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Individual Conscience Under Military Compulsion

by Raymond B. Marcia

The exercise of individual conscience under military compulsion is an issue revived by the My Lai courts martial. Natural law jurists saw a place for individual conscience, but the positivist school's dominance changed that. The Nuremberg doctrine denied the defense of superior orders, and now the debate is raging again.

DURING the recent My Lai courts martial, some defendants proffered the argument that whatever was done at My Lai was done under the compulsion of the military order of a superior officer. In another incident, a young man named Guy Gillette, after being denied conscientious objector status, refused military induction because he considered the Vietnam War immoral and illegal.¹ These two seemingly unrelated incidents form an unlikely combination in that they raise the same question of the individual conscience under military compulsion. That question raises an issue so fundamental that it must, for the record, be reviewed from the perspective of legal history.

The issue of individual conscience under government compulsion has not often been the most eager subject of inquiry for jurisprudence. It was unavoidable, however, at Nuremberg, where no defendant was permitted to escape responsibility for a war crime by claiming that the act was compelled by the order of a superior authority. Article 8 of the Charter of the International Military Tribunal provided: "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."

This principle of individual accountability, sometimes favorably hailed according to the temper of the times, at other times has lost its shield of popular support and, standing alone and unarmed as a rule of law, occasionally has become an embarrassment.² The question raised by Nuremberg and expanded by subsequent debate is this: May the individual decide for himself

the morality of a particular command or even of a particular war?

The Nuremberg precedent was not new law. The proceedings before the Supreme Court at Leipzig after World War I made use of a similar rule of law. Although the Versailles peace treaty authorized war crimes trials by the victorious Allies, it was understood that the stability at the time of the Weimar Republic demanded that the trials of war criminals be German trials. So it was that the Leipzig trials were under German law and employed Section 47 of the German Military Penal Code, providing that a subordinate may be punished if he is aware that his superior's orders directed action which involved a civil or military crime or misdemeanor. As it happened, this rule of German military law eventually became the Nuremberg precedent. Moreover, it has been called an axiom of English and American law "that the plea of superior order is no defense to an illegal act".³

The modern era is not the first time in which the dilemma of individual responsibility under military compulsion has been aired for debate. Augustine tersely stated and resolved the dilemma in one sentence: "[A]n unjust order may perhaps render the king responsible, while the duty of obedience preserves the innocence of the soldier." The municipal law of Rome was in accord with Augustine's approach of excuse or immunity: "He does the in-

1. *Gillette v. United States*, argument of counsel at 39 Law Week 3253 (1970).

2. See *United States v. Mitchell*, 246 F. Supp. 874 (D.Conn. 1965), reversed and remanded, 354 F. 2d 767 (2d Cir. 1966).

3. 2 GARNER, INTERNATIONAL LAW AND THE WORLD WAR 485 (1920). See also, *Mitchell v. Harmony*, 13 How. 115, 137 (1851); *Little v. Barreme*, 2 Cranch 170, 179 (1804), and *Mostyn v. Fabrigas*, 1 Cowper 161, 180 (1774).

jury, they say, who orders that it be done; there is then no guilt on the part of him who has to obey."⁴

In the fourteenth century Giovanni da Legnano, a professor of civil and canon law at the University of Bologna, commented that soldiers "ought to obey their generals, because if they disobey their commands, even in a good cause, they are punished with death nonetheless [emphasis supplied]". But he also clearly emphasized the duty of a subject not to help his ruler when his ruler was waging an unjust war against the Church.⁵

In an age not known for its attention to the rights of the individual, the natural law jurists of the sixteenth and seventeenth centuries addressed themselves, with commendable earnestness, to the problem of conscience under compulsion. Francisci de Victoria, the Spanish theologian and professor at the University of Salamanca, drew on sacred scripture to assert in 1532: "If a subject is convinced of the injustice of a war, he ought not to serve in it, even on the command of his prince. . . . [S]ubjects whose conscience is against the justice of a war may not engage in it *whether they be right or wrong* [emphasis supplied]."⁶

Pierino Belli, Italian statesman and jurist, felt the weight of the dilemma when, in 1558, he agreed that "when the injustice of a lord is clear and manifest, a vassal is not bound to assist the lord". But he went on to caution that "it would be a perilous thing for vassals and subjects to pry into motives".⁷

So it was that the ancients, accosted as they were to the obedience of a slave to a master, saw little difficulty in granting immunity to one who acts unwillingly under the compulsion of a military order, whereas the early natural law jurists, concerned as they were with the "just war", saw of necessity the stirrings of the individual human conscience.

Balthazar Ayala, the Dutch lawyer and military commander, observed in 1582 that "if it chance that [a ruler's] motive for making war is human greed, that will not be imputed to the soldiery as a sin, seeing that they owe

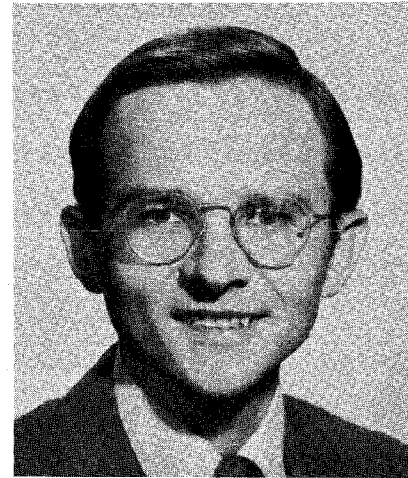
obedience to their prince. . . . [S]ubjects may campaign under a pagan and even heretic commander, *unless it be transparently clear that the war is unjust*; for service is due to God rather than to man [emphasis supplied]."⁸

Refrain from Action If Cause Is Unjust

Of the natural law jurists, the great Dutch humanist and international lawyer, Hugo Grotius, gave us in 1625 probably the most complete treatment to that date of the problem in his *De Jure Belli ac Pacis*. Stated Grotius: "If those under the rule of another are ordered to take the field, as often occurs, they should altogether refrain from so doing if it is clear to them that the cause of the war is unjust."⁹

Grotius cited Victoria and was one with him in upholding the natural law right of the individual to decide for himself whether or not the particular war is just. His observation that in "former times men laughed at Stratocles who had proposed a law at Athens that whatever pleased King Demetrius should be held to be reverent toward the gods and just among men" seemed to hold the opposing viewpoint up to ridicule. The opposing viewpoint did not, however, escape Grotius's objective scan: "Pertinent is the saying of Tacitus: 'To the prince the gods have given the supreme right of decision; for his subjects there remains the glory of obedience.' . . . Says Seneca: 'The slave is not the censorer, but the servant of his master's order.'"

In full consistency with his declaration of the individual's right to decide and conscientiously to refrain, Grotius developed historical precedents for the individual's right to know. He quoted Tertullian: "No law must keep to itself alone the understanding of its uprightness, but must impart such knowledge also to those from whom it expects obedience." And he punctuated this with his own view: "Declarations of war in fact . . . were wont to be made publicly, with a statement of the cause, in order that the whole human race as it were might judge the justness of it. Of a truth wisdom is the virtue characteristic of the ruler . . . but justice is



Kula

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the virtue characteristic of a man in so far as he is a man."

For conscientious objectors Grotius advocated an exemption not unlike the substitute purchase system¹⁰ of Civil War days: "Now if the minds of subjects cannot be satisfied by an explanation of the cause of a war it will by all means be the duty of a good magistrate to impose upon them extraordinary taxes rather than military service. . . ."

Grotius's solution to the dilemma of

4. Quoted by GROTIUS, *DE JURE BELLI AC PACIS* 590, 591 (Classics of International Law edition, Oxford Press, 1925).

5. DA LEGNANO, *TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO* 234, 236 (Classics of International Law edition, Oxford Press, 1947).

6. VICTORIA, *ON THE LAW OF WAR* 173 (Classics of International Law edition, 1917).

7. BELLI, *A TREATISE ON MILITARY MATTERS AND WARFARE* 63, 65 (Classics of International Law edition, Oxford Press, 1936).

8. AYALA, *ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE* 21, 22 (Classics of International Law edition, Oxford Press, 1912).

9. GROTIUS, *DE JURE BELLI AC PACIS* 587 (Classics of International Law Edition, Oxford Press, 1925).

10. 12 Stat. 731, 733.

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conscience and the unjust war or unjust military order represented a somewhat higher degree of humanitarian sophistication than did the solution of the Romans. The Romans and others proposed immunity from prosecution for the individual who was compelled to participate in the unjust war or to perform the unjust act. Grotius, while noting their proposal, chose for his own a principle of exemption for conscientious objectors—thus not only resolving the dilemma but also, and more important, avoiding the outrage committed upon the human conscience by compulsion.

The Spanish scholastic philosopher, Francisco Suarez, seemed to be in accord with his contemporary when he stated in 1612 that “common soldiers, as subjects of princes, are in no wise bound to make diligent investigation, but may go to war when summoned to do so *provided it is not clear to them that the war is unjust* [emphasis supplied]”. However, Suarez went on to qualify his position: “[W]hen the injustice of the war is not evident to these soldiers, the united opinion of the prince and of the realm is sufficient to move them to this action. . . . [S]ubjects when in doubt . . . are bound to obey their superiors.”

Suarez, too, felt the weight of the dilemma and seemed to be unable to focus on it decisively:

[I]f the doubt [as to the justice of a war] is purely negative, it is probable that the soldiers in question may [rightfully] take part in that war without having made any examination of the question, all responsibility being thrown upon the prince to whom they are subject. . . . If, however, the doubt is positive, and if both sides advance plausible arguments, then, in my opinion, [those who are about to enlist] should make an inquiry into the truth of the matter. If they are unable to ascertain the truth, they will be bound to follow the course of action which is more probably just, and to aid him who is more probably in the right.¹¹

Fifty years later Samuel Pufendorf, the famous international lawyer at the Universities of Heidelberg and Lund, foresaw and accurately stated present-day fears¹² when, in his *Law of Nature and Nations*, he cited Grotius's views

but modified them with his own practical observation:

[W]e ought to be very cautious how we determine in this matter about such things as these, for fear we should weaken the Force of the Civil Power, and make the obedience of the subject in a Matter of so much Importance, depend upon every particular Man's Judgment, especially since in this case it would be easy for a Man to pretend Conscience only to disguise his Fears and Cowardice.¹³

In the eighteenth century the Swiss international lawyer, Emmerich Vattel, penned views which harkened back to the Roman position when he wrote: “Soldiers . . . are but instruments in the hands of their commanders.” Pre-scinding from the lengthy debate over conscience that had preceded him, Vattel stressed an unequivocal and unqualified duty to obey the sovereign:

The sovereign is the real author of war, which is made in his name and at his command. The troops, both officers and soldiers, and in general all those persons by whom the sovereign carries on war, are only instruments in his hands. They execute his will and not their own.

Every citizen is bound to serve and defend the state as far as he is able. Society cannot otherwise be preserved; and this union for common defense is one of the first objects of all political association.¹⁴

Vattel's *Law of Nations*, written in 1758, marked the first significant break with the natural law school of jurisprudence and signaled the ascen-

dency of the positivist school.¹⁵ So it was that the United States Supreme Court, in its omnibus decision on the constitutionality of the Draft Act of 1917, could rely solely on the writings of Vattel, without a hint of the grand debate that had preceded them:

It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, *Law of Nations*, Book III, c. 1 and 2.¹⁶

It could perhaps be said that the grand debate of the natural law jurists on the problem of the individual conscience under military compulsion died with the rise of the positivist school of jurisprudence. But, more accurately perhaps, it could be said that the grand debate died for lack of a real forum. For it was that simple provision of a real-life forum at Leipzig, at Nuremberg and at Vietnam that has revived that very same debate.

11. SUAREZ, A WORK ON THE THREE THEOLOGICAL VIRTUES, DISPUTATION XIII ON WAR 832, 836 (Classics of International Law edition, Oxford Press, 1944).

12. See Justice Minton's dissent in *Sicurella v. United States*, 348 U. S. 385, 395 (1955), where he cautions lest one be allowed to “choose the wars in which he shall fight”.

13. PUFENDORF, OF THE LAW OF NATURE AND NATIONS 782 (Oxford edition, 1703).

14. VATTEL, THE LAW OF NATIONS 319 (Classics of International Law edition, Oxford Press, 1916).

15. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 76 (1964).

16. *Selective Draft Law Cases*, 245 U. S. 366, 378 (1918).

No Boners

Something overlooked!
Thought of it for a moment
Went to something else
trembling with apprehension
how could I forget it!
The papers are signed what
a blunder what to do
temples pounding stomach contracting
No excuses
No mistakes can be made
what shall I tell the client!

—ELI E. FINK
Chicago, Illinois