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Albert B. Fletcher

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Based upon the outcome of the Geneva Negotiations now going on, and hopefully to be concluded in 1977, the responsibilities of the Department will obviously expand. I think the most significant point of all in what I have outlined is the fact that at every level within the Office of the Secretary of Defense, and in the three military departments, right down through line commands, the principal responsibility for seeing to it that the laws of war are complied with lies with the legal officials. In many areas, such as training and development of materials, their role is as advisers. But the primary responsibility lies with them. If the lawyers execute their responsibilities and take the initiative to call the shots, even when it may not be a technical intervention point under the regulations and directives, American forces will comply with the Rules of Law. If the lawyers wait to be consulted by the policy makers, some points may be overlooked. I think it is very significant that the lawyers have been given, and will continue to have, this *kind* of fundamental responsibility.

MAJOR GENERAL VAGUE: The next speaker is the Chief Judge of the Court of Military Appeals. He can hardly fail to touch upon the type of cases that could reach him in the disciplinary aspects of insuring compliance with the Laws of War. The Honorable Albert Fletcher is an ex-Army Air Corpsman as well as a distinguished attorney, author, university lecturer, and a Judge of the Eighth Judicial District in Kansas for a period of 16 years.

Individual Responsibility for Compliance with the Laws of Armed Conflict

JUDGE ALBERT B. FLETCHER

The laws of armed conflict provide standards for the individual, as differentiated from the state. Criminal sanctions attach for violations of these standards. But these so-called individual crimes are not codified in any single instrument. In fact, an individual may be held responsible for certain actions even though the prohibited conduct has not been reduced to writing but has developed under rules of customary international law. Second, we must keep in mind that there is no absolute defense for these "crimes." All defenses are relative to time and place not only of the alleged criminal act but the forum for trial. Third, criminal acts under the laws of armed conflict do not necessarily lead to an adjudication of criminal responsibility, i.e., a trial with findings of fact and conclusions of law. In this order I would like to look at these three considerations.

Looking first to the criminal act, I must reiterate that these prohibitions are not neatly codified with distinct elements set forth for each specified prohibition; all possible acts of criminality are not even in writing. Their existence derives from the customary international laws of war which come into being when states have followed a clear and continuous habit of acting in a certain manner and have accepted either expressly or impliedly that such action is obligatory or right.¹

We should not condemn too greatly the vagueness of the obligations imposed upon individuals. General wording is necessary for ratification by as many nations as possible, and, maybe even more fundamentally, it provides a code of aspiration, of minimum standards of civilization. As a result, states are given wide discretion as to the enforcement of alleged violations. It is necessary for my understanding and comprehension of the prohibitions that they be divided into individual responsibility at two different levels of military command.

The first level, which I shall refer to as the policy level, relates to those in command with general policy decision powers. The second level is those in the field who implement that policy which I shall refer to as the implementation level. The dividing line between these two levels cannot be specifically designated for all times at the same place on the vertical scale of military command.

Individuals working at the policy level could be charged with violation of prohibitions provided for under the laws of armed conflict in the following particulars: the planning, preparation, initiation, or waging of a war in violation of international treaties, agreements, or the general rules of war or participation in a common plan or conspiracy for the accomplishment of the same. Further, and more specifically, for murder, ill-treatment, enslavement, or deportation of civilians or the civilian population, for murder or ill-treatment of prisoners of war, killing hostages, plundering of public or private property, wanton destruction of cities, the commission of inhuman acts committed against the civilian populace before or during the conflict, or prosecutions on political, racial, or religious grounds.

Individuals on the implementation level, could be held criminally responsible in these specific areas in the general prohibitions: Deliberate attack on protected medical establishments, the misuse of a non-military unit attached generally to a military unit such as the Red Cross, a dishonest or fraudulent request for truce, the abuse of a tendered flag of truce, the willful or wanton destruction of persons or property for the sake of destruction only; the intentional use of civilian clothing to conceal military persons during conflict, the willful and intentional use of privileged buildings, i.e., museums, etc., or desig-

¹ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (Ithaca: Cornell University Press, 1971).

nated land areas for military use, intentional killing without trial, intentional or purposeful plundering of public or private property, and finally, deliberately depriving any protected person of his fair trial rights.

I have spoken in generalities, for I cannot find anywhere the sufficiently precise language to satisfy the legal or judicial mind as to certainty. A broad principle might be that war does not exclude moral conduct and that immoral conduct which violates minimum standards of civilization or humanity requires accountability. But morality is relative to time and to an individual society. There is a clear need for states to develop *specific* codes for violations of the law of armed conflict and then to use these codes as the basis for criminal responsibility.

I can say with certainty that, to be criminal, the acts must be intentional. In other words, the actor must have *mens rea*. He must have a guilty mind or his acts must be so grossly or wantonly negligent that they are equated with intentional acts.

I believe that certainty as to areas of criminality based upon the prohibitions of the laws of armed conflict is more apparent when we look at the possible defenses.

The umbrella defense to most of the prohibitions to which I have alluded is "military necessity." I find the term difficult to define for it is static only in its verbiage, and at all other times would seem to be *ad hoc*. So I will, for this purpose, accept a definition handed down by a United States military tribunal. It states in part:

[M]ilitary necessity permits a belligerent, *subject to the laws of war, i.e., the laws of armed conflict*, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operation. It permits the destruction of armed enemies and other persons whose elimination is incidentally required by the armed conflicts of the war. It allows the capture of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of an enemy force. It is lawful to destroy railway lines or communications, or any other property that might be utilized by the enemy. Private homes and churches may be destroyed if necessary for military operations, but that does not permit the wanton devastation of a district or a willful infliction of suffering upon its inhabitants for the sake of suffering alone.²

I approach with a jaundiced eye a definition which in its defining uses the

²United States v. List, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1253-4 (1950).

words you need defined, such as "necessities of war" and "if necessary for military operations." Military necessity is a value judgment at the policy level.

Military necessity will be judged generally after the cessation of the conflict. Not only the specific accomplishment, but as it figures into the total jigsaw puzzle of that conflict. I suggest to you, contrary to the normal rules of English jurisprudence, hindsight is given considerable weight.

Military necessity takes on another parameter at the implementation level, and that is the element of time. At this level, one is only a single facet of the whole. Scheduled objectives for accomplishment depend upon several persons or units acting in conjunction, not singularly. The period of time to make a judgment is minimized. Once again I would suggest that only in retrospect will it be ascertainable if military necessity rises to the level of a defense. However, that judgment must be based on factors existing prior to and at the time of the particular military operation involved and not on the results.

A military society, as mentioned before, is vertical. This is necessary to accomplish the avowed purpose of that society—the protection of the parent society. The military society must rely upon command and command functions by order. This presents us with the second defense. I will call it the "order defense." It exists at the policy level and implementation level, although the two differ to some degree.

I will use as a starting point for discussion of the order defense a statement shown in the Army Field Manual. "A military commander is not only responsible for criminal acts that he orders, but also liable for actions within his command of which he has actual knowledge or should have known."³ It can be seen from this statement that we are dealing with a two-fold defense: from the one who orders and the one who receives the order. The only persons who cannot be caught in both folds are those at the top or the bottom of the command ladder.

Let us look first at the *Yamashita* opinion by the Supreme Court of the United States wherein it was stated,

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would be largely defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence, the law of war presupposes that its violation is to be avoided through the control of the operation of war by commanders who are to some extent responsible for their subordinates.⁴

³UNITED STATES ARMY FIELD MANUAL 27-10, 1956.

⁴*Yamashita v. Styer*, 327 U.S. 1 (1946).

Without specifically saying it, the Supreme Court accepted the standard set forth in the *Army Field Manual*. Imbedded in that standard is constructive knowledge, a very severe standard. I ask you to keep this standard in mind as the one that was used for the trial of a national of one state in a forum of another state as we look to the next case.

I am referring to the case of *United States v. Medina*, a case arising out of the Mai Lai incident. By instruction to the jury, actual knowledge of illegal conduct was the only criterion. It poses the question: was a different standard applied where accused and court were of the same country? But the important point is that there was a trial for alleged misconduct.

Let us take a quick look at the other side of the coin—an order given. I need only look at a decision my Court handed down prior to my being there: Following the *Manual for Courts-Martial*, the Court stated:

An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority or pursuant to an order that a man of ordinary sense and understanding would know to be illegal or any wanton manner in the discharge of a lawful duty is not excusable.⁵

I believe that it would be improper for me to comment as to whether I agree or disagree with the Court's statement. Suffice it to say that if a determination as to the availability of a defense is to be based upon the legality or illegality of an order, an educational process must be implemented not only for the military but also for the civilian components of our society. The laws of individual responsibility in armed conflict traditionally have been assimilated more through the sociological process of folkways and custom rather than through formal education. I would suggest further that the temporary military man has no concept that there are individual responsibilities provided for in the laws of armed conflict other than what little education he may have received in basic training. The area of training and education is critical to prevention of violations and needs to be strongly developed in depth for us to insure adequate observance of the laws of armed conflict.

Let me conclude by discussing the third area, which is that criminal acts based upon prohibitions do not necessarily lead to criminal accountability. There is a general proposition that states will impose upon their own nationals criminal responsibility where it is necessary to maintain discipline, for discipline is the backbone of a fighting force. Other than this, an individual breach of a prohibition will only find its way into a criminal forum where the conscience of the governmental leaders or civilian population has been stricken; or, where a nation fears adverse reaction of the other nations whose support it needs. I

⁵Paragraph 216d, *MANUAL FOR COURTS-MARTIAL*, UNITED STATES, 1969 (rev.); *United States v. Calley*, 22 USCMA 534, 48 C.M.R. 19 (1973).