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THE LAW OF ARMED CONFLICT
WITH REGARD TO THE PROTECTION OF CIVILIANS

by

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A paper presented to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Operations.

The contents of this paper reflect my own personal views and are notd necessarily endorsed by the Naval War College or the Department of the Navy.

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ABSTRACT of

LAW OF ARMED CONFLICT WITH REGARD TO THE PROTECTION OF CIVILIANS

U.S. Navy Regulations state that a commander shall observe and require his command to observe the principles of international law. This paper reviews the development and current status of the law of armed conflict (LOAC) with regard to the protection of civilians. It also gives specific attention to LOAC as it relates to the development of rules of engagement and the commander's position in the chain of command. Although the subject is legal, the intent is to avoid legalism. The author does not presume to possess a lawyer's expertise. An attempt is made to demonstrate that LOAC is not merely a conglomeration of legal niceties and utopian illusions, having as their primary effect the obstruction of the operational commander. Rather, LOAC is an evolutionary military, moral, and legal attempt to ensure that in the pursuit of victory, commanders do not betray their duty.

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CHAPTER I

INTRODUCTION

Under the Constitution, treaties constitute part of the supreme Law of the Land. Their provisions must be observed by military personnel with the same strict regard for both the letter and spirit of the law which is required with respect to the Constitution itself. Article 0605, U.S. Navy Regulations specifically requires that "a commander shall observe and require his command to observe the principles of international law. Where necessary to fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized." Likewise the Chairman of the JCS and commanders of unified and specified commands are directed to ensure compliance with, and prevent violations of, the law of war.¹

International law plays a variety of roles in planning and implementing national security decisions. The legal tradition, can counter the preoccupation with short range goals which causes long range interests to suffer. As noted in NWP 9, The Commander's Handbook on the Law of Naval Operations, failure to comply with international law ordinarily involves greater political and economic costs than does observance.² A concern for international law supports the national interest in the stability and quality of the international system.

America seeks a new world order based on the rule of law.³ If we ourselves do not adhere to that standard, we will have abandoned one of the vital objectives we are bent upon attaining.

CHAPTER II

THE PROTECTION OF CIVILIANS: A HISTORICAL REVIEW

Though the ancient philosophers rejected the senseless carnage of war, they failed to provide a general theory that justified sparing the non-soldier. Their thought did not include the concept of an all-embracing "humanity". Aristotle considered the person who resided outside the polis either a beast or a god, but not a human.⁴ For the Romans, who greatly advanced the practice of a society ruled by law, enemy peoples were simply outside the law. The normal course of events was such that "the vanquished were at the mercy of the conqueror, who was generally perfidious and implacable."⁵

The Christianization of the Roman world provided no gentling effect. While there arose many pacifist writers, they did not represent a generally accepted and formalized opinion. The Church itself was not pacifist. Still, the pacifist argument exposed the rawest of nerves for many Christians, among them Augustine, Bishop of Hippo. Augustine rejected private killings, even in self defense, as absolutely impermissible. But while he insisted that the Christian's private life must be modeled on the life of Christ and the order of charity; he also believed that in this imperfect world the state must be ruled by the order of justice.⁶ Serving as an agent of God's design, it is possible for a state to wage just war so long as several prerequisites are met: right inward disposition, a just cause, right authority, right intent, the prospect of success, proportionality of good to

evil done, and that it be a last resort.⁷ The only permissible inward disposition was one of love, saving sinners by restraining them from doing further evil. With regard to intent, Augustine declared: "Peace should be the object of your desire; war should be waged only as a necessity, and waged only that God may by it deliver men from the necessity and preserve them in peace." With this right intent and the requisite inward disposition, it follows that there should be no wanton violence, for that only works against the establishment of peace.

These prerequisites of just war should have provided an important element of humanization to the conduct of war. Unfortunately, this is little more than an implication of Augustine's teachings. In defining war as a struggle between sin and justice, Augustine recognized that the innocent might suffer in the process of vindicating justice; however, he consigned this to necessity and was perfectly resigned to it. He found the ascription of individual innocence not only impossible but irrelevant, for "in eternity [the innocent] quite escape punishment."⁸

Augustine's teachings became the common heritage of medieval writers. A strict Augustinian, Thomas Aquinas's contribution to development of the notion of innocent immunity came in his Summa theologiae, written in 1245:

"Nothing hinders one act from having two effects, only one of which is intended...moral acts take their species according to what is intended...And yet, proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end."⁹

Though these principles of double-effect and proportionality remain pillars of the law of war today, standing alone they can still excuse horrible actions through the device of good intentions. And though the protection of certain classes, such as clerics and women, was well established, a general theory of innocence within the theater of war remained to be developed.

A step towards such a theory was taken in the 1300's by Lucas de Penna, who considered war subject to not only moral but also legal limitation. And because law is a matter of objective fact, only those participating in an unjust act could be held responsible. Lucas went beyond the theological tradition by establishing active participation in injustice as the criterion for judging the guilty among the enemy: "To extend their liability to their innocent fellow members is against the principle of justice and equity."¹⁰

The principle of distinction had begun to take shape and was advanced by the Spanish Dominican Francisco de Vitoria who reasoned that any slaughter of the innocent by primary intent is prohibited. Again, the only test of guilt or innocence is a material objective fact, determined by the bearing or non-bearing of arms. Vitoria argued that with regard to the peaceable civilian population, "all these are presumed innocent until the contrary is shown."¹¹

This rejection of the ancient notion of collective guilt was promoted by the secular jurists. Standing out among them was Hugo Grotius, who built a case that:

"one must take care, so far as is possible, to prevent the death of innocent persons, even by accident." [Furthermore], "nature does not sanction retaliation except against those who have done wrong. It is not sufficient that by a sort of fiction the enemy may be conceived as forming a single body."¹²

From the standpoint of civilian immunity, the most important author of the Enlightenment was Emmerich von Vattel. In his writings there is no hint of moral legitimacy derived from theological or philosophical sources. He is unequivocal that a person is not immune because of sex, age, or occupation; but rather because he offers no resistance, the belligerent has no right to offer violence to him.¹³ Immunity is not something which is earned, but which is inherent to any person until they take action which causes it to be forfeit.

The publicists of the Enlightenment were not utopians. Vattel acknowledged all of a nation as enemies and recognized the demands of necessity, but a necessity which was subject to moral assessment. Military necessity was not a release for violence, but a constraint upon it: "A lawful end confers a right only to those means which are necessary to attain that end. Whatever is done in excess of those measures is contrary to natural law."¹⁴

The belligerent who would make use of a measure of violence without necessity, when less severe measures would have achieved the purpose, "would not be guiltless before God and in his own conscience."¹⁵ Precisely because it is difficult to form a just estimate of what the actual situation demands, it becomes absolutely necessary that nations develop and mutually conform to certain rules on the subject.

CHAPTER III

THE INTERNATIONAL CONVENTIONS

In 1868, the first chapter of the international law of war was written in the Declaration of St. Petersburg. While the purpose of that document was to outlaw specific explosive bullets, its significance for the protection of civilians lay in a single phrase of the Preamble: "the only legitimate object which States may endeavor to accomplish during war is to weaken the military forces of the enemy."¹⁸

In 1874, the delegates of fifteen European states met in Brussels to attempt a codification of the law of war. Though the Brussels Declaration was never ratified, along with the Oxford Manual of the Laws and Customs of War produced by the Institute of International Law, it formed the basis of the Hague Conventions of 1899 and 1907. The resulting Regulations recognized that "the right of the belligerent to adopt means of injuring the enemy is not unlimited"(Art. 22), prohibited attack or bombardment of undefended towns(Art. 23), and required a military occupation authority to respect "family honour and rights, the lives of persons, and personal property."(Art. 46). Still, it dealt almost exclusively with the military, with no specific mention of civilians. This emphasis was continued with the Geneva Conventions of 1906 and 1929 Relative to Wounded and Sick in Armies in the Fields and Prisoners of War.

The birth of aerial bombardment brought the plight of civilians to the forefront. Though never adopted in legally

binding form, the 1923 Hague Rules of Air Warfare are an authoritative attempt to clarify and formulate rules of war:

Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.(Art. 22)

Specifically, it is

...legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.(Art. 24:1)

In cases where the military objective

...cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment(Art. 24:3) [unless] in the immediate neighborhood of the operations of land forces.(Art. 24:4)

In which case, it may be legitimate if there exists a

...reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population. (Art. 24:4)

The Final Act of the Geneva Convention of 1929 recognized the need for further protection of civilians but it was not until after the Second World War that another diplomatic conference was held to review the Geneva Conventions. From that conference of representatives of 63 governments came four conventions, including Convention IV Relative to the Protection of Civilian Persons in Time of War. Though it did not introduce any specifically new ideas, it was of special significance as the first international agreement in the law of war to exclusively address the treatment of civilians. Along with requiring that "persons taking no active part in the hostilities...shall in all

circumstances be treated humanely" (Art. 3), and providing special protection to certain groups of people, it also prohibited reprisals against protected persons and rejected the notion of collective guilt: "No protected person may be punished for an offense he or she has not personally committed." (Art. 33)

Although not specifically a part of LOAC, the 1969 Vienna Convention on the Law of Treaties made treaties of a humanitarian character an exception to suspension through violation. That is, although a government is not bound by the provisions of LOAC treaties when in conflict with non-signatory powers, one side is not released from its humanitarian obligations solely because the other side commits a breach of faith.

From 1974 to 1977, at the urging of the U.N. General Assembly, a Diplomatic Conference met with a view toward ensuring a more complete protection of civilians, prisoners, and combatants. Two draft protocols additional to the Geneva Conventions were reviewed. Protocol I pertained to international armed conflicts, while Protocol II applied the basic principles of the law of war to non-international armed conflicts.

Most of the Hague Regulations and the Fourth Convention regarding civilians apply only to those in the hands of a power hostile to them. Protocol I codifies and considerably expands the protection of civilians still in territory controlled by their own side or in the immediate vicinity of a battle. Article 51 requires that the civilian population enjoy "general protection" and not be the object of attack. Specifically,

Indiscriminate attacks are prohibited. [That is, those] of a nature to strike military objectives and civilians or civilian objects without distinction...among others...an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated...[Also] attacks against the civilian population...by way of reprisals are prohibited...[and] the presence...of...civilians shall not be used to render certain points...immune from military operations.

Although the Reagan Administration recognized "that certain provisions of Protocol I reflect customary international law, and other appear to be positive new developments", it also determined that in key respects it would undermine humanitarian law. Most objectionable were provisions giving special status to "wars of national liberation", and Article 44(3), which "in a single subordinate clause, sweeps away years of law by 'recognizing' that an armed irregular 'cannot' always distinguish himself from non-combatants; [but] would grant combatant status [and protection (Art. 44.4)] to such an irregular anyway."¹⁷

Protocol I was not submitted to the Senate for ratification and remains unratified by most major powers. Protocol II was submitted but has not been ratified. It is important to remember though, that the Nuremberg Judgement in 1946 regarded the Hague Regulations as amounting to customary law, and therefore binding on all states, including those which never became parties to either convention and regardless of the provision which declared the Convention and Regulations as irrelevant if any belligerent was not a party thereto.¹⁸

CHAPTER IV

U.S. MILITARY REGULATIONS

The first U.S. military code governing the conduct of armies in the field was General Orders, Number 100, published during the Civil War. Drafted by Professor Francis Lieber at the request of Secretary of War Stanton and distributed to both sides at the direction of President Lincoln, it became the prototype not only for follow-on military law but also for the Hague Conventions. This is indicative of the symbiotic relationship of military law and international law. Military law does not merely conform; rather, it is a major factor in the development of both the codified law and customary law.

That portion of the so-called Lieber Code with perhaps the greatest lasting significance is an echo of Vattel.

Art. 21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subject to the hardships of the war.

Art. 22. Nevertheless, as civilization has advanced...so has...the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms...the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

Lieber also undertook to define military necessity as:

"those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war." (Articles 14 and 15)

Retaliation was permitted, but only as a means of protective retribution and a last resort, with the realization that "unjust

or inconsiderate retaliation...by rapid steps leads belligerents nearer to the internecine wars of savages."(Art 28)

Lieber also addressed the problem of armed enemies not belonging to the hostile army, an issue similar to that which Protocol I has been unable to overcome. Clearly the following is more in keeping with U.S. government policy.

Art. 82. Men...who commit hostilities...without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war...divesting themselves of the character and appearance of soldiers--such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

The 1914 Army Field Manual, Rules of Land Warfare, advised in its preface that "everything vital contained in G.O. 100" had been incorporated in that manual and wherever practicable the original text was used. However, reference was made to the written rules of war which had been developed in the previous 50 years and for the first time, there was also a section specifically devoted to "war crimes" identified as such. In this regard, the defense of superior order and the relevance of command responsibility were also examined.

Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they fall.(Art. 366)¹⁹

This blanket of protection for the individual soldier was clearly restated in the 1940 edition of The Rules of Land Warfare.

However, in anticipation of the war crimes trials to follow the Second World War, The Rules were revised in 1944 in such a way as to deny the traditional appeal to superior orders.²⁰

While the current Law of Land Warfare still states that every national of the enemy state becomes an enemy of every national of the other state, it also notes in the same article that "it is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them." (Art. 25)²¹ Along with this specific recognition of the principle of distinction, and implicitly the principle of double-effect, the principle of proportionality is also explicitly recognized: "...all reasonable steps [must be taken] to ensure that..military objectives...may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated." (Art. 41) Military objectives having been defined in Article 40 as:

combatants, and those objects which...make an effective contribution to military action and whose total or partial destruction, capture, or neutralization... offers definite military advantage to the attacker.

The principle of military necessity continues as the pivotal concept: "the law of war...requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes" (Art. 3) and, in consonance with previous editions, "that they conduct hostilities with regard for the principles of humanity and chivalry." (Art. 3) In accordance with the 1949 Geneva Conventions, collective penalties and reprisals against protected persons (those persons

who find themselves in the hands of another party to the conflict) and their property were prohibited. This in contrast to the 1914 Rules which stated that when properly authorized, "persons guilty of no offense whatever may be punished as retaliation for the guilty acts of others." (Art. 383)

The Law of Land Warfare is not the only publication of the U.S. military dealing with the law of armed conflict.²² It has been given precedence in these pages only to demonstrate the historical development of our military regulations regarding LOAC. Although the Navy Commander's Handbook on the Law of Naval Operations is generally a reflection of the Army Field Manual and international law as outlined above, it does provide additional guidance by way of more definitive explanations of the terms noncombatants and civilian objects.

The term noncombatant is primarily applied to those individuals who do not form a part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts. In this context, noncombatants and, generally, the civilian population are synonymous ... The term is also applied to armed forces personnel who are unable to engage in combat. (Para 5.3)

Civilian objects consist of all civilian property and activities other than those used to support or sustain the enemy's warfighting capability. (Para 8.1.2)

Civilian objects may not be made the object of attack.

Although incidental injury to civilians or collateral property damage is not unlawful, it should not be excessive in light of the military advantage anticipated, nor may the degree and kind of force exceed that required for submission of the enemy.²³

CHAPTER V

IMPLICATIONS AND APPLICATIONS FOR THE COMMANDER

Rules of Engagement (ROE)

One of the primary objections by military personnel to the law of armed conflict is what they perceive to be the inevitably over-restrictive rules of engagement which result. But while ROE must be in accordance with international law, it is only a framework which establishes certain minimum standards. ROE must also reflect operational, political, and diplomatic factors, and NWP-9 acknowledges "they often restrict combat operations far more than do the requirements of international law." ROE may also reflect the on-scene commander's desire to exercise control over his forces in keeping with his concept of operations.

During the Vietnam War, and more specifically the Rolling Thunder campaign, the Johnson administration selected the minimization of civilian casualties as its standard in target selection, rather than the legal prohibition on excessive collateral damage. In practice the criteria slipped farther, to approving only those targets that would result in a minimum of civilian casualties. With this as the paramount consideration, there was substantial disregard for the security of the attacking forces and the efficient accomplishment of the mission. The restrictions imposed were perhaps the result of humanitarian, political, or other considerations, or even ignorance of the law, but they were not based on the law of war.²⁴

In similar manner, in the first 24 hours of Operation Desert

Storm, the Chairman of the Joint Chiefs of Staff stated there would be "very tight control to minimize collateral civilian damage" and allied forces would be "very sensitive to cultural and religious sites."²⁵ However, as the war progressed and it became apparent that the Iraqis might be moving their command and control centers into just such sites, a U.S. CENTCOM spokesman stated that allied forces would not target schools and mosques even when housing legitimate military objectives.²⁶ President Bush then confirmed allied forces were going to "unprecedented lengths to avoid destroying civilian and religious sites."²⁷

It must be remembered that the law provides not only restrictions, but also rights. The law of war accepts the principle of military necessity and the inevitability of collateral civilian casualties and damage; what it prohibits is attacks directed against civilians and excessive collateral casualties. The law also places responsibility for the protection of civilians on both sides of the conflict. If the defender violates the law, using civilians in an attempt to shield an otherwise military objective, he bears the burden of responsibility for collateral damage. A military target does not change its character by being so situated.

Command Responsibility

The most famous case involving the concept of command responsibility for war crimes was the 1945 trial of General Tomoyuki Yamashita, commander of the Japanese 14th Area Army in

the Philippines from October 1944 to the end of the war.²⁸ The general comprehensive charge against Yamashita read:

[General Yamashita] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities...[and he] thereby violated the law of war.

The defense contended:

The Accused is not charged with having done something or having failed to do something, but solely with having been something. For the gravamen of the charge is that the Accused was the commander of the Japanese forces, and by virtue of that fact alone, is guilty of every crime committed by every soldier assigned to his command.

The prosecution's counter-argument was that the atrocities

were so notorious and so flagrant and so enormous ...that they must have been known to the Accused if he were making any effort whatever to meet the responsibilities of his command or his position; and that if he did not know of those acts...it was simply because he took affirmative action not to know.

The defense conceded the enormity of the atrocities in Manila, but denied Yamashita had any knowledge of them. The general had taken command only 11 days prior to the U.S. invasion and under very chaotic conditions. By mid-December Yamashita had implemented a defense strategy in which he personally commanded 152,000 troops in Northern Luzon, while separate components, including a naval force in Manila which was not a part of his command, were responsible for the Bataan and Manila areas. Communications were extremely difficult, to the point of being nonexistent with these other groups. Anticipating this, his order establishing the separate commands required all elements to prepare for self-sufficiency and independent fighting.

Despite these circumstances, the court found that General Yamashita "failed to provide effective control" of his troops. He was sentenced to death by hanging. Appeal was made to the U.S. Supreme Court, which found that international law "plainly imposed on [Yamashita]...an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population." Exercising judicial restraint, the Court did not consider extenuating circumstances and upheld the conviction. General MacArthur confirmed sentence, President Truman refused clemency, and on 23 February, 1946, sentence was executed.

The Reynolds Commission which had tried Yamashita imposed an awesome standard on commanding officers with its acceptance of the argument that he must have known or should have known about atrocities. But this was not the only post-war case dealing with the issue and the follow-on cases from the European theater did not impose those same strict guidelines.

In 1948, the Hostage Case court abolished the must have known assumption and severely curtailed the should have known logic. It held that courts should assume that an officer had knowledge only if the violations occurred within his sector and no exceptional circumstances existed at the time, or if reports had reached his headquarters concerning violations.

The High Command court went one step further in October of that year by establishing proof of knowledge and of criminal acquiescence on the part of the commanding officer as the sole

basis for holding such an officer responsible for the illegal activities of his subordinates.

Despite these rulings, the 1956 Law of Land Warfare more nearly reflects the Reynolds Commission. It states the commander is responsible not only for illegal acts he ordered, but also those war crimes which are about to be committed or have been committed by troops subject to his control, and of which he has actual knowledge, or "should have knowledge", and which he fails to stop or punish. (Art. 501)

This contradiction came to the forefront with the court martial of Captain Medina following the My Lai massacre committed by troops under his command. In his comments to the jury, the judge explained:

...legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship will not allow an inference of knowledge.

The jury could assume neither that the commander must have known nor that he should have known. This was a rejection of the Reynolds Commission and also the Army's own Law of Land Warfare.

Although the 1949 Geneva Conventions had remained ambiguous on the issue of command responsibility, Protocol I Art. 86 provides yet another version of the "knowledge" requirement, one that vindicates the more narrow interpretation. It states that superiors are not absolved of responsibility "if they knew, or had information which should have enabled them to conclude in the circumstances at the time" that a breach of the Conventions was

being committed or was going to be committed and "they did not take all feasible measures within their power to prevent or repress the breach."

In its 1987 Commander's Handbook, the Navy did not adopt the "should have known" requirement. While noting that a commander cannot delegate responsibility for the conduct of the forces he commands, it instead required the proper exercise of command authority and the taking of "reasonable measures to discover and correct violations that may have already occurred."²⁹

Defense of Superior Order

Before beginning a discussion of the defense of superior order it must be understood that duress, necessity, or physical coercion may be added as separate or cumulative defenses, but they are not the same as superior orders. What we are speaking of here is the concept of immunity based upon a soldier's station in life, that he must obey all orders from superior officers for the army to maintain the discipline required to function.

The earliest case on record is that of Peter of Hagenbach in 1474, who as governor of the Upper Rhine brutally secured the submission of the populace.³⁰ At his trial his counsel contended "he had no right to question the orders which he was obliged to carry out, and it was his duty to obey." The tribunal rejected the defence and Hagenbach was executed.

Following the Civil War, Captain Henry Wirz was tried for atrocities committed against Union prisoners of war at

Andersonville. During his trial the Judge Advocate argued:

A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey such an order and disastrous consequences result, both the superior and the subordinate must answer for it.

Wirz, too, was convicted.

Although the 1914 Rules of Land Warfare did recognize unconditionally the defense of superior order, post-WWI war crimes trials showed that the defense was not all inclusive. A German submarine crew alleged to have opened fire on survivors of a torpedoed hospital ship pled defense of superior order from their commander, but the court had this to say:

It is certainly to be urged in favour of the military subordinates that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatsoever against the law...They well knew that this was the case here...They should, therefore, have refused to obey. As they did not do so, they must be punished.

Despite that decision, The Rules of Land Warfare remained unchanged until 1944 when it was amended to the effect that "individuals and organizations who violate the accepted laws and customs of war may be punished therefor, [though superior order] may be taken into consideration in determining the culpability, either by way of defense or in mitigation of punishment."

Following WWII the Nuremberg Tribunal had no option but to reject the defense, as this was clearly provided in its Charter. The Tribunal did state:

The true test...is not the existence of the order, but whether moral choice was in fact possible...

Participation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs.

Despite the IMT's espousement of "moral choice", most judgements in the war crimes trials were more concerned with the nature of the order. In the High Command Trial, the Tribunal rejected the plea, saying "servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defense."

In the Hostages Trial, the issue was complicated by the defense's use of the earlier provisions of the military manuals, both U.S. and British, which accepted the defense of superior order. However, the Tribunal found that "army regulations are not a competent source of international law when a fundamental rule of justice is concerned." Likewise, the 1956 edition of the Army Field Manual incorporates the disclaimer: "those provisions of the Manual which are neither statutes nor texts of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war."

These findings carried over to the 1951 Manual for Courts Martial:

The general rule is that the acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable. This justification does not exist, however, when those acts are manifestly beyond the scope of his authority, or the order is such that a man of ordinary sense and understanding would know it to be illegal..."

In a Board of Review ruling in the case of an American soldier convicted of killing, under order, a Korean civilian who

was in custody and neither resisting or attempting to escape, reference was made to an order "so obviously and palpably unlawful as to admit of no reasonable doubt." Almost the same phrases were used in a similar case from the war in Vietnam.

The articles of the 1956 Law of Land Warfare relating to the defense of superior orders was also significantly expanded. No longer was the individual soldier given blanket immunity from war crimes prosecution when acting pursuant to orders. That defense now requires that the individual "did not know and could not reasonably have been expected to know that the act ordered was unlawful"(Art 509.a), while still providing the protection that the court take into consideration that the individual "cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received"(Art. 509.b).

But what is the meaning of "palpably unlawful"? Perhaps the best description is provided by Israeli District Court Judge Halevy, one of the members of the court trying Eichmann:

Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernable only by the eyes of legal experts, is important here, but a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart stony and corrupt.

CHAPTER VI

CONCLUSION

The infliction of suffering is an inevitable part of war and this often leads to objection against all attempts at legal safeguards. But it must be remembered that a basic premise of LOAC is that all necessary force may be used to secure victory over the enemy. The validity of that premise is not undermined by the general principle that "the right of belligerents to adopt means of injuring the enemy is not unlimited." Not all suffering in wartime is necessary, and it is the military acts which create suffering beyond that required for the submission of the enemy which international law prohibits. This makes not only for a more efficient use of force by the military commander and an easier return to a state of peace, but finds its basis in the foundation of civilization itself--respect for human dignity and the worth of the individual.³¹

There does exist a school of thought which holds that to talk of military necessity grants an undeserved aura of justification; that appeal to the doctrine of military necessity is in fact an appeal to a doctrine of military utility, or even military convenience. And given the pervasiveness of the doctrine, almost all possible moral claims are overridden.³²

In fact, such an interpretation is diametrically opposed to the stated intent of the law. The German doctrine of military necessity did claim justification for measures beyond the bounds of law if the military situation demanded it. However, such a

doctrine was rejected in the post-WWII war crimes trials.³³ It is military necessity that is limited by prohibited acts under the laws of war. As noted above, the Lieber Code, Article 16, placed limits on military necessity, including "any act of hostility which makes the return to peace unnecessarily difficult." The Law of Land Warfare, 1956, acknowledges that LOAC has been "developed and framed with consideration for the concept of military necessity" but also explicitly states that otherwise "the prohibitory effect of the law of war is not minimized by 'military necessity'." (Art. 3)

As long ago as 1880, the Institute of International Law, in attempting to codify the accepted law of war, believed that it was rendering a service to military men themselves.

A positive set of rules, [it stated], if they are judicious, serves the interests of the belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts--which battle always awakens, as much as it awakens courage and manly virtues--it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers and keeps them within the limits of respect due to the rights of humanity.³⁴

But Thomas Hobbes said, "Covenants without swords are but words", and the international law of armed conflict certainly lacks an enforcement agency to coerce compliance. And, because of its subjective nature in all but the most obscene cases, it probably lacks the legal precision necessary for effective judicial action. However, this does not make it valueless. Words are as powerful as the ideas they represent. The aim of LOAC is to enlarge the humanity of war to the maximum extent possible, not

merely to punish the purveyors of inhumanity. Punishment after the fact does little to benefit the victim. Instead the primary benefit of LOAC, and its goal, should be to influence decision makers. And none is more important than the operational commander who must interpret the guidance provided by higher authority and provide the orders for those who perform in the arena of armed conflict. The law of armed conflict will not provide him clear definitions; but given the endless possible scenarios and the dilemmas of morality, perhaps some things are best not defined, for definitions will always lag behind scoundrels.

General MacArthur, in reviewing the Yamashita case, ruled:

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust he not only profanes his entire cult but threatens the very fabric of international society.³⁵

I submit that the law of armed conflict exists precisely for this purpose. It is not there to obstruct the commander, but to help him do his duty.

ENDNOTES

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