

Illegal Orders

When I was an Officer Cadet in Army Reserve I had become aware of two concepts that I regarded as important to undertaking my role as a potential Army Officer. The First was the doctrine of the Just versus an Unjust War a Christian doctrine which informs much of International Humanitarian Law. And the second was a realization that the defense of “I was only following orders” was not considered as an adequate defense as was highlighted at the end of the World War II during the Nuremberg Trials of the captured Nazi war leaders.

As a young officer I had two veterans one from World War I and another from World War II take it upon themselves to school me on when I should disobey orders whilst on operations. This is because often in operations a young officers is “Johnny on the spot” out of communications with higher authority and that this required junior officers sometimes quite literally to make decisions of life and death importance.

It is important for Junior Officers to be confident of the Legality and Morality of any orders or operations because they are the ones issuing the order to fire to their soldiers. The giving of such an order can have lethal effect is a decision that could not be taken lightly.

As a junior officer I studied what was and was not a lawful command. This was important as Disobeying a lawful command was a criminal offense. An offense that for the early period of service in could carry the death penalty. Indeed for the first few years of my service, I as a junior officer in a declared war in certain limited situations had the power to impose the death penalty on my soldiers. The old regulations empowered junior officers with the power of “Summary Execution” for the offenses of: “Cowardice in the face of the enemy, Disobeying a lawful command, and Mutiny.”

As for the question: What is a lawful command? The command must be for a military purpose and not in itself unlawful. That is why the concept of a just war is important because it informs whether the military action itself is lawful. If the military action itself is unlawful it follow that all orders given to prosecute an illegal war are themselves unlawful and must be disobeyed. I would point out that in the military unlike in the civilian world you are not excused from following a military directions on the grounds that it is unsafe, certainly not on operations.

The concept of Just versus Unjust War is a Christian Concept that attempted to place Warfare within a moral framework. This is because warfare by its nature often requires the willful taking of life an action normally regarded murder, a mortal sin in the Catholic tradition. The just war tradition was developed to inform the Christian Princes of Europe on how to balance their duty to keep their people safe a duty which at times required the enforcing of boundaries with neighboring states using warfare.

I discovered that the concept of a just war is something akin to the right of self-defense. It stipulates that warfare should only be employed as a last resort and only for defensive purposes. The concept of war as a last resort links to the notion of “a clear and present danger” which it often sited when conducting military strikes such as the one on the Iranian General Qasem Soleimani because in the absence of a clear and present danger it is hard to argue that the strike was a “Last resort”. This is also why the “Weapons of Mass Destruction” argument was needed (The so called argument we could all agree on) prior to the Invasion of Iraq because in the absence of WMD there was no “present danger” necessitating and the immediate invasion of Iraq Invasion would not be morally justifiable. The absence of WMD rendered the invasion an illegal war of aggression which the Army Officers would then be legally obliged to disobey.

Personally I would not have deployed to Iraq Firstly due to the fact my wife comes from an Arabic speaking country I was terribly conflicted in that I would have I suspect been unable to accomplish the necessary dehumanisation to be combat effective in the medium level conflict that was the Iraq war and Secondly as I regarded the Iraq War as illegal from the start as: I never bought that Iraq had anything to do with 9/11 as this was inconceivable to me as Al Qaeda were the sworn enemies of Saddam and even if there were WMD the UN inspectors were crawling all over Iraq making their operanalization in the immediate future and therefore them becoming “a clear and present danger” needed to trigger the invasion, highly unlikely.

The concept of being for a military purposes is designed to exclude as unlawful orders that are given for not “militarily useful” purposes or for personal purposes such as ordering soldiers to work on your own personal business. This is similar to the concept in Corporations Law that decisions must not be for an “Improper Purpose” most of the case law around this relates to doing otherwise legal things such as issuing shares with the purpose of avoiding a hostile takeover. This was the position I believe Colonel Vindman found himself in were he was of the view that calling for an investigation by Ukraine an otherwise lawful act was tainted by the motivation of damaging a political rival.

This then brings us to the Concept of orders which in and of themselves are unlawful. This relates to Humanitarian Laws and is linked to the concept of War Crimes. No-body can order you to commit a war crime as they in and of themselves unlawful. This may at times create significant balancing issues when it comes to collateral damage. This brings into play the concept of proportionality. The best way I can describe it is to use the analogy of a surgeon who makes the call to amputate a patients leg to save the patients life.

The concept behind much of humanitarian law is that virtually all conflict end with some for of political settlement. Actions which inflame animosity such as torture or the killing of innocent women and children make the achievement of a political settlement much more difficult and should be avoided even at the expense of some short term military advantage. This is why the alleged behavior of our troops in shooting unarmed locals in Afghanistan and President Trumps interference in the case of Navy Seal Eddie Gallagher who was found guilty of posing with the severed head of an insurgent and then posting it online is so problematic. These dead men have family who suspect or know the truth. Can you imagine the outcry if a policeman posted a picture of himself with the dead body of a school shooter he had just shot? Studies have shown that the loss of a close family member in the conflict is a common trait in suicide bombers.

While we are guarding the country, we must accept being the guardian of the finest ethics. The country needs it and we must do it.

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