



Civil Liability for Military Orders

Argentina • Bolivia • Chile • Guatemala
Haiti • Honduras • Peru • El Salvador

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ARGENTINA

The principle of *due obedience* (*obediencia debida*) is a longstanding and basic principle in military law. It requires a subordinate to follow an order, within the scope of the military service, issued by his superior in rank. Under the CODE OF MILITARY JUSTICE,¹ if, because of the execution of such order, a crime is committed by the subordinate, the superior is responsible for the crime unless the subordinate exceeded his responsibility in the execution of the order. In such a case, the subordinate is responsible as an accomplice to the crime.²

Under the CRIMINAL CODE,³ due obedience is considered as an excuse for criminal liability.⁴ This criminal excuse is based on the fact that the subordinate was *obliged* to obey and not in the fact that he obeyed. Therefore, a subordinate is required under military law to comply with an order if it is given by a superior within the context of military service. The subordinate is not allowed to question such order⁵ unless atrocities or cruelties are involved.⁶ These acts are so grossly illegal that they are not even justified in times of war.⁷

The Law on Due Obedience⁸ established the legal presumption that chief officers and subordinate personnel of Argentina's armed forces on active duty between March 24, 1976, to September 26, 1983, during the Military Government's fight against terrorism, acted as a consequence of due obedience with no decision authority in the belief that the orders executed were of a legal nature, except in cases of atrocities or cruelty.⁹ A Supreme Court decision¹⁰ upholding

¹ O. Igounet, CODIGO DE JUSTICIA MILITAR (Buenos Aires, Libreria del Jurista, 1985), art. 514.

² *Id.* art. 878.

³ B. Arias, CODIGO PENAL (Buenos Aires, Editorial Astrea, 1993).

⁴ *Id.* art. 34, para. 5.

⁵ M. Rufino, *Algunas Palabras sobre la Obediencia Debida en el Ambito Militar*, 1988-1 JURISPRUDENCIA ARGENTINA 795 (1988).

⁶ *Id.* at 127.

⁷ M.A. Bercaitz, LA GUERRA SUCIA-LA OBEDIENCIA DEBIDA 25 (Buenos Aires, 1985).

⁸ Law No. 23521 of June 8, 1987, in BOLETIN OFICIAL June 9, 1987.

⁹ *Id.* art. 1.

¹⁰ *Corte Suprema de Justicia de la Nacion*, Decision of June 22, 1987 [Arias, *supra* note 3, at 128].

the constitutionality of the Law on Due Obedience did not characterize it as an amnesty law. The Law on Due Obedience extinguished an action for civil damages, which an amnesty law does not do according to the CRIMINAL CODE.¹¹

Once criminal liability has been determined, the issue of compensation for civil damages is governed by the provisions of the CIVIL CODE.¹² In civil law, anyone who produces damages as a result of his or her actions is liable for compensation for both physical and moral damages.¹³ Therefore, if, as a consequence of the execution of the illegal order by a subordinate who has no way to examine or question such an order, damages to third persons are produced, then the superior in rank will be held civilly liable for the damages. Even when the superior did not materially cause the damage, he has to compensate any damage that occurred because of his order.¹⁴ The subordinate is excused of such liability under the civil law principle that compliance with a legal requirement may not render its performance illegal.¹⁵

The subordinate will have joint civil liability with his superior only if accomplice liability exists on his part.¹⁶ That is, if he exceeded his authority in the execution of the order.

It is also worthy of mention that, under the CIVIL CODE,¹⁷ the State is jointly liable for the actions of the dependents under its control. Therefore, the State has joint civil liability with those involved in the execution of a military order.¹⁸

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¹¹ Arias, *supra* note 3, art. 61.

¹² *Codigo Civil* (Buenos Aires, Zavalia Editores, 1994).

¹³ *Id.* arts. 1078 & 1109.

¹⁴ G. Fierro, *La Obediencia Debida en el Ambito Penal y Militar* 255 (Buenos Aires, Ediciones Depalma, 1984).

¹⁵ Rufino, *supra* note 5, art. 1071.

¹⁶ *Supra* note 12, art. 1081; Arias, *supra* note 3, art. 31.

¹⁷ *Id.* arts. 43 and 1113.

¹⁸ Arias, *supra* note 3, art. 31.

BOLIVIA

Under the MILITARY CRIMINAL CODE¹ a subordinate who, following an order issued by a hierarchical superior, commits a military crime is excused of military criminal liability if the following conditions are met:

- there is a direct and immediate hierarchical dependence between the superior and the subordinate;
- the order refers to the regular work relation between the superior and the subordinate within their respective powers and competence;
- the order complies with regulatory formal requirements; and
- the order is not a clear violation of constitutional provisions, in which case, the subordinate has to report it. If the act is not reported, the subordinate will share criminal liability.²

On the other hand, the CRIMINAL CODE³ exempts from criminal liability a subordinate who followed an order that he was obliged to follow because it was issued by a competent authority and was not in violation of any constitutional provisions. In such case, the hierarchical superior who gave the order would be liable under the CRIMINAL CODE.⁴ However, if the order and its execution infringes on personal safety and security, both the issuer of the order and its executor will be responsible based on a constitutional mandate that states that hierarchical obedience is no excuse under such circumstances.⁵

Under the CRIMINAL CODE, any individual found criminally liable is also civilly liable for any moral or material damage produced as a consequence of the execution of an illegal act.⁶ Therefore, once the criminal court has determined, according to the above-listed provisions, the criminal liability of both the superior and the subordinate, the same court has to determine, in

¹ C. M. Silva, CODIGO PENAL MILITAR, in MANUAL DE DERECHO MILITAR (La Paz, Editorial Amigos del Libro, 1989).

² *Id.* art. 13, para. 3.

³ B. M. Harb, CODIGO PENAL BOLIVIANO (La Paz, Editorial Los Amigos del Libro, 1987).

⁴ *Id.* art. 16, para. 4.

⁵ CONSTITUCION NACIONAL DE BOLIVIA, Feb. 2, 1967, as amended by the Law of Apr. 1, 1994, art. 13.

⁶ *Id.* art. 87.

accordance with the evidence submitted, the amount of compensation for damages due by each of the participants in the criminal act.⁷

In Bolivia, the State created a Compensation Fund (*Caja de Reparaciones*) that provides for the compensation for damages derived from crimes, when the responsible individual is insolvent, incapacitated or bankrupt. In such cases, the Fund will pay the compensation that the convicted or civilly responsible is not able to pay.⁸

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⁷ Decision of Aug. 9, 1978, of the Sala Penal del Supremo Tribunal de Bolivia, *in* DICCIONARIO DE JURISPRUDENCIA PENAL 555 (Sucre, 1989).

⁸ Harb, *supra* note 3, art. 94.

CHILE

Under the CODE OF MILITARY JUSTICE,¹ if a crime is perpetrated while executing an order within the scope of the service, the superior in rank who gave the order is responsible for the crime except in case of conspiracy between the superior and the subordinate.² The subordinate is also liable if he has exceeded in the execution of the order or if the order was notoriously intended to perpetrate a crime and the subordinate did not suspend its execution or, if urgent, he did not change it. The subordinate will be penalized with a sanction one degree less than the one assigned by law for that crime.³ If the subordinate executed an illegal order because of an avoidable error, he is liable for negligence.⁴

Any damage derived from the perpetration of such a crime has to be compensated⁵ by its perpetrator, accomplices, and all those legally responsible.⁶ Compensation includes both physical and moral damages as well as all legal fees and expenses incurred by the victim or his or her legal representatives to recover the pertinent compensation.⁷

The State has joint civil liability for any damage perpetrated by any of its agents while performing an official function. According to constitutional provisions,⁸ officials are required to comply with the National Constitution and its laws. Military personnel are official agents, and their illegal behavior and consequent damages brings about the State's responsibility for such damages.⁹

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¹ CODIGO DE JUSTICIA MILITAR (Editorial Juridica de Chile, 1992).

² *Id.* art. 214.

³ *Id.* art. 214, para. 2.

⁴ G. Labatut Glens, 1 DERECHO PENAL 109 (Santiago, Editorial Juridica de Chile, 1990).

⁵ *Id.* art. 216.

⁶ CODIGO PENAL (Editorial Juridica de Chile, 1989), art. 24.

⁷ CODIGO DE PROCEDIMIENTO PENAL (Santiago, Editorial Juridica de Chile, 1994), art. 504.

⁸ CONSTITUCION DE LA REPUBLICA DE CHILE (Santiago, Editorial Juridica de Chile, 1991), art. 6.

⁹ H. Caldera Delgado, SISTEMA DE LA RESPONSABILIDAD DEL ESTADO EN LA CONSTITUCION POLITICA DE 1980, 120 (Santiago, Editorial Juridica de Chile, 1982).

GUATEMALA**Constitution**

Under the Constitution of Guatemala, the armed forces are comprised of the Army, Navy, and Air force. Their primary purpose is to guarantee the nation's independence, sovereignty, and territorial integrity. If necessary, the military may take control of domestic law and order in accordance with article 244 of the Constitution.¹ The President of the Republic is the Commander in Chief of the Armed Forces and conveys his orders through the general officer or colonel or his equivalent in the Navy who holds the position of Minister of National Defense.²

The Armed Forces of Guatemala are managed according to the provisions of the Constitution, their Constituent Laws, and other laws and military regulations.³

Military Code⁴

The military courts are charged with the maintenance of discipline, morality and order in the Guatemala armed forces.⁵ The Military Courts are empowered to hear any civil or criminal act committed by an officer or serviceman while in the service or by any person who is affiliated with the military.⁶ Further, such an act is considered an aggravated violation of the military laws when an individual who is under military jurisdiction fails to comply with an order or perform it.⁷

The MILITARY CODE exempts from responsibility anyone who follows an order from a superior. A lower ranking member of the armed forces, while on duty, is not responsible for a verbal or written order from his superior.⁸ Currently, new laws are being enacted. These state that, during times of peace, a personnel officer is responsible for any matter related to military personnel under his jurisdiction.⁹

¹ Constitution of the Republic of Guatemala. Text of Constitution enacted Jan. 14, 1986.

² *Id.* art. 246.

³ *Id.* art. 250.

⁴ MILITARY CODE, Decree No. 214, enacted Sept. 15, 1981.

⁵ *Id.* Pt. II, art. 1.

⁶ *Id.* art. 4.

⁷ *Id.* Pt. I, Title III, Ch. I, art. 195.

⁸ *Id.* art. 5.

⁹ Military Regulations for Times of Peace, enacted by Government Agreement No. 1395-90, Dec. 28, 1990.

Penal Code¹⁰

Any person who is criminally responsible for an act or who fails to comply with the law is also civilly liable.¹¹ In accord with the present law, the grade or degree of an offense depends on the culpability with which the offense is committed. The PENAL CODE is a supplement to the MILITARY CODE. It appears that responsibility for an illegal order should be assumed by the officer who issued the order. However, to this extent the serviceman or officer of a lower rank should also be liable for any excesses in the commission of an order.

Civil Restitution¹²

The obligation and restitution is held jointly and severally among those individuals who committed or were ordered to commit such an illegal act. A civil action arising out of a illegal act is not extinguished while a penal act is pending.

The criteria for determining the degree of responsibility is stipulated by the law.¹³ However, it is necessary to determine the relationship between the harm and that which caused it. Moreover, there are cases where the person would be liable even though he did not cause harm. This, is known as an indirect responsibility. In such a case, although there is no a factual connection, there is still a legal responsibility.

Conclusion

In conclusion, the MILITARY CODE allows the application of the PENAL CODE as supplementary law for illegal acts or a failure to perform or comply with the law.¹⁴ The PENAL CODE also allows for civil restitution in case of vicarious liability. By comparison a lawful order must be related to a military duty. A military duty includes any activity that is reasonably necessary to safeguard or promote the welfare, morale discipline and usefulness of members of a command.

On the other hand, orders that relate to the convenience and personal benefit of a serviceman and have no reasonable connection to the efficient employment of the military as a fighting force are illegal. Thus, an officer of a higher rank who is in immediate command by implication and application of the laws should be vicariously liable for the commission of an illegal order or act. However, the officer or immediate commander in charge should have civil liability only to the extent of the illegal

¹⁰ Decree No. 17-73, enacted July 9, 1980.

¹¹ *Id.* art. 112.

¹² *Id.* arts. 113 & 120.

¹³ *Id.* arts. 114, 115, 116 & 117.

¹⁴ *Supra* note 4, art. 24.

order but not for ny excess committed by the servicemen or lower ranking officer who carried out the order.

Finally, the parameters used in determining civil liability for a military order should be measured by the application of the PENAL CODE as a supplementary law for the MILITARY CODE.

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HAITI

Under the National Constitution,¹ the armed forces constitute an organization based essentially on *obedience*.² Under military law,³ officers of the staff of the *Garde d'Haiti* have all the necessary authority within their particular services for the performance of their respective duties and will be obeyed accordingly by their subordinates. They will not be exempted from obeying the lawful commands of officers of the line who may be charged with authority according to the details of military duty incident to service in the *Garde d'Haiti*.⁴ Moreover, the disobedience of an order issued by a hierarchical chief is considered a military crime.⁵

The Haitian CRIMINAL CODE⁶ does not provide for the general principle of *due obedience* or *hierarchical obedience* as a general principle of excuse for criminal liability. However, it does provide for such if a homicide, wounds and injuries were ordered by a legitimate authority.⁷ No crime may be excused or its sanction reduced except in cases specifically provided by the Law.⁸ Therefore, the superior in rank who gave an order involving the perpetration of such crime is responsible for the act. In all other cases, both the subordinate and the superior will be criminally liable according to their participation, as principal or accessory, in the perpetration of the crime.⁹

Civil liability derived from any damage brought about by the commission of a crime will be governed by the provisions of the CIVIL CODE,¹⁰ which provides that liability for damages derives either from intentional behavior, negligence or imprudence.¹¹ Therefore, the civil liability of both

¹ Constitution d'Haiti 1971, in LE MONITEUR (L.M.) Feb. 25, 1971.

² *Id.* art. 189.

³ REGULATIONS GARDE D' HAITI (Port-au-Prince, 1928), art. 2-20.

⁴ *Id.*

⁵ MANUEL DE JUSTICE MILITAIRE-REGLEMENTS RELATIFS A LA DISCIPLINE MILITAIRE DE LA GARDE D' HAITI, Sept. 1, 1929, Ch. III, p. 12.

⁶ CODE PENAL (Port-au-Prince, Les Editions Fardin, 1988).

⁷ *Id.* art. 272.

⁸ *Id.* art. 49.

⁹ *Id.* arts. 44 & 45.

¹⁰ A. N. Leger, CODE CIVIL D'HAITI (Port-au-Prince, Les Editions Fardin, 1986).

¹¹ *Id.* arts. 1168 & 1169.

the subordinate and the superior is determined by the criminal court at the time the final decision is issued¹² according to their participation in the perpetration of the crime.

In addition, the CIVIL CODE provides for liability for damages caused by someone under the control or responsibility of someone else.¹³ In the case of a military officer who commits a crime while performing a service-related action, the State will be jointly liable for civil damages.

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¹² *Id.* art. 56.

¹³ *Id.* art. 1170.

HONDURAS

Under the Constitution of Honduras,¹ the armed forces are comprised of the Army, Navy, and Air force.² Their primary purpose is to guarantee the nation's independence, sovereignty, and territorial integrity.³ The armed forces are under the direct command of the Chief of the Armed Forces. Through him, the President carries out his constitutional mandate relating to the military in harmony with the law establishing the armed forces. Furthermore, any order given by the President to the armed forces, through their chief, must be obeyed and executed.⁴

Military Code⁵

The military tribunals (courts) are empowered to hear any illegal civil or criminal act committed by an officer or servicemen while in the service.⁶ However, if the crime or illegal act is committed by any person who is affiliated with the military or an officer or serviceman who has been expelled from the armed forces, the jurisdiction of the common forum shall hear the case.⁷ In other words, penal and civil laws apply when an act has been committed outside the military jurisdiction, e.g. by a civilian or by a former member of the armed forces. The armed forces are exclusively ruled by military laws and subject to a military court jurisdiction.⁸

An empowering authority is vested in every member of the armed forces, no matter what rank they happen to be. The exercise of their authority is subject to military laws and regulations.⁹

¹ Honduran Constitution, enacted Jan. 20, 1982.

² *Id.* art. 273.

³ *Id.* art. 272.

⁴ *Id.* arts. 277 & 278.

⁵ MILITARY CODE, Decree No. 98-84, enacted July 10, 1984.

⁶ *Id.* art. 235.

⁷ *Id.*

⁸ *Id.* art. 236.

⁹ *Id.* art. 189.

The MILITARY CODE vests responsibility to any officer who is in charge of personnel of a lower rank.¹⁰ Every officer who exercises any order or reduces its responsibility in the pursue of his military duties shall be subject to disciplinary regulations under the "agreement made with the Commander in Chief of the Armed Forces, enacted through the National Defense and Public Security Secretary office."¹¹

Penal Code¹²

Any person who is criminally responsible for an act or who fails to comply with the law is also civilly liable.¹³ The PENAL CODE exempts from responsibility any individual who acted in obeying orders from a superior within the scope of legality under the Constitution and Honduran laws. This paragraph should be understood with the qualification that the orders must be followed by an individual within the armed forces.¹⁴ In accord with the present law, if the offense is carried out by two or more persons, the tribunal determines the grade or degree to which each individual is responsible.¹⁵

The PENAL CODE serves as a supplement to the MILITARY CODE. It appears that responsibility for an illegal order should be assumed by the officer who issued the order. However, nothing has been asserted by law to what extent the serviceman or officer of a lower rank should also be liable for any excesses in the commission of an order. It is stated in the MILITARY CODE that if the order is carried out in the fulfillment of a duty, the officer who carries the higher rank is responsible. Further, the criteria for determining the degree of responsibility is stipulated by the military laws. However, it is necessary to determine the relationship between the harm and the act which caused the harm.

¹⁰ *Id.* art. 190.

¹¹ *Id.* art. 192.

¹² Legislative Decree No. 144-83, enacted Aug. 23, 1983, as amended.

¹³ *Id.* art. 105.

¹⁴ *Id.* Ch. II, art. 24, p. 4.

¹⁵ *Id.* art. 113.

Civil Restitution¹⁶

A civil action arising out of a illegal act is not extinguished while a penal act is pending. Anyone, who by negligence or failure to perform or comply with the law causes injuries to another, is obligated to pay restitution for the harm caused.¹⁷

Conclusion

In conclusion, the MILITARY CODE is supplemented by the PENAL CODE, CIVIL CODE, and other common forum laws in dealing with illegal acts or a failure to perform or comply with the law.

The PENAL CODE also allows for civil restitution in case of negligence or liability. By comparison, a lawful order must be related to a military duty. A military duty includes any activity that is reasonably necessary to safeguard or promote the welfare, morale, discipline and usefulness of members of a command. Moreover, if the act is committed outside the military jurisdiction, no military officer should be implicated or responsible for the order or illegal act.

On the other hand, orders that relate to the convenience and personal benefit of a serviceman and have no reasonable connection to the efficient employment of the military as a fighting force are illegal. Thus, an officer of a higher rank who is in immediate command by implication and application of the laws should be liable for the commission of an illegal order or act. However, the officer or immediate commander in charge should have civil liability only to the extent of the illegal order but not for any excess committed by the serviceman or lower ranking officer who carried out the order.

Finally, the parameters used in determining civil liability for a military order should be measured by the application of the PENAL CODE and CIVIL CODE as a supplementary laws for the MILITARY CODE.

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¹⁶ Honduran CIVIL CODE, enacted Mar. 1, 1906, as amended.

¹⁷ *Id.* art. 2236.

PERU

Constitution

Under the Constitution of Peru, the armed forces are comprised of the Army, Navy, and the Air Force. Their primary purpose is to guarantee the nation's independence, sovereignty, and territorial integrity. They may take control of domestic law and order in accordance with article 137 of the Constitution which reads:¹

Article 137

The President of the Republic, acting with the consent of the Cabinet, may, for a specific period of time, in all or part of the territory, and while reporting to Congress or the Standing Committee, order the type of state of emergency outlined in this article:²

1. A state of emergency is declared in case of disturbances of the peace or the domestic order, disasters, or serious circumstances affecting the life of the nation. Under such conditions, constitutional rights relating to personal freedom and security, the inviolability of the home, and the freedom to assemble and move about within the territory, as provided in paragraphs 9, 11 and 12 of Article 2 and paragraph 24 of the same article [Fundamental Rights of the Individual], may be curtailed or suspended. Under no circumstances may the punishment of exile be imposed.³

A state of emergency may not exceed 60 days. Its extension requires a new order. Under a state of emergency, the Armed Forces assume control of domestic law and order when the President of the Republic so orders.⁴

As applied by article 168 of the Constitution, members of the armed forces are subject to military tribunals which apply the CODE OF MILITARY JUSTICE. Article 168 of the Constitution reads:

¹ Constitution of the Republic of Peru. Text of Constitution approved by referendum on Oct. 31, 1993.

² *Id.* art. 137.

³ *Id.*

⁴ *Id.*

The respective laws and regulations determine the organization, duties, areas of specialization, training, and use and govern the discipline of the Armed Forces and National Police.⁵

The Constitution is the supreme law of the nation, and is intended to prevent any excess by the armed forces in the fulfillment of their duties. Article 169 of the Constitution states:

The Armed Forces and the National Police are not deliberative bodies. They are subordinate to constitutional power.⁶

Further, the Constitution addresses crimes committed by the members of the military while on duty. Such members are turned over to their respective superiors, and the CODE OF MILITARY JUSTICE applies.⁷ Anyone who violates the standards of compulsory military service is also subject to this CODE.⁸

CODE OF MILITARY JUSTICE⁹

The military courts maintain discipline, morality and order in the armed forces to the same extent the PENAL CODE covers crimes committed by the civilian population.¹⁰ The military courts have jurisdiction to hear any common crime as well as any illegal act committed by an officer or serviceman while in the military service.¹¹

Articles 13, 14, 15 and 16 define who has criminal responsibility when an illegal act has been committed in conspiracy or by an individual who committed such an act on his own. Article 19, paragraph 7, exempts from criminal responsibility anyone who follows an order from a superior as long as the order is not notoriously illegal. The judge has the authority to determine the responsibility of conspirators in the commission of a crime or illegal act.¹²

⁵ *Id.* art. 168.

⁶ *Id.* art. 169.

⁷ *Id.* art. 173.

⁸ *Id.*

⁹ NEW ORGANIC LAW AND MILITARY JUSTICE CODE. Law Decrees No. 23201 and No. 23214, EL PERUANO (official gazette of Peru) on July 26, 1980, as amended.

¹⁰ *Id.* Preliminary Title I, at 5.

¹¹ *Supra* note 1, art. 324.

¹² *Supra* note 9, arts. 45 and 46.

PENAL CODE¹³

The PENAL CODE also established a crime for an individual who acted by himself or through another when the offense or act was maliciously committed. In accord with the present law, the grade or degree of an offense depends on the culpability with which the offense is committed.¹⁴ These articles from the PENAL CODE are applied by the CODE OF MILITARY JUSTICE as supplementary laws. The responsibility for any order is assumed either by the officer who issued such order or by an officer of a higher rank. However, the order should be executed only to the amount or meaning of the order and not to excess in the execution of the order. To this extent servicemen or officers of a lower rank are also liable for any excesses committed in performing such an order.

Civil Restitution¹⁵

Restitution is held jointly and severally among those individuals who are liable for an illegal act and by a third party who has a civil obligation. A civil action arising out of an illegal act is not extinguished while a criminal action is pending.

CIVIL CODE¹⁶

Vicarious liability under non-contract responsibility/torts, article 1981, defines the term *vicarious liability* as involving a person employed by his superior to perform a certain service for him in his affairs with the retention of control by the superior or a right of control over the physical details of the service. In other words, the scope of this article implies that an employer or superior who has a subordinate under his control or acting on his behalf in the commission of such orders is vicariously liable for an act committed by his subordinate. This liability exists even when the superior is not the direct author of the act.

Article 1985 provides the criteria for determining the degree of responsibility. However, it is first necessary to determine the relationship between the harm and its cause. Moreover, there are cases when the person is liable even though he did not cause harm.¹⁷ This is known as indirect responsibility. This can occur where there is no factual connection but a legal responsibility.

Jurisdiction

Under the Code of Military Justice, a military court has jurisdiction to hear civil liability cases arising out of a judgment handed down by a criminal court (the PENAL CODE is applicable to military

¹³ Law No. 25280 enacted on Apr. 3, 1991.

¹⁴ *Id.* arts. 23, 24 and 25.

¹⁵ *Id.* arts. 93, 94, 95 & 100.

¹⁶ CIVIL CODE enacted Nov. 14, 1984, as amended.

¹⁷ *See, also* EJECUTORIA JUDICIAL (Jurisprudence Review) of Dec. 11, 1945. R. de los T. 1946, at 235; Mar. 26, 1946. R. de J. P. 1946, at 417.

courts as supplementary law).¹⁸ However, in the event of a jurisdictional conflict, the Supreme Court has the authority to resolve any dispute between the common forum (or jurisdictions outside the military, e.g., civil or criminal courts) and the military forum or jurisdiction.¹⁹ According to articles 141 and 173 of the Peruvian Constitution, the courts of military justice exercise a judiciary role regarding crimes committed by members of the armed Forces.²⁰

In cases of jurisdictional controversies, the Constitution authorizes the Supreme Court to rule over a superior tribunal. A military tribunal is considered a superior court.

The Supreme Court will rule on appeal or as the court of last resort when the proceedings are instituted in a Superior Court or before the Supreme Court itself in accordance with the law. Likewise, it will hear upon appeal the resolutions of Military Tribunals, with the limitations set forth in article 173.

However, members of the armed forces are surrendered by the civil authorities to their respective military jurisdictions in order to be prosecuted. The limitations found in article 173 read:

In case of crimes committed while on duty, members of the Armed Forces and National Police are turned over to their respective jurisdictions and the Code of Military Justice is applied. The latter's provisions are not applicable to civilians except in the case of crimes of treason and terrorism....²¹

Conclusion

The CODE OF MILITARY JUSTICE allows for the supplemental application of the PENAL CODE for illegal orders or acts. The PENAL CODE refers to the CIVIL CODE for restitution in case of vicarious liability. By comparison, for an order to be lawful, it must be related to a military duty. A *military duty* includes any activity that is reasonably necessary to safeguard or promote the welfare, morale, discipline and usefulness of members of a command.

On the other hand, orders that relate to the convenience and personal benefit of a serviceman and have no reasonable connection with the efficient employment of the armed forces as a fighting force are illegal. Thus, an officer of a higher rank who is in immediate command by implication and application of the laws may be vicariously liable for the commission of an illegal order or act committed by someone under him. However, the officer or immediate commander in charge may have a civil liability to the extent of the illegal order but not regarding the excess committed by the serviceman or lower ranking officer who carried out the order.

¹⁸ *Supra* note 9, art. 367.

¹⁹ *Supra* note 12, art. 21.

²⁰ *Supra* note 10.

²¹ *Supra* note 1, arts. 141 & 173.

Finally, the military courts have jurisdiction over members of the armed force. The courts apply the CODE OF MILITARY JUSTICE and its organic laws. However, in determining civil liability for a member of the military the principles of the PENAL CODE and CIVIL CODE are applied as supplementary laws.

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EL SALVADOR

In El Salvador the doctrine of the armed forces seems to be based on a distinction between the concepts of security and defense. National defense, the responsibility of the armed forces, is intended to safeguard sovereignty and territorial integrity against any outside military threat. Security, even when it includes this notion, is a broader concept based on unrestricted respect for the individual and social rights of the person. Security includes, in addition to national defense, economic, political and social aspects which are far beyond the constitutional range of competence of the armed forces and are the responsibility of other sectors of society and the State.¹

Under the Constitution of El Salvador,² the armed forces are comprised of the Army, Navy, and Air force.³ Their primary purpose is to guarantee the nation's independence, sovereignty, and territorial integrity.⁴ The armed forces are under the direct command of the Chief of the Armed Forces. Through him the President carries his constitutional function related to the military. This is done in harmony with the law establishing the armed forces.⁵ A military jurisdiction is established when judgments and trials involve purely military crimes and offenses. There are special tribunals and procedures for such acts. Decisions of the courts may be applied, in the last instance, before the commander-in-chief or before the operations chief in the field. Moreover, a military jurisdiction is extended to members of the armed forces in active service for purely military crimes and offenses.⁶

CODE OF MILITARY JUSTICE⁷

Military jurisdiction is extended only to the military tribunals (courts) and authorities who are subject to the CODE. The military tribunals hear any military related issues and apply the laws of the CODE OF MILITARY JUSTICE and the PENAL CODE.⁸

¹ See, the Peace Agreement signed at Mexico City on Jan. 16, 1992, between the Government of El Salvador and the Frente Farabundo Marti, Ch. I, p. 1, § A.

² Constitution of the Republic of El Salvador, enacted Dec. 20, 1983, as amended by Legislative Decree No. 152 of Jan. 30, 1992.

³ CODE OF MILITARY JUSTICE, Decree No. 562, enacted May 5, 1964, as amended.

⁴ *Supra* note 1, art. 212.

⁵ *Id.* art. 213.

⁶ *Id.* art. 216.

⁷ *Supra* note 2.

⁸ *Id.* arts. 177 & 178.

For military purposes and responsibilities, the term *armed service*⁹ includes an act to receive, communicate, or perform an order related to the act.¹⁰ The terms *order or commission* are understood to mean a command from a superior regarding what should be done, executed or impeded to be performed within the military boundaries.¹¹

Under military law, an officer must prevent any of his lower rank officers or servicemen under his command to looting, plundering or devastating any town, city or village. If such acts occurs, the officer in charge should assume responsibility. The punishment for such acts is five to ten years in prison.¹² Moreover, if common crimes are committed while a rebellion or insurrection is taking place, those who commit such acts shall be punished according to criminal law. In the event that the authors of such acts cannot be found, those in charge should be punished as responsible parties.¹³

Finally, any act that breaches a military duty is considered an offense. Those convicted of such acts are punished according to the CODE OF MILITARY JUSTICE. Further, any violation that has a negative effect on military discipline and is not contemplated as a violation of the CODE shall be considered a crime and punished accordingly.¹⁴ However, the CODE considers a typical violation to be a situation where an officer of a higher rank compels officers or men under his command to execute or commit acts outside their military duties or boundaries.¹⁵ Thus, the CODE vests responsibility with any officer who is in charge of lower ranking personnel, as long as their duties are fulfilled within military boundaries.

Penal Code¹⁶

Any person who is criminally responsible for an act or who fails to comply with the law is also civilly liable.¹⁷ The PENAL CODE exempts from responsibility any individual who acted in obedience to an order from a superior.¹⁸ Such orders are to be followed by an individual within the armed

⁹ The term *armed service* includes any deed that involves a military act that consists of the use of any weapon, subject to the regulations and special laws dictated by military officers.

¹⁰ *Supra* note 2, art. 42, p. 1.

¹¹ *Id.* art. 48.

¹² *Id.* art. 73.

¹³ *Id.* art. 90.

¹⁴ *Id.* art. 164.

¹⁵ *Id.* art. 166, p. 12a.

¹⁶ Decree No. 270, enacted Jan. 1, 1974, as amended.

¹⁷ *Id.* art. 130.

¹⁸ *Id.* art. 40, as amended by Decree No. 621, art. 6, enacted June 15, 1974.

forces.¹⁹ In accord with the present law, if the offense was committed by two or more persons, the court will determine the grade or degree by which each individual should be held responsible.²⁰

The PENAL CODE is a supplement to the CODE OF MILITARY JUSTICE. It appears that responsibility for an illegal order should be assumed by the officer who issued the order. Nothing has been asserted by law concerning to what extent the serviceman or officer of a lower rank should also be liable for any excesses in the commission of an order. It is stated in the CODE that if the orders were carried as part of the fulfillment of a duty, the officer of a higher rank shall be responsible. Further, the criteria for determining the degree of responsibility is stipulated by military law.

Finally, a civil restitution arising out of any offense, defect or violation is not extinguished while a criminal act is pending. Moreover, anyone who by negligence or failure to perform or comply with the law causes injuries to another is obligated to pay restitution for the harm caused.²¹

Conclusion

In conclusion, the CODE OF MILITARY JUSTICE allows for the application of the PENAL CODE, as supplementary law for illegal acts or a failure to perform or comply with the law. The PENAL CODE also allows for civil restitution in case of negligence or breach of an obligation. By comparison, a lawful order must be related to a military duty. A military duty includes any activity that is reasonably necessary to safeguard or promote the welfare, morale, discipline and usefulness of members of a command. Moreover, if the act was committed outside military duties, a military officer should be implicated and responsible for the command of orders for acts committed outside the military jurisdiction.

On the other hand, orders that relate to the convenience and personal benefit of a serviceman and have no reasonable connection to the efficient employment of the military as a fighting force are illegal. Thus, an officer of a higher rank who is in immediate command by implication and application of the laws should be liable for the commission of an illegal order or act.

Finally, the parameters used in determining civil liability for a military order should be measured by the application of the PENAL CODE as a supplementary law for the CODE OF MILITARY JUSTICE.

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¹⁹ *Id.* Ch. II, art. 24, p. 4.

²⁰ *Supra* note 16, art. 140.

²¹ *Id.* arts. 137 & 147.