Commentary

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Recently I came across a statement that international lawyers and strategists make strange bedfellows. We seem to be infrequent bedfellows.

Nothing has been published by the Strategic and Defence Studies Centre here in Canberra on the laws of war in general and the defence of superior orders in particular. Nothing, as far as I can ascertain, has been published by the International Institute of Strategic Studies in London.

The Law Library here has three books on the subject of obedience to orders. Two were written by experts to whom Professor Johnson referred in his paper. Both are law professors. The third was written by a Dutch naval officer.

We should do better than that. The late Professor O'Connell and Professor Ivan Shearer have set a fine example in this country. The failure of the two disciplines to mix can be rationalised. It can be rationalised using the topic of this morning's paper. The defence of superior orders is operationally irrelevant. There is no time to expound on that categorical statement beyond saying that you cannot court-martial a machine and that wars are no longer won by the unhesitating obedience of orders by soldiers. The President's finger on the button is more important than the private soldier's finger on the trigger.

There once was a way of making officers accountable. In the seventeenth century, the Articles of War of Gustavas Adolphus contained the following offence: ''No Colonel or Captain shall command his soldiers to do any unlawful thing; which who so does, shall be punished according to the discretion of the Judges''. Does anyone know of a modern code which contains a similar provision — or extends it to weapons systems? Is any President vulnerable? Anyone who expects Article 86 of Protocol I to climb that high is ignorant of the facts of military and political life.

Restrictions on the defence of superior orders remain useful as a control within Australian Police Forces. In that respect, they justify the on-going attention of law professors. The restrictions remain useful because they are re-inforced by restraints on the use of force whether ordered or not. Under Australian law, no amount of force may be used by our police unless it is necessary and then only the least amount needed to control the situation.

Proportionality is needed just as much in the prevention of assaults as in their mitigation. Let me transpose that. Proportionality is needed just as much in the prevention of wars as in their mitigation.

Our restraint came from English law. England derived it centuries ago from the medieval laws of war. It is an extraordinary reflection on Western civilisation that we have rejected externally what we insist on internally and that we have regressed in our control of war.

One of the tragedies of the Western intellectual tradition is the belief that Hugo

Grotius was the founder of international law. It has not only grievously offended nations in other continents. It intellectually disinherited Europe. In the Middle Ages, the laws of war had much more to say about the *jus ad bellum* than the *jus in bello*. More concerned with stopping than mitigating, it ceased to be important during and after the 14th century because the concept of the just war lost credibility and because property could be acquired in the new world without worrying about the justness of the acquisition. The medieval laws of war are a gold mine. There is no definite work on them. Yet that is when restrictions on the defence of superior orders came from Rome.

We badly need some one to do as much for the *jus ad bellum* as the Red Cross has done for the *jus in bello*. Semantically there is no such thing as a nuclear war. A war requires two bodies of troops. There can only be a nuclear holocaust. We must prevent it. Mitigation is useless.

I have two messages for Rudi Jaeckli to take home. Europe should re-study its history and give humanitarian law its proper roots. The Red Cross can not do it alone. I have a message for the crusaders for peace. Don't knock the Red Cross or the Protocols. Revive the *jus ad bellum*.

Supplementary Note

By P.J. Cameron
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The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts had the opportunity to adopt a rule governing the availability of the defence of superior orders in connection with the commission of grave breaches of the provisions of the Geneva Conventions of 1949 or of Protocol I additional thereto. As it transpired, the Conference declined to include any such provision in the Protocol. Thus was lost an opportunity to add some certainty to what is patently a very complex and controversial area of international law.

The Conference had before it, and used as the basis of its discussions, a draft prepared by the ICRC. This draft reflected both the views of legal and other experts gathered during a series of conferences held over a period prior to 1974, and the advice of persons and bodies consulted by the ICRC.

Two provisions of this draft (draft Articles 76 and 77) were viewed as complementary. Draft Article 76 (Failure to Act) was adopted by the Conference without any essential change to its substance and has now become Article 86 of the Protocol. Draft Article 77 (Superior Orders) the text of which is below, was considered in some detail, was amended and, as amended, was ultimately rejected by the Conference in plenary session because when voted upon, it failed to gain the support (necessary under the Conference Rules of Procedure) of two thirds of the delegations present and voting. The voting figures were 36-25-25.

Draft Article 77 read as follows:

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

Introducing debate in Committee, the ICRC stated that draft Article 77 rested on principles recognised by the Charter of the Nuremberg Tribunal and its judgments, affirmed by the U.N. General Assembly and subsequently formulated by the International Law Commission at the request of the General Assembly. The reference was to Principle IV enunciated by the Intenational Law Commission at the request of the General Assembly:

> "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law,

provided a moral choice was in fact possible to him''.

In limiting the provision to cover only grave breaches, the ICRC said, it had bowed unwillingly to pressure from experts who had maintained that it was difficult to permit soldiers to dispute every order.

Predictably, debate was protracted and covered almost every previously known argument — from allegations of possible interference with the sovereign rights of States to require absolute obedience from their soldiers to assertions that draft Article 77 was in conflict with already well-established international law, plus suggestions that soldiers might often be quite unable to determine the legalities of a given situation. Clearly the world was not ready for draft Article 77.

In the end the matter went to a Working Group. There was no unanimity. A ''square brackets'' draft was referred back to the Committee and, after a series of votes, was adopted for reference to the Conference. The following were its terms:

''1. The High Contracting Parties undertake to ensure that their internal law penalising disobedience to orders shall not apply to orders that would constitute grave breaches of the Conventions and this Protocol.

2. The mere fact of having acted pursuant to an order of an authority or a superior does not absolve an accused person from penal responsibility, if it be established that in the circumstances at the time he knew or should have known that he was committing a grave breach of the Conventions or of this Protocol. It may, however, be taken into account in mitigation of punishment.''

As already indicated, when it came to the point, the Conference rejected it.

PART V

ENFORCEMENT AND APPLICATION