to be lawful and…disobeyed at the peril of the subordinate.” Moreover, he finds inadequate the existing limitations that stipulate that the inference “does not apply to a patently illegal order, such as one that directs the commission of a crime.” In Osiel’s opinion, excusing those who follow orders that result in atrocities except in cases where the illegality is “manifest” does not sufficiently incentivize military personnel to question their superior’s suspect directives.

Osiel proposes to “civilianize” military law by replacing the current rule with one that

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1. For information about the Truth and Reconciliation Commission, see http://www.truth.org.za.
3. Ibid.

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requires members of the armed forces to “disobey illegal orders, qualified by a general standard-like exception, unless reasonably convinced of their legality.” He argues that this “value-oriented approach” would foster “situational” calculations and, in fact, calls upon military members to “deliberate with fellow soldiers about the legality of orders.” If after this deliberation it appears reasonable that the order was lawful and the member thereafter complies with it, then no culpability would accrue for the consequences of compliance even if the order later proves to be unlawful. He calls his proposal a “reasonable error rule.”

Osiel comes to his proposal by an approach that is interdisciplinary and exhaustive. To support his argument, he plumbs works ranging from contemporary newspaper reports to the ancient classics. In doing so, he presents a cornucopia of often-fascinating ideas and anecdotes that frequently transition into discussions of collateral issues. Regrettably, the relationship of some of these segues to his central thesis is not always clear. His obviously rich intellect attempts, perhaps too much so, to examine a multitude of contexts. Too often this does little to bolster his premise. The causes and motivations surrounding atrocities committed by, for example, the Wehrmacht on the Eastern Front during World War II, or the Argentinean military during the “dirty war” of the 1970s or, for that matter, by American soldiers during the Vietnam War, speak less to the realities of operations conducted by the modern militaries of developed nations in the 21st century than Osiel seems to recognize.

Out of Synch with Today’s Time Crunch?

Herein lies a key problem with the book. As he candidly admits, Osiel does not himself have military experience. Although he heroically examines a phenomenal amount of military literature, and evidently conducted a number of interviews of active duty military personnel, many veterans and serving officers still may find the effort falls short of full comprehension of the military environment. He never adequately explains, for example, how the deliberation process he espouses could realistically be accommodated in today’s situation where emerging technologies are exponentially accelerating battle rhythm while simultaneously shortening decision cycles.

Osiel’s answer to this obvious “time crunch” issue is ultimately unconvincing. He merely asserts that “virtually all veterans report that soldiering is mostly an experience of waiting and watching.” Based on such reports he concluded that “there is plenty of time for soldiers to consider and discuss the implications of what they have recently done and what they are likely to be ordered to do again.” Even assuming that this “waiting” time exists as Osiel conceives it, how can one be assured that it will be available at the precise moment for deliberation that his proposal requires? Once one concedes—as he does—that the absence of time may factor into the “reasonableness” of the reflection his proposal mandates, the distinction between his plan and current practice rapidly fades.

He further argues that the deliberation he calls for prior to the obedience of orders mirrors the decentralized “initiative and ingenuity” modern militaries seek to encourage at the tactical level. This logic seems to miss the mark. While good leaders ordinarily should fashion orders in such a way that subordinates are able to productively employ initiative and ingenuity, it does not follow that the very orders that define the parameters for doing so, or require explicit responses, should themselves be questioned (absent patent illegality). Likewise, the illustrations he offers for how his proposal might apply in practice do not always ring true. For example, he posits the well-worn scenario where pilots are instructed to use high-explosive ordnance to attack artillery and missile installations located on top of earthen dikes. Such an attack, the scenario goes, would destroy the dike and kill noncombatants in the ensuing flood. (The time-honored solution is to use anti-personnel munitions that leave the dike intact.) Under Professor Osiel’s conception, the pilots cannot presume the legality of the order even though it is not patently illegal (there could be many valid reasons to use high explosives), but rather must insist upon an “adequate” explanation for the order or risk prosecution.

If the luxury of time for an explanation were available in such a case, it is not at all clear that experienced military professionals would conclude that Professor Osiel’s proposal would generate any different discussion than would
take place in any event. Changing military law does not necessarily inject reasonableness into military operations that would otherwise be absent. In fact, there is little to support the notion that cognizance of technical definitions in criminal codes plays much of a role in compelling moral and ethical conduct in war. At any rate, the dynamics of actual combat operations, the dictates of operational security, and the complexity of a genuinely "adequate" answer would seldom allow the kind of inquiry Osiel stipulates.

Does this mean the U.S. pilots have a cavalier attitude toward the use of force or their legal obligations? Of course not. Rather, it is a reflection of the faith that pilots have in the many disciplines — from intelligence officers to planners to legal officers — that support the execution of combat missions. Those familiar with the targeting process would understand the extensive vetting that the air tasking order undergoes. For very good reasons, pilots readily assume that the process will ensure that what they are being asked to do complies with international law. In other words, military operations of all kinds are built on a measure of trust that does not require "deliberating" upon the legitimacy of every directive. Absent proof that this trust is misplaced, Professor Osiel's proposal is not only unneeded but might actually have the unintended consequence of creating an atmosphere of distrust that undermines military effectiveness. Additionally, focusing on the pilot at the end of the chain to question the appropriateness of an order may serve to diminish the sense of responsibility currently assumed by those elsewhere in the targeting cycle, a circumstance unlikely to deter war crimes.

Indeed, one gets the uneasy sense from the book that it proposes a solution in search of a problem. Is mandating deliberation really necessary? How many war crimes are occurring — and how many perpetrators are escaping punishment — because the actor successfully pleads a failure to recognize the patent illegality of the order that resulted in an atrocity? There appear to be few instances where this presents a genuine dilemma or fails to reach what Osiel would characterize as "atrocity." Osiel defines it as involving "the deliberate harming of known noncombatants (and their property)." In his infamous court-martial for the 1968 My Lai massacre, then-Lt. William L. Calley, Jr. contended that he acted in execution of Capt. Ernest Medina's alleged order to "kill everyone" in the village. On appeal, Calley's lawyers argued he was a person of "commonest understanding" and therefore might not have recognized the illegal nature of the order. The Court of Military Appeals dismissed this contention almost out of hand by finding that even if Calley "was the most ignorant man in the United States Army in Vietnam," he must be presumed to know that it was illegal to summarily execute helpless civilian captives. 4

Despite the problematic nature of his proposal, Professor Osiel's book is still an important contribution to the literature of military law. This well-written treatise is one of the very few recent attempts by a civilian scholar to conduct an unbiased analysis of military disciplinary policies. Clearly, his book is a refreshing authentic intellectual approach to a difficult issue. As conscientious soldiers, sailors, and airmen find themselves ever more frequently in extremely complex international situations involving the use of force, Professor Osiel's text is sure to be considered an important contribution to the legal infrastructure that produces answers to the emerging questions. That some might disagree with his proposal is almost immaterial, as its complexity and richness stimulates a level of critical thinking that is much needed. This volume deserves a place on the bookshelves of everyone concerned with the ethical — and effective — conduct of war.