The question of superior orders and the responsibility of Commanding Officers

in the Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (Protocol I) of 8 June 1977

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Introduction

Much has been written on the question of orders from a superior officer [1]. The problem is too complex for any simple reply. The national legislation to which soldiers are subject renders any member of the armed forces who refuses to carry out an order liable to presocution for a penal offence. In serious cases and especially in time of war military penal codes generally provide that the judge may sentence the offender to death. However the plea of superior orders does not necessarily relieve a military subordinate of penal responsibility for a violation of international humanitarian law committed in carrying out those orders.

The contradiction between the principle of discipline and the principle of responsibility therefore merits examination. In this paper, developments since the Nuremberg trials will first be examined. Attention will then be drawn to the provisions of the Geneva Conventions of 1949 relating to penal sanctions. Consideration will be given to the debate on this question at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (hereinafter referred to as CDDH) of 1974-1977.

[1] See, *inter alia*, the monographs by Mueller-Rappard, Ekkehart, *L'ordre supérieur militaire et la responsabilité pénale du subordonné*, thesis, Pedone, Paris, 1965, and Greene, L. C., *Superior orders in national and international law*, Sijthoff, Leyden, 1976.

The scope of the provisions of Protocol I relating to the repression of serious breaches will be examined next and it will be found that the extent of the responsibility of superiors and commanding officers largely makes up for the absence of provisions restricting the principle of the plea of superior orders. This principle depends on the national legislation regulating military discipline, and in this respect reference will be made mainly to Swiss law. It will be considered how far the legal provisions imposing obedience to orders in the Swiss army leave the person carrying out the orders any responsibility to resist them on the grounds of respect for international humanitarian law. Finally, an attempt will be made to determine the effect of the reservations made by Switzerland on ratifying Protocol I.

1. From the Nuremberg Tribunal to the work done by the United Nations.

As several authors point out, although prior to the Second World War the question of superior orders had not been definitely settled there was a school of thought which for the most part rejected the theory of abstract obedience; it held that soldiers were not robots, and conceded that subordinates were responsible, though only up to a point, for orders carried out. [2]. On the other hand, Article 8 of the Charter of the Nuremberg International Military Tribunal stipulates that the fact that the defendant acted pursuant to order of a superior shall not free him from responsibility, but may be considered only in mitigation of punishment [3]. To a great extent this proviso rules out obedience to an order as justification. A subordinate who has committed an offence under international law must be recognized as guilty and sentenced and will have the benefit only of extenuating circumstances. Generally speaking, this principle has been applied only to major criminals. Some authors maintain that punishment of enemy war criminals was principally a political problem [4]. It may be observed that this rule is contrary

[2] Lauterpacht, *Oppenheim's International Law*, vol. II, 6th ed., p. 454, N° 2, with references.

[3] Article 8 of the Statute of the International Military Tribunal, Nuremberg, signed in London, 8 August 1945, reproduced in United Nations, *Treaty Series*, vol. 82, pp. 278-310, No 251.

[4] See for example Boissier, P., *L'épée et la balance*, Geneva, 1953, conclusion; Lauterpacht, H., "The Law of Nations and the Punishment of War Crimes", in *British Yearbook of International Law* (BYIL), 1944, p. 71; Mueller-Rappard, E., *op. cit.*, p. 201; and Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht", in *Süddeutsche Juristenzeitung*, 1946, p. 105 ff.

to the penal law of some States and that it was not possible to apply it at trials of minor war criminals.

At present, more than 40 years after the event, it is impossible to conclude whether the provisions of the Charter of the International Military Tribunal, Law No. 10 of the Allied Control Council for Germany, and national statutes relating to the repression of war crimes are to be regarded as having any constitutive effect on international law [5]. The question of the Nuremberg principles was taken up by the United Nations, which charged the Internatioanl Law Commission to study it. The Article IV prepared by this Commission and relating to superior orders has been much discussed. The draft code incorporating the Nuremberg principles, prepared in 1954 [6] by the International Law Commission after various referrals to the United Nations General Assembly, was suspended *sine die*. The Commission is, however, working on a draft code of crimes against peace and the security of mankind, and its rapporteur has proposed an Article 8(C) which rejects the plea of superior orders except in a state of necessity [7]. As no code incorporating the Nuremberg principles has ever been formally approved, their value as a rule of international law is still questionable and legal opinion is accordingly divided on the subject [8]. This paper does not propose to settle the question.

2. The Geneva Conventions of 1949

In pursuance of the recommendations of the Seventeenth International Conference of the Red Cross (Stockholm, 1948) the ICRC consulted a group of experts which prepared a draft article stating that the fact that the accused acted in obedience to the orders of a superior did not constitute a valid defence if the prosecution could show that in view of the circumstances the accused had reasonable grounds to

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[5] See Mueller-Rappard, *op. cit.*, p. 223.

[6] *Yearbook of the International Law Commission*, 1954, Doc. A/UN.4/88.

[7] Report of the International Law Commission on the Proceedings of its 37th Session, 1986, Proposal by Mr. Doudou Thiam of an article 8C. Document A/41/10.

[8] Blishchenko, Igor, "Responsabilité en cas de violation du droit international humanitaire", in *Les dimensions internationales du droit humanitaire*, Pedone and UNESCO, Paris, and Henry Dunant Institute, Geneva, 1986, p. 330; David, Eric, "L'Excuse de l'ordre supérieur et l'état de nécessité", in *Revue Belge de Droit International (RBDI)*, 1978-1979, vol. XIV, p. 70; Rölling, Bert, "Criminal Responsability for Violations of the Laws of War", in *RBDI*, 1976-I, vol. XII, p. 20.

assume that he was committing a breach of the Geneva Conventions [9]. The Diplomatic Conference in 1949 rejected the draft [10].

The system of penal sanctions in the Conventions is based on the distinction between breaches and grave breaches. All States party to the Conventions are competent to, and under the obligation to, repress grave breaches in accordance with the principle of *aut punire aut dedere* (either punish or extradite). They undertake to inflict penal sanctions on persons who have committed or ordered grave breaches, and to bring them before their courts or extradite them [11].

Grave breaches comprise wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly [12]. Convention III also mentions compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial [13]. Convention IV adds to grave breaches deportation, transfer or unlawful confinement, and taking of hostages [14].

States ratifying the Geneva Conventions accept the responsibility of instituting proceedings in the event of a breach. It is noteworthy that the principle that superior orders are not a valid defence does not appear in the Geneva Conventions. It may perhaps be recognized that States are under a customary obligation to respect the Nuremberg principles, but whether superior orders are a valid defence depends on the laws of the State conducting the penal proceedings.

3. The debates of the CDDH

Article 77 of the draft Protocol I drawn up by the ICRC provided, in effect, that:

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[9] See *Remarks and proposals submitted by the International Committee of the Red Cross, document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference at Geneva* (April 21, 1949)—IIIrd Revision of the Convention signed at Geneva on July 27, 1929, relative to the treatment of prisoners of war. Art. 119(b), p. 64.

[10] Maunoir, J.-P., *La répression des crimes de guerre devant les tribunaux français et alliés*, thesis, University of Geneva, Law Faculty, 1956, pp. 231 ff.

[11] Geneva Conventions of 1949, Articles I 49, II 50, III 129 and IV 146.

[12] Geneva Conventions, Articles I 50, II 51, III 130 and IV 147.

[13] Article III 130.

[14] Article IV 147.

(a) no person shall be punished for refusing to obey an order of a superior which, if carried out, would constitute a grave breach of the Geneva Conventions,

(b) the fact of having acted pursuant to an order of a superior does not absolve an accused person from penal responsibility if it be established that he should have reasonably known that he was committing a grave breach and that he had the possibility of refusing to obey the order.

As the ICRC representative pointed out, these provisions rested on one of the principles embodied in the Charter of the Nuremberg Tribunal [15]. This draft article evoked much discussion before being rejected [16]. Some speakers feared that it might be interpreted as an unwarranted intrusion into the criminal law of States [17]. Other speakers said the provisions for repression of breaches were, *inter alia* by reason of the introduction of Article 77 (Article 87 in the definitive text) relating to the duties of Commanding Officers, perfectly balanced and that they gave a sufficient guarantee of the prevention or repression of any breach, whether by commission or omission. Against this it was argued that if Commanding Officers were to be held responsible it was meet and proper to include an article on individual responsibility [18]. Furthermore, the draft Article 77 raised the delicate subject of how far the laws of their country allowed subordinates to question the orders of their military superiors [19]. The draft could, it was stated, even encourage the infringement of national laws [20]. Commenting on the rejection of Article 77, the representative of the Holy See said the Conference had to some extent written off the legal principles established in Nuremberg and by doing so had set humanitarian law back a step.

Rejection of these provisions has made it more difficult to admit the Nuremberg principles as being part of international law, for logically they should have been included in international humanitarian law. Some authors are, however, of the opinion that non-inclusion of this

[15] CDDH/I/SR.51, in *Official Records (O.R.) of the Diplomatic Conference on Humanitarian Law*, vol. IX, p. 127, para. 20.

[16] See the article by David, Eric, *op. cit.*, pp. 68 ff.

[17] Including the representative of the United Kingdom at the Diplomatic Conference on Humanitarian Law: see CDDH/I/SR.51, *op. cit.*, p. 131.

[18] CDDH/SR.45, Annex, in *O. R. CDDH*, *op. cit.*, vol. VI, p. 330.

[19] *Id.*, p. 329.

[20] *Id.*, p. 338.

rule in a treaty does not prevent its survival as a customay rule, and even that refusal to accept a plea of superior orders as a valid defence is part of regional customary law between Western and socialist states [21]. Whatever one may think of this, humanitarian law can hardly be said to have suffered a setback. A setback, to be universal, must be accepted by all Parties, not imposed by a victor. Even if it is held that these principles have been "shown the door" of international law, they may conceivably be back again some day by the side entrance! More States are including these principles in their legislation of their own free will, and their pressure could end by firmly establishing these principles as part of international law.

The national legislation of many countries now recognizes that a plea of superior orders does not absolve subordinates of penal responsibility. Whether this provision is contained in the military penal code or the penal code, or is the result of case law, depends on the contry's legal tradition. It is in all cases the result of the principles established at the Nuremberg and Tokyo trials.

In their various ways, national legislations establish a link between an individual's penal responsibility and the latitude allowed him in the way he carries out an order. Even if national legislation does not recognize superior orders as an excuse, when the court comes to establish the extent of a subordinate's responsibility it must take into consideration the constraints to which he is subject. In practice, therefore, the national legislation of many countries appears to be in general agreement with the Nuremberg principles [22].

Although Protocol I does not deal with the question of superior orders as an excuse, it does state at some length the other side of the problem, namely the duty of leaders to exercise control over their subordinates. This is perhaps a preferable course. Where a high authority gives an order violating humanitarian law, it is not carried out by a chain of executants, but distributed from the tip of a pyramid to a growing number of go-betweens. In the end it often reaches a host of executants who, although aware of committing an illegal act, seek to minimize their responsibility on the grounds that it is shared by a large number of people. They look upon themselves as merely a cog in the wheel set in motion by superior orders! Also, in a wartime atmosphere of violence and fear they need courage to refuse to obey an order.

[21] Cassese, Antonio, *Violenza e Diritto nell'era nucleare*, Bari, 1986, p. 147.

[22] See the detailed study by Green, L. C., *op. cit.*, 374 pages, in which the author explains the situation in 26 countries representing all the legal traditions and current trends in international society.

Protocol I approaches the question differently, from the angle of the commander's responsibility. A commander ordered to commit a grave breach must not pass on or carry out the order—not because he refuses to obey superior orders, but because he knows that the power to command invested in him makes him personally responsible for the way his subordinates behave. According to Protocol I a commander given superior orders is not an intermediary; whatever his rank, he remains a commander and is responsible for the orders he gives his subordinates. Respect for humanitarian law is therefore not based on the threat that the plea of superior orders will not be accepted as an excuse, but on the psychologically more motivating principle of the duty of leaders in exercising command. This paper will seek to show that the purpose of the provisions of Protocol I coincides with the purpose of the Nuremberg principles.

4. Grave breaches as defined by Protocol I

Protocol I did not modify the principle of the Conventions, which is based on the difference between breaches and greave breaches; but the list of grave breaches has been much extended [23]. Those against health or mental integrity (such as mutilations, medical experiments, removal of organs, etc.) are specified in detail [24]. Also regarded as grave breaches are acts committed wilfully and causing death or serious injury to body or health, such as—

(a) making the civilian population the object of attack;

(b) launching an indiscriminate attack affecting the civilian population, or against dangerous forces (i.e., dams or nuclear power stations), knowing that the attack will cause losses among the civilian population;

(c) the perfidious use of the emblem of the red cross or red crescent [25].

Article 49 of Protocol I states that the word "attacks" means acts of violence against the adversary whether in offence or in defence.

Acts such as the following are also regarded as grave breaches when committed wilfully:

[23] See the observations in the "Message du Conseil fédéral concernant les Protocoles additionnels aux Conventions de Genève, du 18 février 1981" in *Feuille fédérale*, 14 April 1981, vol. I, p. 1033.

[24] Protocol I, Article 11.

[25] Protocol I, Article 85, para. 3.

(a) transfer by the Occupying Power of part of its own civilian population into the territory it occupies, or the deportation of part of the population of that territory;
(b) unjustifiable delay in the repatriation of prisoners of war or civilians;
(c) practices of racial discrimination such as *apartheid*;
(d) depriving a person protected by international humanitarian law of the rights of fair and regular trial [26].

5. Responsibility of leaders according to Protocol I

It will be found that in general the grave breaches mentioned in Protocol I are acts for which commanders and not individual combatants must bear responsibility. To establish the guilt of leaders it was also necessary to state how they are required to behave. It was therefore stipulated that failure to act when under a duty to do so may be considered as a guilty act [27]. The fact that a breach was committed by a subordinate does not absolve his superiors from their penal responsibility if they knew that the breach was going to be committed and if they did not take steps to prevent it [28].

Military powers and duties are established by national law, but the duty resulting therefrom has to be interpreted in the light of international humanitarian law [29]. Superiors are therefore subject to special responsibility where they have failed to take all feasible measures within their power to prevent or repress a breach committed by a subordinate [30]. "Superior" means any person who has a personal responsibility with regard to the perpetrator of the acts concerned, because the latter, being his subordinate, is under his control [31]. Three conditions must be fulfilled before superiors become responsible. These are—

(a) the superior concerned must be the superior of that subordinate;
(b) he knew, or had information which should have enabled him to conclude, that a breach was being committed or was going to be committed;

[26] Protocol I, Article 85, para. 4.

[27] Protocol I, Article 86, para. 1.

[28] Protocol I, Article 86, para. 2.

[29] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff Publishers, Geneva, 1986, p. 1010, section 3537.

[30] Protocol I, Article 86, para. 2.

[31] *Commentary...*, *op. cit.*, p. 1013, section 3544.

(c) he did not take the measures within his power to prevent or repress it [32].

The armed forces must be subject to an internal disciplinary system which, *inter alia*, must enforce compliance with international humanitarian law [33]. Consequently, the Parties to the conflict must require military commanders to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of Protocol I [34]. Commanders are therefore required to ensure that their subordinates are aware of their obligations under the Conventions and Protocol I [35]. The concept of the humanitarian duty of commanders existed even before the first Geneva Convention of 1864, and is clearly stated in an order by General G. H. Dufour issued in 1847 [36]. Under Protocol I, when a commander has instructed his subordinate in accordance with this obligation, and the subordinate commits an illegal act in carrying out an order by the means commensurate with his rank, he may not invoke superior orders as an excuse. Furthermore, any commander who is aware that subordinates are going to commit a breach must take all necessary steps to prevent it. Where a breach has been committed, he must take action against the persons who committed it [37]. "The word 'commanders' refers to all those persons who have command responsibility, from commanders at the highest level to leaders with only a few men under their command" [38]. In other words,

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[32] *Commentary...*, *op. cit.*, p. 1012, section 3543.

[33] Protocol I, Article 43, para. 1.

[34] Protocol I, Article 87, para. 1.

[35] Protocol I, Article 87, para. 2.

[36] In 1847 an internal conflict, the War of the Sonderbund, took place in Switzerland. Guillaume-Henri Dufour was appointed General and Commander-in-Chief of the federal troops. In his "Recommendations on the conduct to be observed towards the inhabitants and troops", which he ordered the general staffs to follow, he gave orders that civilian persons and property should be respected, that enemy wounded should be looked after as carefully as his own wounded, and that no harm should be done to prisoners. In a P.S. to this document in his own hand, General Dufour (later the first President of the ICRC) added: "High commanders will take care to inculcate these principles in their subordinates, who will in turn inculcate them in their junior officers, so that from the latter they shall be passed to other ranks and serve as a rule for the entire federal army. That army must do everything to prove to the world that it is not a crowd of barbarians. Bern, 4 November 1847, The Commander-in-Chief." Olivier Reverdin: "Le Général Guillaume-Henry Dufour, précurseur d'Henry Dunant" in *Studies and essays on international humanitarian law and the principles of the Red Cross in honour of Jean Pictet*, ed. Christophe Swinarski, Martinus Nijhoff Publishers, Geneva-The Hague, 1985, p. 957.

[37] Protocol I, Article 87, para. 3.

[38] *Commentary ...*, *op. cit.*, p. 1019, section 3553.

all ranks in the military hierarchy, from general to corporal, each to the extent commensurate with his rank, are responsible for enforcing international humanitarian law.

"The development of a battle may not permit a commander to exercise control over his troops all the time; but he must impose discipline to a sufficient degree" [39]. To be effective, however, discipline must be based on training. Subordinates must therefore be trained by their superiors to apply the rules of humanitarian law on which they are competent to take decisions.

In view of the responsibility commanders are required to bear it would appear somewhat illogical to have rejected the principle that superior orders are not a valid excuse in law. But this illogicality is more apparent than real. In the present author's opinion, the point is not whether to accept or reject that principle, but how to assess the act in relation to the level of responsibility of the soldier(s) concerned, allowing for the latitude given to the executant to refuse to obey the order.

Where a commander gives an order and a subordinate then orders persons under *his* command to carry it out, it will be seen that by acting as a commander he comes under Part V, section 2 of Protocol I, which concerns repression of breaches. If he knew or should have known that his subordinates were about to commit a breach, and he took no steps to prevent it, he is responsible either for failing to take action or for failing to do his duty. It must therefore be accepted that a commander who, in carrying out superior orders, gives an order violating international humanitarian law is himself guilty [40].

Just as at the Nuremberg Tribunal, a distinction must be drawn between an "enabling" order which leaves a subordinate free to give an executory order for which he takes responsibility (for example, a tank regiment is ordered to advance in a given direction) and a "strict" order that allows the executant no latitude (for example, that all prisoners of war recaptured after escape are to be shot immediately). In the first case, regimental commanders can and must take international humanitarian law into account when giving their orders. In the second case, even if the national legislation to which the commandant of the prisoner-of-war camp is subject does not recognize the Nuremberg principles, he must not carry out the order. For him that order is impossible of performance, for by passing it on to his subordinates he would himself become responsible for it. An unlawful order must not

[39] *Commentary...*, *op. cit.*, p. 1018. section 3550.

[40] Blishchenko, *op. cit.*, p. 343.

be carried out and it is therefore a commander's duty to refuse to obey it. Otherwise it remains for him to free himself of responsibility by proving that he was forced to carry out the order.

The only soldiers not subject to the responsibility borne by their superiors and commanders (Articles 86 and 87, Protocol I) are private soldiers, who are however accountable for breaches of the basic rules of international humanitarian law. They must for example refuse to carry out an order by their lieutenant to finish off a wounded enemy or shoot prisoners. Only if a private soldier carries out such an order when forced to do so by a serious threat, for example that he will himself be shot, may he be relieved of his penal responsibility.

It has been objected that not to accept the plea of superior orders as an excuse weakens military discipline as provided for by national legislation, and undermines confidence in superior officers. In actual fact, bearing in mind the heat of the moment, the difficulty of applying the order usually lies in the subordinate's ability to understand its implications. Therefore, the fact that Protocol I does not define the extent to which superior orders are a valid excuse does not in any way mean that a soldier can divest himself of responsibility if he carries out orders which he can realize violate the elementary principles of the Geneva Conventions, such as respect for the wounded, shipwrecked, prisoners or civilians, or the provisions of that Protocol forbidding attack on an enemy who is *hors de combat* or perfidious use of a protective sign. As stated above, responsibility for many of the grave breaches listed in Protocol I must be borne mainly by Commanders, because they are in a position to assess the situation. This, for example, applies to methods of warfare, but the difficulty lies in deciding on what lever responsibility is to be assigned.

6. Internal provisions of Swiss law

The Swiss military penal code (MPC), like that of all other armies, regards disobedience as an offence. It provides that any person failing to obey an order given to him or the troops of which he forms part, and relating to the conduct of the service, shall be punishable by imprisonment [41]. In wartime, if such disobedience takes place in the face of the enemy, the punishment is hard labour or death [42].

"If the execution of an order relating to the conduct of the service is a crime or offence, the officer or superior giving the order shall be

[41] *Swiss Military Penal Code (MPC)*, Article 61, para. 1.

[42] *MPC.*, Article 61, para. 2.

punishable as the author of the breach" [43]. Superiors are therefore responsible for the orders they give, but as shown above the responsibility assigned by Protocol I is broader since it also covers offences of omission [44]. More directly, commanders are responsible for the acts of their subordinates [45]. They must also ensure that subordinates under their command are aware of their obligations under the Conventions and Protocol I [46].

A subordinate is also punishable if when carrying out an order he realized that he was taking part in perpetrating a crime or offence. Under Article 2, paragraph 2 of the MPC the judge may, however, mitigate his punishment or exempt him from punishment. In the positive law of Switzerland and other States [47] the plea of superior orders does not free the accused from his responsibility, but the judge is empowered to take such a plea into consideration, depending on circumstances. This appears to be a fair solution. Although as a militia the Swiss army must maintain strict discipline to guarantee its efficacy, it is only fair that every citizen-soldier should bear some responsibility which gives him the right to refuse to obey an illegal order. For example, at target practice the security officer may veto an order to fire outside the target area, even if his superior officer insists on it. Admittedly, since Switzerland has not been at war, there is no relevant case law. The notion of "participating" in a crime, the circumstances in which a person could be accused as co-author, instigator or accomplice, and his personal position as a subordinate that enables him to plead extenuating circumstances such as the duty of obedience, are outside the scope of this paper [48].

Switzerland has complied with the Geneva Conventions by introducing new provisions into Chapter 6 of the MPC (a chapter dealing with breaches of international law in the event of armed conflict), which state that breaches of international conventions on the conduct of war and the protection of persons and property, and breaches of other recognized laws or customs of war, are punishable [49]. Even though

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[43] *MPC.*, Article 18, para. 1. For "penal responsibility" in international humanitarian law, see *Commentary...*, *op. cit.*, p. 979, section 3411.

[44] Protocol I, Article 86, para. 2.

[45] Protocol I, Article 87, paras. 1 and 2.

[46] Protocol I, Article 87.

[47] See, *inter alia*, in Belgium the "Règlement de discipline des forces armées introduit par la loi du 14 janvier 1975", Article ii, para. 2, reproduced in David, *op. cit.*, p. 70 ff.

[48] See *MPC*, Article 45.

[49] According to *MPC*, Article 109.

Protocol I is somewhat vague in its definition of certain offences in so far as the principle of *nullum crimen sine lege* is concerned, in the legislator's view Switzerland's ratification of the Additional Protocols, especially Protocol I, did not make revision of the MPC necessary [50]. Grave breaches such as those described in Protocol I are accordingly covered by Chapter 6 of the MPC, subject to the reservations made by Switzerland when ratifying Protocol I.

As regards the obligation of mutual assistance in connexion with criminal proceedings [51] Switzerland is in a position to give the greatest possible co-operation in any procedure relating to grave breaches, by applying the federal law on mutual assistance in criminal proceedings [52].

7. Swiss reservations on ratifying Protocol I

When ratifying the Protocols, Switzerland made reservations regarding certain provisions of Protocol I on protection of the civilian population in the event of attack [53]. Protocol I reaffirms the principle that in the conduct of military operations care shall be taken to spare the civilian population [54]. Under Article 57, paragraph 2, the attacker must take the following precautions:

a) he must do everything feasible to verify that the objectives to be attacked are military objectives only;
(b) where that is not the case he shall refrain from, or cancel or suspend, the attack;
(c) he shall give advance warning to the civilian population of attacks which may affect it.

At the Diplomatic Conference the representative of Switzerland pointed out that the phrase "those who plan or decide upon an attack" was too vague, in that it might place a buden of responsiblity on junior military personnel which ought normally to be borne by those of higher

[50] Message du Conseil fédéral, *op. cit.*, p. 1034.

[51] Protocol I, Article 88.

[52] See Aubert, Maurice, "La répression des crimes de guerre dans le cadre des Conventions de Genève et du Protocole additionnel I et l'entraide judiciaire accordée par la Suisse", in "*Schweizerischen Juristen-Zeitung*, No. 23, 1983, p. 368 ff.

[53] See Aubert, Maurice, "Les réserves formulées par la Suisse lors de la ratification du Protocole additionnel aux Conventions de Genève relatif à la protection des victimes des conflits armés internationaux (Protocole I), in *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*, ed. Christophe Swinarski, Martinus Nijhoff Publishers, Geneva-The Hague, 1985, p. 139 ff.

[54] Protocol I, Article 57, para. 1.

rank [55]. When Switzerland signed Protocol I the Swiss Federal Council accordingly made a statement interpreting Article 57, paragraph 2, of the Protocol as follows: "The provisions of Article 57, paragraph 2, create obligations only for commanding officers at the battalion or group level and above" [56]. At the time of ratification the Government repeated this interpretative declaration in the form of a reservation and added a sentence reading: "The information available to the commanding officers at the time of their decision is determinative" [57]. The Republic of Austria, which in military matters is in a position resembling that of Switzerland, made a similar reservation with regard to Article 57, paragraph 2 of Protocol I when ratifying that Protocol [58].

Military action would be impossible if commanders planning an attack were required to make its success less likely by awaiting further information before deciding to attack. The above reservations would appear justified, for company or battery commanders—and *a fortiori* lower ranks—are not usually in a position to take decisions with Article 57, paragraph 2 in mind. Battalion or group commanders, however, and commanders of still higher formations, have a general staff and scouting or intelligence facilities from which they can assess the situation. Such formations must therefore take steps to ensure compliance with Article 57, paragraph 2, and must give clear orders to their subordinates not to commit breaches [59].

The Swiss reservation only partially exonerates subordinates in respect of precautions in attacks; it does not affect their duty as commanders. However clear an order may be, it nearly always leaves some initiative to the subordinate who carries it out. Consequently, whilst a company or battery commander can plead as an excuse that he was given an order, when carrying out the order in the light of the information in his possession he remains responsible, both generally and in accordance with Article 57, paragraph 2, for preventing his subordinates from committing grave breaches.

The second Swiss reservation [60], stating that certain precautions against the effects of attacks "will be applied subject to requirements

[55] *O.R. CDDH*, *op. cit.*, vol. VI, p. 212 (CDDH/SR.42, para. 43).

[56] The term "group" is equivalent in the Swiss army to "battalion" and is used *inter alia*, in the artillery, including anti-aircraft artillery.

[57] Message du Conseil fédéral, *op. cit.*, p. 1063. (Text appears as an Annex to these notes.)

[58] The instrument of ratification of the Additional Protocols by the Republic of Austria of 13 August 1982.

[59] Protocol I, Article 86.

[60] Reservation (attached) with regard to Article 58, Protocol I.

for the defence of the national territory" [61], is made because Switzerland is a densely populated country with an excellent civil defence system [62].

It has just been seen that according to Switzerland's reservation with regard to precautions in attack (Article 57, paragraph 2 of Protocol I) these create obligations only for commanding officers at battalion or group level and above. By extension, it seems reasonable to accept that precautions against the effects of attack create obligations only for commanders of battalions or groups. If the phrase "to the maximum extent feasible" [63] and its restrictive Swiss interpretation are added, there is little risk that a subordinate carrying out an order that does not comply with Article 58 could be held penally responsible for breaching that article.

Conclusions

In international law the question whether superior orders provide an excuse is neither firmly based nor exactly defined. It must therefore be regulated by States, who must allow for the individual characteristics of their national legislation.

From the point of view of international humanitarian law the lack of relevant provisions is not as serious as might be supposed. International humanitarian law must be universally applied and obeyed; it cannot attempt to impose rules on this subject that are contrary to national legislation, otherwise it will be rejected. Besides, the grave breaches committed in armed conflicts over the last few years are principally of the Geneva Conventions, and relate to inhuman treatment of wounded, conditions of detention for prisoners, failure to respect the civilian population, and suchlike.

Protocol I, however, is particularly concerned with non-compliance with rules that are universally recognized, such as those for the protection of the civilian population against the effects of hostilities, and restrictions on methods of warfare. Even if an article on the responsibility of persons carrying out an illegal order had been added to the Geneva Conventions or Protocol I, it would probably not have prevented grave breaches or led to their punishment. Unfortunately, grave breaches of international humanitarian law are usually the result of orders from the highest levels of the military hierarchy, and troops

[61] Federal order of 9 October 1981 in *Feuille Fédérale*, 1981, p. 1063. Recueil systématique du droit fédéral, O.518.521., p. 63.

[62] Aubert, Maurice, "Réserves...", *op. cit.*, p. 144.

[63] Protocol I, Article 58.

could therefore not resist them. For the real culprits to be punished, a supranational tribunal would have to be appointed with authority to try, and punish, Heads of States who had ordered or tolerated grave breaches of international humanitarian law. That is still a long way off!

However, Protocol I, by specifying the responsibility of commanders at all levels, is a great step forward, and should have a coercive effect in international humanitarian law. The Parties to a conflict must insist on their commanders doing all necessary to prevent their subordinates from committing grave breaches, and to repress any such breaches [64]. But especially in the heat of battle, this obligation cannot be properly fulfilled unless it is supported by training as thorough as that required for the handling of weapons and the conduct of warfare. The first and principal duty required of commanders by Protocol I is, therefore, to ensure that all ranks are familiar with international humanitarian law. It is important that States which have ratified the Protocol should be fully conscious of their responsibility in this connexion. States that have not yet ratified it cannot claim, however, that its rules on the responsibility of commanders are no concern of theirs, for these are not special rules added to Protocol I. On the contrary, they express basic principles whose breach would make a mockery of the Geneva Conventions.

It is particularly necessary to uphold the principle of the commanders' responsibility in States that do not accept the principle of subordinates' responsibility in carrying out unlawful orders from a superior. The two principles partly overlap, and the purpose of both is to make members of the armed forces fully aware of their responsibilities, and so to prevent, if not punish, grave breaches. All States must therefore realize that it is their duty to comply with and enforce international humanitarian law in armed conflicts, as a branch of international law accepted by all members of the community of States.

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[64] Protocol I, Articles 86 and 87.