Commentary
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First of all, I wish to thank the organisers of this Seminar for inviting me and for giving me the opportunity to comment on Professor Johnson's paper.

I should like to say at the outset that it provided a lot of stimulus for my thinking. I should also say that it is a well-argued thesis reflecting a common lawyer's approach to international law. Many of you may readily agree with it. I will have no complaint against you, if you do. But it is not my cup of tea. If I do say this, it is not because I find his reasoning tenuous, but because I do not share his basic premises, of which I will be speaking later.

The first issue that arises out of this paper, Mr Chairman, is whether the Nuremberg and Tokyo judgments are good law so far as the validity of superior orders is concerned. Professor Johnson poses the issue somewhat differently when he asks the question whether they are binding precedents in international law. You see in this question itself evidence of a common lawyer's bias towards precedent. No quarrel about it, of course. As to the Nuremberg and Tokyo agreements, I am in agreement with Mr Justice Radha Binod Pal of India who takes the view that these judgments were rather politically motivated in that they tried only the nationals of the vanquished. Such a course of action only gives a signal to future victorious powers as to what they can lawfully do. To say this, however, is not to deny the intrinsic worth of some of the principles laid down in the judgments.

That brings me to the second important issue, namely, what is the ratio of the Nuremberg Judgment so far as the plea of superior orders is concerned. This is no doubt well-known to all of you, but it is esssential that I recount it for the purposes of my argument and analysis. The Charter of the International Military Tribunal set up by the Principal Allied Powers, in 1945, rejecting the plea of superior orders as a defence, laid it down that "it may be considered in mitigation of punishment if the Tribunal so requires". The Nuremberg and Tokyo tribunals acquiesced in the Charter principle without demur. This is as it should be. In my opinion, the principle is sound in law, justice and morality. No one — not even a soldier on the battle-front — should be under an obligation to act in a manner to outrage humanity. What of military necessity, you may ask. My simple answer would be that this plea should not be allowed to operate at the expense of the life or injury of another. True it is that it may be hard upon military men and the war effort. But how else can you control cruelty, suffering and destruction in war? In the event, I should have liked Professor Johnson's paper to re-emphasise the importance of the principle of the Nuremberg Judgment in the context of humanitarianism. No "military establishment" should feel at liberty to breach it with impunity. This is an imperative principle of

law which cannot be derogated from. Should military establishments disregard it, they act at their peril.

This leads me to the third issue which concerns developments after the Nuremberg and Tokyo verdicts. I refer especially to the alleged war-crimes in the *Calley* case and *Hostages* case. Professor Johnson gives a vivid account of these cases against the background of the provisions of law in the military codes of the United States and Canada. It appears from a review of all this that the principles of the London Charter and the Nuremberg Judgment have been whittled down in the period since the Second World War. In the description of Professor Johnson: "subsequent experience has shown an unwillingness, at least on the part of certain military establishments, to accept as a general rule what may have been thought appropriate to the particular case of the Nazi defendants". That certain of the military establishments should so regard the Nuremberg verdict is not in the least surprising. But what troubles me is that Professor Johnson should consider that the principle of obedience to superior orders conflicts with a basic principle of criminal law, that of *mens rea* (guilty intention). I do not share Professor Johnson's view here, notwithstanding the authorities he invokes in support of his proposition, for the reason that *mens rea* is not a condition *sine qua non* for every crime. Modern developments in law have recognised certain acts as "crimes" irrespective of proof of *mens rea*. International criminal law should follow this development rather than be governed by the notion that *mens rea* is a necessary constituent of crime. That the person arraigned for a war crime is not endowed with the "commonest understanding" or is a conscript does not matter. Nor is it of any consequence that he is acting under a mistake or compulsion so long as the act in question is prima facie unlawful. In as much as I dissent from Professor Johnson on this point, I also join issue with Professor Dinstein's finding (above p 306) that obedience to superior orders should be regarded as "a circumstance that may be taken into account for purposes of discharge from responsibility". Such an interpretation, in my view, would impair international humanitarian law.

Where do we go from here? If the law on this point is allegedly inadequate, what will have to be done? Professor Johnson is sceptical about convoking an international conference to define the precise scope of the plea of superior orders. I share his scepticism, but not for the reasons advanced by him. First, as to his reasons: he doubts whether the process involved in the trial of war crimes is at all international. In his view the entire process, meaning evidence, procedure and sentencing, all come within the domain of municipal rather than international law. In other words jurisdiction over so-called "international crimes", says Professor Johnson, is national. And so long as this remains so, the defences of municipal law, viz., mistake, compulsion, superior orders, would be available to an accused as a defence to war crimes. According to Professor Johnson, it appears that, so long as there is not international jurisdiction, little can be done to improve the theoretical position in law. This is a weighty argument that must be fairly and squarely met. I concede that at present there are no international tribunals vested with jurisdiction to try war and other international criminals. But it does not follow therefrom, in my opinion, that there cannot be an exercise of international jurisdiction over war crimes. Nothing, in my view, precludes the exercise of such jurisdiction by national courts. National institutions that exercise

jurisdiction over international crimes, that is, crimes deriving validity from international agreements, treaties and custom, would be acting, as it were, as the instruments of international law. I should also like to point out that national courts in federal countries assume and exercise jurisdiction over crimes defined by ''State'' or ''provincial'' legislatures as well as by the ''Federal'' legislature. The position in regard to the exercise of jurisdiction by national courts over international crimes, in my view, approximates in law to the exercise of jurisdiction over both ''State'' and ''Federal'' offences in federal countries. While exercising jursidiction over such crimes, national courts act as if they are an international court. The analogy of a Prize Court may be relevant here. When exercising jurisdiction over war and other international crimes, national courts should look to international law rather than to municipal law for the definition of the offence as well as the defences open to the arraigned. Therefore, I see no valid legal objection of the kind Professor Johnson perceived to the holding of an international conference. But I have my own reservations on holding a conference for this purpose at present. It is for the reason that the time for codification is not ripe, and that a prematurely held conference might result in impairing the Nuremberg principle as regards superior orders which was unanimously endorsed by the General Assembly.

Incidently, Professor Johnson, while dealing with the legal effect of the General Assembly resolution regarding the Nuremberg judgment, says that it is not ''binding'', although it may carry considerable weight. I beg to differ. In my view, the General Assembly in endorsing the Nuremberg Judgment merely confirmed the legal position in international law. Resolutions of this kind are distinct from other resolutions of the Assembly. They are binding on Member States of the United Nations, not *qua* resolutions of the Assembly, but as evidence of State practice accepted by States, within the meaning of Article 38.1 (b) of the Statute of the International Court.

Mr Chairman, I wish to say that I should have liked to see in a comprehensive study of the kind undertaken by Professor Johnson an analysis of the question in terms of relation of law to morality. It would be a commonplace to say that rules of law devoid of morality have no enduring and pervasive influence on the conduct of an individual. This is particularly true in the case of obedience or disobedience of orders by soldiers on the battle-front. It is to the dictates of morality and conscience rather than to rules of law, as such, that a person who defies orders looks to in making a decision. In the circumstances, it is but essential that we reiterate the close and inextricable connection between law and morality in an examination concerning the validity of superior orders.

Finally, Mr Chairman, let me say that it is no pleasure for me to disagree with the views and analysis of Professor Johnson. If I am impelled to disagree, it is because I fear that the acceptance of Professor Johnson's thesis would jeopardise the principle of the Nuremberg Judgment as regards superior orders and in turn impair humanitarianism.