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THE LAW OF WAR AND NEUTRALITY AT SEA

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CHAPTER 3

ENFORCEMENT OF THE LAWS OF WAR

300 MEANS OF ENFORCEMENT OF THE LAWS OF WAR

Various means are available to belligerents under international law for inducing the observance of legitimate warfare.

In the event of a clearly established violation of the laws of war, an injured belligerent may resort to remedial action of the following types: [1]

1. Publication of the facts with a view to influencing world opinion against an offending belligerent.

2. Protest and demand for punishment of individual offenders. Such protest and demand for punishment may be communicated directly to an offending belligerent or to the commander of the offending forces. On the other hand, an offended belligerent may choose to forward its complaints through a protecting power,[2] a humanitarian organization acting in the capacity of a protecting power,[3] or any state not participating in the armed conflict.

3. Demand for compensation from an offending belligerent.[4]

4. Reprisals.[5] (See Section 310.)

5. Trial and punishment of captured individual offenders for war crimes. (See Section 330.)

310 REPRISALS [6]

a. Character and purpose. Reprisals between belligerents are acts, otherwise illegal, which are exceptionally permitted to a belligerent as a reaction against illegal acts of warfare committed by an enemy. The illegal acts justifying reprisals between belligerents may be committed by order of a government, by order of military commanders, or by the armed forces of a belligerent acting without higher authorization. The purpose of reprisals is to induce compliance with the laws of war.

b. When employed.[7] Reprisals are never to be taken merely for revenge but only as a last resort to induce an enemy to desist from unlawful practices. Whenever possible, the injured belligerent first must attempt to obtain the cessation of the illegal acts through methods other than reprisal. Acts taken in reprisal should be brought to the attention of the enemy, and of neutrals, if necessary, in order to achieve maximum effectiveness. As a general rule reprisals should not be employed by subordinate commanders in the absence of direct orders of the highest military authority. The

(Footnotes at end of chapter)

latter should give such orders only after as careful an inquiry into the alleged offense as circumstances permit.[8]

If immediate action is demanded as a matter of military necessity, a subordinate commander may, on his own initiative, order appropriate reprisals, but only after as careful an inquiry into the alleged offense as circumstances permit. Hasty or ill-considered action may be found subsequently to have been unjustified and may subject the officer himself to punishment for violation of the laws of war. Reprisals must cease as soon as they have achieved their objective, which is to induce a belligerent to desist from illegal conduct and to comply with the laws of war.

c. Forms of reprisal. The acts resorted to by way of reprisal need not conform to those complained of by the injured belligerent, but should not be excessive or exceed the degree of violence committed by the offending belligerent.

d. Objects of reprisals. Subject to the prohibitions enumerated in paragraph (e) below, reprisals may lawfully be taken against enemy individuals (i. e., members of the armed forces and of the civilian population) and property.

e. Reprisals: against whom forbidden. Reprisals are forbidden against the following:

1. Prisoners of war.[9]

2. Wounded, sick, and shipwrecked persons, as the latter are defined in the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; hospital ships and medical aircraft, and the personnel of such ships and aircraft, as are protected by the same Convention.[10]

3. Wounded and sick personnel in the field, as they are defined in the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the buildings, equipment, and personnel that are protected by the same Convention.[11]

4. Civilian persons and their property, as these persons and property are defined in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[12]

320 WAR CRIMES UNDER INTERNATIONAL LAW [13]

a. Definition of war crimes. War crimes may be defined as those acts which violate the rules established by customary and conventional international law regulating the conduct of warfare. Acts constituting war crimes may be committed either by members of the armed forces of a belligerent or by individuals belonging to the civilian population.

b. Examples of war crimes. The following acts are representative war crimes:

1. Offenses against prisoners of war: killing without due cause; the infliction of ill-treatment and torture, denial of minimum conditions conducive to life and health; causing the performance of unhealthy,

dangerous, or otherwise prohibited labor; infringement of religious rights; and deprivation of the right of a fair and regular trial.

2. Offenses against civilian inhabitants of occupied territories: killing without due cause; infliction of ill-treatment and torture; subjection to illegal experiments; deportation; compelling forced labor; compelling entry into the armed forces of the occupant; denial of religious rights; denaturalization; infringement of property rights; and denial of a fair and regular trial.

3. Offenses against the sick and wounded: killing, wounding, or otherwise ill-treating members of armed forces in the field who are disabled by sickness or wounds or who have laid down arms and surrendered.

4. Offenses against the survivors of sunken ships: killing, wounding, or otherwise ill-treating the shipwrecked, wounded, or sick at sea; failure to search out and make provision for the safety of survivors of sunken ships when military interests so permit.

5. Plunder and pillage of public or private property.

6. Wanton destruction of cities, towns, or villages or devastation not justified by military necessity; aerial bombardment whose sole purpose is to attack and terrorize civilian population.

7. Deliberate attack upon hospital ships, medical establishments, or medical units.

8. Maltreatment of dead bodies.

9. Abuse of, or firing on, a flag of truce.

10. Misuse of the Red Cross emblem or a similar protective emblem.

11. Denial of quarter, unless bad faith is reasonably suspected.

12. Treacherous request for quarter.

13. Imposing punishment, without a fair trial, upon spies and other persons suspected of hostile acts.

14. Violations of surrender terms.

15. Other analogous acts violating the accepted rules regulating the conduct of warfare.

330 PUNISHMENT OF WAR CRIMES UNDER INTERNATIONAL LAW

a. General. Belligerent states have the obligation under customary international law to punish their own nationals who violate the laws of war and the right to punish enemy nationals, whether members of the armed forces or civilian persons, who fall under their control.

b. Special defenses to charges of war crimes under international law

(1) *Defense of Superior Orders.* The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law but may be considered in mitigation of punishment.[14] To establish responsibility the person must know, or have reason to know, that an act he is ordered to perform is unlawful under

international law.[15] In addition, if an act, though known to the person to be unlawful at the time of commission, is performed under duress, this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.[16]

(2) *Responsibility of Commanding Officers.* Commanding Officers are responsible for illegitimate acts of warfare performed by subordinates when such acts are committed by order, authorization, or acquiescence of a superior. The fact that a commanding officer did not order, authorize, or acquiesce in illegal acts of warfare committed by subordinates does not relieve him from responsibility, provided it is established that the superior failed to exercise his authority to prevent such acts and, in addition, did not take reasonable measures to discover and stop offenses already perpetrated.[17]

(3) *Acts Legal or Obligatory Under National Law.* The fact that national law does not prohibit an act which constitutes a war crime under international law does not relieve the person who committed the act from responsibility under international law. However, the fact that an act which constitutes a war crime under international law is made legal and even obligatory under national law may be considered in mitigation of punishment.

NOTES FOR CHAPTER 3

[1] Commanders are not usually required to make the policy decision as to the appropriate use of one or more of the remedial actions set forth in the text, although there are exceptional situations in which even junior commanders may be required to decide upon the use of reprisals, or to make protests and demands addressed directly to the commander of offending forces. It is also apparent that a governmental decision cannot be made intelligently unless all officers upon whom the responsibility for decision rests understand the available remedial actions and report promptly to higher authority those circumstances which may justify their use.

[2] A "protecting power" is a neutral state entrusted with the protection of certain legal interests of one belligerent—particularly the interests of the latter's nationals—which have come under the control of another belligerent.

[3] The International Red Cross, for example, has performed the duties of a protecting power.

[4] Article 3 of Hague Convention No. IV (1907), Respecting The Laws and Customs of War on Land states:

> "A belligerent party which violates the provisions of the said (Hague) Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

It is now generally established that the principle laid down in Article 3 is applicable to the violation of any rule regulating the conduct of war and not merely to violations of the Hague Regulations.

[5] Reprisals must be clearly distinguished from retortion. Retortion is retaliation for *legally permissible* acts of a state which are of a cruel, discourteous, unfair, harassing, or otherwise objectionable nature by acts of a similar kind, i. e., by acts that are legally permissible. Reprisal is distinguished from retortion in that a reprisal is a retaliation against an illegal act and has the legal character of an enforcement action which may involve the use of armed force.

[6] Section 310 deals only with reprisals taken by one belligerent in retaliation for illegal acts of warfare performed by the armed forces of an enemy. Section 310 does not deal with the

collective measures an occupying power may take against the population of an occupied territory in retaliation for illegitimate acts of hostility committed by the civilian population. Although the collective measures taken by an occupying power against the population of an occupied territory are frequently referred to as reprisals, they should be clearly distinguished from reprisals between belligerents, dealt with in Section 310.

[7] In addition to the legal conditions which must be satisfied before a belligerent may resort to reprisals, there are various political factors which governments will usually consider before taking reprisals. The importance of any of these factors will obviously depend upon the degree and kind of armed conflict, the character of the enemy and its resources, and the importance of the states not participating in the hostilities. The political factors are as follows:

1. Reprisals may have an adverse influence on the attitudes of governments not participating in a war.
2. Reprisals may only strengthen enemy morale and underground resistance.
3. Reprisals may only lead to counter-reprisals by an enemy, in which case the enemy's ability to retaliate effectively is an important factor.
4. Reprisals may render enemy resources less able to contribute to the rehabilitation of an area after the cessation of hostilities.
5. The threat of reprisals may be more effective than their actual use.
6. Reprisals, to be effective, should be carried out speedily and should be kept under control. They may be ineffective if random, excessive, or prolonged.
7. In any event, the decision to employ reprisals will generally be reached as a matter of strategic policy. The immediate advantage sought must be weighed against the possible long-range military and political consequences.

[8] The principle that reprisals should be taken only as a last resort has been interpreted to mean that an injured belligerent should first attempt, where possible and appropriate, to exhaust other means of redress before resorting to reprisals. If protest by an injured belligerent leads to the cessation of the illegitimate acts and if appropriate redress is made to the injured belligerent, the right to reprisals ceases. However, this requirement and the requirement that a careful inquiry be made into the real occurrence of the alleged acts are subject to the important qualification that, in certain circumstances, an offended belligerent is justified in taking immediate reprisals against illegal acts of warfare, particularly in those situations where the safety of his armed forces would clearly be endangered by a continuance of the illegal acts. Where immediate action is demanded as a matter of military necessity, a subordinate commander may, on his own initiative, order appropriate reprisals.

[9] "Measures of reprisal against prisoners of war are forbidden."—Article 13 paragraph 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. This provision of the 1949 Geneva Convention reproduces a similar provision of the 1929 Geneva Convention on Prisoners of War. War crimes tribunals have considered the rule forbidding reprisals against prisoners of war as a codification of existing customary law. Hence, this prohibition may be regarded as binding upon all States regardless of whether or not they are parties to the 1949 Convention. As to those individuals who may be considered as coming within the category of "prisoners of war," see Article 4 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.

[10] Article 47 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea reads: "Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited." The "wounded, sick and shipwrecked" persons protected by the Convention are defined in Article 13 thereof.

[11] Article 46 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field reads: "Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited." The "wounded and sick" persons protected by the Convention are defined in Article 13 thereof.

[12] Articles 33 and 34 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War state:

"Article 33. No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.

Article 34. The taking of hostages is prohibited."

The persons "protected" by the Convention against the measures enumerated in Articles 33 and 34 are identified in Article 4 thereof as those individuals located in the territories of the parties to a conflict, or in occupied territories, who find themselves under the control of a belligerent of which they are not nationals. As outlined in Article 4, however, Articles 33 and 34 do not protect the nationals of a state not bound by the Convention, nor do they apply to nationals of neutral and cobelligerent states maintaining normal diplomatic representation with the belligerent state in whose control these nationals may find themselves.

[13] War crimes, as defined in Section 320 (that is, acts violating the rules regulating the conduct of war) must be distinguished from so-called "crimes against peace" and "crimes against humanity." This distinction may be seen from Article 6 of the Charter of the International Military Tribunal at Nuremberg, which defined the Tribunal's jurisdiction as follows:

"The following acts, or any one of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace. Namely, planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes. Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the high seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity. Namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war or persecution on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." *U. S. Naval War College, International Law Documents, 1944–45* (1946), p. 254.

Although the distinction between crimes against peace and war crimes is readily apparent, there is a certain difficulty in distinguishing war crimes from crimes against humanity. The precise scope of those acts included within the category of crimes against humanity is not entirely clear from the definition given in Article 6 of the Charter of the International Military Tribunal at Nuremberg. A survey of the judgments of the various tribunals which tried individuals for crimes against humanity may be summarized in the following manner:

1. Certain acts constitute both war crimes and crimes against humanity and may be tried under either charge.

2. Generally, crimes against humanity are offenses against the human rights of individuals, carried on in a widespread and systematic manner. Thus, isolated offenses have not been considered as crimes against humanity, and courts have usually insisted upon proof that the acts alleged to be crimes against humanity resulted from systematic governmental action.

3. The possible victims of crimes against humanity constitute a wider class than those who are capable of being made the objects of war crimes and may include the nationals of the enemy state committing the offense as well as stateless persons.

4. Acts constituting crimes against humanity must be committed in execution of, or in connection with, crimes against peace, or war crimes.

On November 21, 1947, the United Nations General Assembly adopted a Resolution (177 (II)) directing the International Law Commission of the United Nations to do the following:

"(a) Formulate the principles of international law recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal, and

(b) Prepare a draft code of offenses against the peace and security of mankind . . ."

The text of the principles formulated by the United Nations International Law Commission, with a commentary, is to be found in the *Report of the International Law Commission, covering its Second Session, General Assembly Official Records: Fifth Session, Supp. No. 12 (A/1316), Pt. III,* pp. 11–4 (1950). The text of the principles as formulated by the International Law Commission reads as follows:

"Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government Official does not relieve him from responsibility under international law.

Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI. The crimes hereinafter set out are punishable as crimes under international law: (*Here follow substantially similar definitions of crimes against peace, war crimes, and crimes against humanity, as are given in Article 6 of the Charter of the International Military Tribunal at Nuremberg, quoted at the beginning of this Note.*)

Principle VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

[14] Article 8 of the Charter of the International Military Tribunal at Nuremberg stated:

"The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." *U. S. Naval War College, International Law Documents, 1944–45,* (1946), p. 255.

[15] The following statement indicates those circumstances in which the plea of superior orders may serve as a defense:

"Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime." Oppenheim-Lauterpacht, *International Law,* Vol. II (7th ed.; 1952), p. 569.

As to the general attitude taken by military tribunals toward the plea of superior orders, the following statement is representative:

"It cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders

of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice."

The Hostages Case (*United States v. Wilhelm List et al.*), *Trials of War Criminals*, Vol. XI (1950), p. 1236.

[16] An individual may plead duress if he can establish that he acted only under pain of an immediate threat, e. g., the immediate threat of physical coercion, in the event of noncompliance with the order of a superior. In the judgment of one Tribunal it was declared that

"... there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong." The High Command Case (*United States v. Wilhelm von Leeb et al.*), *Trials of War Criminals*, Vol. XI (1950), p. 509.

The International Military Tribunal at Nuremberg declared in its judgment that the test of responsibility for superior orders "is not the existence of the order, but whether moral choice was in fact possible." *U. S. Naval War College, International Law Documents, 1946–47* (1948), p. 260.

[17] Some military tribunals have held that, in suitable circumstances, the responsibility of commanding officers may be based upon the failure to acquire knowledge of the unlawful conduct of subordinates. In The Hostages Case the United States Military Tribunal stated:

"Want of knowledge of the contents of reports made him [i. e., to the commanding general] is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf." (*United States v. Wilhelm List et al.*), *Trials of War Criminals*, Vol. XI (1950), p. 1271.

The responsibility of commanding officers for unlawful conduct of subordinates has not applied to isolated offenses against the laws of war but only to offenses of considerable magnitude and duration. Even in the latter instances, the circumstances surrounding the commission of the unlawful acts have been given careful consideration.

"It is absurd ... to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them." (*Trial of General Tomoyuki Yamashita*), *Law Reports of Trials of War Criminals*, Vol. IV (1948), p. 35.

Thus the responsibility of a commanding officer may be based solely upon inaction. It is not essential to establish that a superior knew, or must be presumed to have known, of the offenses committed by his subordinates.