SUPERIOR ORDERS

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WE are bound to obey the legitimate orders of our legitimate superiors in any society we claim to be part of.

The defendants at Nüremberg admitted themselves to be members of the Nazi State; both the defendants and the prosecutors admitted that Nazi Germany was a state in the international sense of that term, and in that state orders could be legitimately conveyed down the appropriate chain of military or civil command.

Because authority was legitimately vested in the state, it could be presumed to be properly exercised by those to whom commands were addressed. This presumption was not irrebuttable to the ordinary European mind; but the Nazis strove to make it irrebuttable. The Nazis sought to make the state the sole society to which a Nazi could belong, and to make the head of that state the sole source of legal and moral obligation; this monolithic conception, intended to be the strength of the Nazi state, in fact became its greatest weakness. When the Führer destroyed himself, he also carried the Nazi state to destruction: as he intended.

A strong society is one which allows the free growth of legitimate aspirations expressed in different forms of societies and corporations. The closed, or totalitarian, form of society looks strong from outside, it looks neat and streamlined, but internally its life tends to be cramped and to lack spontaneity when not kept young by regular blood transfusions from those who direct it and who themselves remain relatively free.

It is fashionable nowadays for some critics of the Church to compare the Church with a totalitarian state. Clearly there are resemblances between any well-organised hierarchical societies when viewed from outside: but such a comparison overlooks the essential difference in spirit between the Church and the secular state. The difference between the Church and the totalitarian lay state is funda-

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mental, and has vital consequences in connection with the question of obedience.

The Nazi pledge was 'I pledge eternal allegiance to Adolf Hitler. I pledge unconditional obedience to him and the Führers appointed by him.' As Mr Justice Jackson said at Nüremberg,[1] 'the defendants may have become the slaves of a dictator but he was their dictator. To make him such was, as Göring has testified, the object of the Nazi movement from the beginning.'

The Nazi pledge did not prevent conspiracies against Hitler, some of which included party members, and doubtless it was intended to be solemn and legally binding, but was the Nazi pledge an oath? The essential feature of an oath of obedience made before the infinite and all-powerful God of Christians and of Jews, by a Christian or a Jew, is that the oath itself implies a limitation on the power of both those administering and those taking the oath; this view-point is what no thorough-going state idolater can stand, but it is just this that differentiates the Church, and every God--fearing society, from the totalitarian state. The God-respecting man must recognise the temporal and impermanent nature of all purely human societies in face of eternity. The totalitarian Nazi thought, not of eternity, but of the 'thousand year Reich'. Even the most strict of religious orders would not dare to make members take a pledge or an oath of 'eternal' and 'unconditional obedience' to a human superior: Popes, saints and martyrs, have not been always sinless throughout their lives! Nor have the commands they have given always been necessarily impeccable. Even on the way to becoming saints or martyrs persons may err in the conduct of their human relationships: St Margaret of Cortona became a saint despite her apparently harsh treatment of her child. The Society of Jesus, popularly regarded as one of the most exacting in its demands of its members in obedience to superiors, is said to require a member to promise 'In all things *except sin* . . . to do the will of my superior and not my own'.

This exception is the safety-valve which must exist in any God-fearing society, and the one which the totalitarian

[1] Part 19 of the Proceedings, H.M.S.O., 1949, p. 400.

denies. The possession of power to give legally binding orders is inherent in the legitimately recognised superiors in any lawful society; it would be uncharitable for a Christian to presume such an order to be unlawful. But a Christian is not required to shut his eyes to facts. and whilst, by inertia, fear, respect or love, he may obey orders from a legitimate source, he can never himself fully assent to what he *knows* to be sinful without feeling that he shares the sin and may answer for it in this world or the next.

Human law is never self-sufficient. In the legal systems of Christian societies there are always references to oaths, and to morality: judicial interpretation, equity and even fictions, are required to adapt legal statements to the ever changing circumstances of life. In a civilised community the state is not an end in itself, nor is the law; they are means for securing a good life—a life which presumes civilised values that transcend ephemeral laws and states.

Disobedience to the law is *prima facie* illegal and immoral; but the contrary may be proved. The presumption of legality is, as we have seen, on the side of legitimate authority; but that presumption may be displaced. Irresponsible disobedience may destroy the state itself and dissolve it in anarchy: on the other hand blind and servile obedience may result in a slave state.

By the common law of England a man is not entitled to disobey a lawful and reasonable order, nor to obey an order that is plainly unlawful. Obedience to the precepts of law, and of lawful authority, is sanctioned by public opinion, by custom, and, in the last resort, by punishment. When it comes to maintaining order it is happily not possible for the citizen to leave the task to the police and military. Every man is, at common law, bound to help to put down a breach of the peace committed in his presence; failure to do so may result in his indictment. On the other hand, if excessive force is used to maintain the peace, the maintenance of the peace will not excuse the force which may amount to a common law assault, and, if death results, an indictment for manslaughter, or even murder, may conceivably follow.

But what of the soldier? So far as the common law is concerned, he is bound by its precepts. The matter is clearly

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set out in the *Manual of Military Law*[2] as well as in the books on Constitutional Law, like Dicey: each of these authorities cites the Report of the Committee on the Featherstone Riots (1893-4, Cmd. 7234): 'Officers and soldiers are under no special privileges and subject to no special responsibilities as regards this principle of the law', i.e. the right and duty of all to suppress riotous assemblages and the like.

But what about operations against the enemy? Here indeed the soldier is a privileged person by international law, since, under that system, he alone is entitled to bear arms and entitled to be spared if captured; a *franc-tireur* may be treated as a war criminal. But just how far does a soldier's licence to kill extend? There appear to be two limitations: first, the soldier operates only on orders from a higher authority in the chain of command, right up to the commander-in-chief, who operates under sovereignty, if he is not himself sovereign; and secondly, he will operate under the accepted laws and usages of the international law of war. These laws and usages are designed to limit destruction of life and property, and, in particular, preserve the innocent and non-combatants from destruction.

A soldier may, indeed he must, presume his orders from his lawful superior to be lawful, even if he is a member of a firing squad to execute a person condemned as a war criminal; but, being a member of a properly organised execution party is one thing: accepting an invitation, or even an order, to shoot defenceless survivors from a torpedoed ship,[3] or captured airmen who surrender,[4] is another.

The defence of superior orders may be a plea in mitigation of liability or guilt but, according to the *British Manual of Military Law*, as revised by Amendment No. 34 in April 1944, it is not an excuse. Incidentally, as Professor Lauterpacht of Cambridge showed, in a brilliant and influential survey of the position published in the *British Yearbook of International Law for* 1944,[5] the old British rule did allow

[2] 1929 ed. In XIII, p. 246.

[3] *The Peleus*: L.R. of War Criminals, H.M.S.O. 1947, Vol. I, Case No. 1.

[4] *Dreierwald Case*, ibid. Case No. 7.

[5] 'The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander

superior orders to be an excuse, but the present rule (so often under fire) does not.

This 1944 Amendment,[6] which is now being reviewed again, occasioned protests from distinguished soldiers and sailors, and brought forth a most interesting article from Viscount Simon in *The Times* newspaper of August 19th, 1952.

The position of the soldier in relation to military discipline is well understood, and his dilemma when faced with an order which he considers both violates 'unchallenged rules of warfare and outrages the general sentiment of humanity' may be a real one. Where, as happens in totalitarian states, he has real reason to fear that if he disobeys such an order his wife and family at home may themselves be the victims of reprisals by his superiors, his dilemma is a cruel one indeed.

In a properly conducted army of a civilised state, which respects human rights, operating under the rules of war, the dilemma should not arise. If however it does occur, the soldier will still not be liable unless, as Viscount Simon has said, 'the case is of the grossest possible description, for the decision that he is to be tried is in the hands of his superiors' —or, we may add, in the hands of his enemy superior officer, if having participated in a war crime he is afterwards taken

does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously lawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the orders received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity.' (*British Manual of Military Law, Amendment No.* 34, April 1944.)

[6] The full story of the Amendment is to be found in *The History of the U.N. War Crimes Commission: the Development of the Laws of War* (H.M.S.O., 1948, pp. 274-88).

prisoner, as happened with the German submarine crew in the case of the *Peleus*.

There is an objective standard of conduct in warfare and, like members of a trade union, soldiers are often very well aware of accepted practices relating to their business. Manifest illegality must be proved in order to convict; in other words, in international law, in a doubtful case, the soldier is not to be held guilty for obeying orders. The prosecution must prove a guilty knowledge, a consciousness of sin, as in murder in civil law. If this is proved he will be liable for a war crime.

In the words of the judgment of Solomon J. cited by Viscount Simon, 'it would be monstrous to suppose that a soldier would be protected when the order is grossly illegal. The court cannot therefore decide that a soldier is bound to obey any order which may be given to him.' Incidentally, even if the court had so decided, it is doubtful whether a soldier could successfully plead obedience to an outrageous order given by an officer who was obviously mad, or completely drunk; a soldier, for example, suddenly ordered by his company commander to kill a colonel could scarcely be unaware of the gross illegality of such an order.

In the words of Dr Sauer, counsel for Funk, at Nüremberg:[7] 'if the official order obviously constitutes a breach of the law, it may, in general, be fully approved that the subordinate is not permitted to refer to his superior's official order as an excuse and to maintain that he was only carrying out that order. In that respect the stipulation of the Charter [of the Court at Nüremberg] contains nothing essentially new. . . .' This was already the German military law. Counsel then went on to claim that his client had in fact obeyed the law of Germany, but as we have seen, that law required not mere allegiance, but unconditional obedience. And that is what neither the common law, nor international law, nor good morals, requires.

Curiously enough, as the French prosecutor, de Menthon, pointed out at Nüremberg,[8] even Goebbels had been known to cite (against the Allies) article 47 of the German Military

[7] Part 18, p. 352.

[8] *Nüremberg Proceedings*, Part 4, p. 372.

Code of Justice of 1940 which, 'although maintaining the principle that a criminal order from a superior removes the responsibility of the agent, punishes the latter as an accomplice when he exceeded the orders received or when he acted with knowledge of the criminal character of the act which had been ordered'.

One final word: is the general position we have outlined altered in the case when the soldier is participating in a war that is itself unlawful in international law? Here we think a distinction must be drawn between those who give their superiors the benefit of the doubt in accepting the order to join the forces, and those who know they are doing wrong in embarking on the particular war. In a modern state, control of the means of communication, coupled with formidable propaganda devices, may make it very difficult, if not impossible, for the ordinary man to disentangle the rights and wrongs of the conflict. His ordinary course is to 'join up' when called to defend his country.

But the case of those who know the facts, and who still actively participate in planning and carrying out an unlawful war, is very different, as Nüremberg showed. '*Non solum qui male agunt, sed et qui consentiunt factientibus digni sunt morte.*' Aggressive politics is a dangerous game; and rightly so.

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