Commentary
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It was said during the Opening Session yesterday, I think by M. Meurant, that International Humanitarian Law was not the creature of Western Christian thought, but that it was a system entirely consonant with the principles of all the world's great moral and intellectual traditions.

This proposition has now been persuasively argued by Professor Adachi in his interesting study of the evolution of Humanitarian Law in Japan.

I must say that when I first came to read his paper several weeks ago and then to read around the subject, I was very sceptical about the matter. I wondered whether in Japan International Humanitarian Law was really only a Western graft that had not taken, a Western seed in alien soil which would never flourish.

The ethnocentric view was, I confess, one founded on ignorance and prejudice. I hope you will understand why. In my impressionable Australian childhood in the nineteen-forties north of the Brisbane Line, the rising sun was not exactly a symbol of sweetness and light. That was a time when, during the Second World War, Japan flouted the Geneva Conventions on a grand scale.

Later I was to learn that my father-in-law, caught in the toils of that war in Hong Kong, had spent five perilous and degrading years in Stanley Prison. I met men who had survived the hell of Changi, and later still, when living in Papua New Guinea, I came to know many who had suffered grievously at the hands of the occupying Japanese army.

Clearly, there had been, in the mild expression of Professor Adachi in the article cited in his paper, many "regrettable events" during those years.

Professor Adachi touches on these matters in his paper. He refers to the war crimes against Chinese forces and civilians in the Sino-Japanese War and also, but without specification, to "inhuman practices" during the Second World War.

What I found particularly interesting were the reasons assigned for the decline in the rigour of application of Humanitarian Law between the Russo-Japanese War of 1904–1905 and the Second World War.

In the first-mentioned war, the behaviour of the Japanese forces was exemplary. Then the slide began. Professor Adachi sets out the reasons for this in that part of his paper headed "Turning to degradation". They were the dehumanising effect of the technology of total war, the new nationalism and the perversion of the *bushido* tradition in the "No Surrender" doctrine.

All these definitions diminished the respect of the Japanese forces for the essential human quality of those whom they captured and those who apparently obstructed their path to victory. I suggest also that Japan's failure to ratify the 1929 Convention was very significant. The existence of a binding legal regime

which has been taught to, or as we would now say, disseminated to, the combatants in a war is of crucial importance.

We heard some suggestions yesterday that the Conventions are irrelevant in today's world. But it is as well to remember that any system of law, however imperfect, imposes a discipline on those who administer it or live under it. That is better than no system at all and better than vague aspirations or exhortations to behave properly.

The point I am making is that nothing has yet been discovered which beats the steady observance of rules which have been promulgated before the event. It is better to apply a set of pre-determined rules rather than to proceed by whim or expediency.

One of the troubles on the Japanese side was that the rules were either not accepted as applicable, or had not been disseminated. It seems clear enought that in the stress of World War II, an ancient chivalrous tradition was set aside and that the fair nature of many Japanese service personnel was disguised with hard favoured rage.

As Professor Adachi has pointed out, the Imperial Navy had a manual of the law of war which had been widely circulated, but the Army did not. The Army was furnished with a very general Code of Military Conduct but it did not descend to detailed discussion of the correct treatment of prisoners of war. It is not surprising then that the way was made clear for the perpetration of gross abuses.

I must say that for me a perplexing feature of the Japanese treatment of POWs is that the enlightened self-interest, of which Professor Feliciano spoke yesterday, did not dictate a superior mode of conduct. Perhaps the answer in part is, as Professor Adachi has told us, that Japanese soldiers did not expect reciprocal treatment — they had been instructed not to fall into enemy hands, to prepare for death rather than to suffer the dishonour of being prisoners of war. The other reason, I suppose, is that given by Mr Thomson yesterday: they did not expect to lose, and self-interest only became a consideration when the tide of war turned.

It was a sorry episode in the history of the law of war. However, Professor Adachi has shown in his paper that the values which imbue International Humanitarian Law are entirely consistent with an ancient Japanese tradition of chivalry. It is to be hoped that if the tradition is again challenged, it will re-assert itself more effectively than it did in the Second World War.

I have one final comment. It relates to Professor Adachi's seventh element in the *bushido* Code of Morals referred to at page 2 of his paper — loyalty to one's superior. This, he went on to say, is subject to the qualification set out on page 160. It would be interesting to know whether that element was incorporated into the municipal criminal law of Japan as a defence of superior orders — the defence discussed in Professor Johnson's paper this morning.

The traditional common law rule, enunciated in *Keighly* v *Bell*,[1] is that an action is justified if done in obedience to a superior order unless the order is "necessarily or manifestly unlawful". A similar rule found its way into the

1. (1866) 4 F & F 763.

criminal law of Israel by a circuitous route — by adoption of certain provisions of the Criminal Code of Queensland — but it did not avail Eichman at his trial. I wonder whether Japanese criminal law which is based, I understand, on the civil law system has, or had at the time of the Second World War, a similar provision. Perhaps its presence in the domestic law might have fostered a greater respect for the obligations of International Humanitarian Law.