

To The Graduate Council:

I am submitting herewith a dissertation written by Min-Soo Lee entitled "Military Virtues and Superior Orders." I have examined the final copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy with a major in Philosophy.

Sheldon M. Cohen
Sheldon M. Cohen, Major Professor

We have read this dissertation
and recommend its acceptance:

Betty C. Poston
Rem B. Edwards
David E. Lin, Jr.

Accepted for the Council:

Lew Minkel
Associate Vice Chancellor
and Dean of The Graduate
School

MILITARY VIRTUES AND SUPERIOR ORDERS

A Dissertation

Presented for the

Doctor of Philosophy

Degree

The University of Tennessee, Knoxville

Min-Soo Lee

August 1992

To my mother,

Bong-Sim Park

who nurtured within me a love for learning

ACKNOWLEDGMENTS

I would like to express my gratitude to those people whose encouragement and support made this study possible.

To my major professor, Sheldon M. Cohen, for his guidance in this project, and for his patience in reading and revising my poor English writings. Without his help, I could not have completed the study.

To the members of my Doctoral committee, Dr. Rem B. Edwards, Dr. Betsy C. Postow, and Dr. David E. Linge, for their encouragement, direction, and challenging and fruitful comments.

To Dr. Richard Aquila, Director of Graduate Studies, for his guidance and help from the start to the end of my study. As a foreign student, I have owed him much. To Dr. George Brenkert, the Department Head, for his careful concern and the allowance of the use of an office for my writing of the dissertation.

To Dr. Tai-Kil Kim, Professor Emeritus at the Seoul National University, for his direction and encouragement over the years. To the faculty of the Philosophy Department at the Korea Military Academy, Dr. Byung-Soo Lim, Dr.

Seung-Ok Cho, Dr. Yong-Sun Chang, and Dr. Taik-Ho Lee for their advice and thoughtful consideration.

I would like also to express my appreciation to the ROK Army and the KMA Academic Board for offering me the opportunity, and financial support, for the study at this university.

Finally, to my wife, Hyo-Shin, who has inspired and helped me to concentrate my efforts on the study. Without her patience and encouragement, I would not have reached the completion of my study.

ABSTRACT

The purpose of this study is to seek a way of solving the problem of obedience to superior orders, which has been one of the most prominent considerations that ought to make us uneasy about the application of judgments of criminal responsibility to soldiers in combat. For this purpose, the author reviews first the conception of war, war crimes, and rules of war, and considers two types of moral thought as the basic principles for rules of war: absolutist deontology and utilitarianism.

Next, the author discusses the problem of the responsibility of the individual for crimes committed by subordinates under orders of superiors, and examines three doctrines as the answers to this problem: the respondeat superior doctrine, the absolute liability doctrine, and the mens rea principle. But none of these is considered as an appropriate answer.

Supposing that the key to the solution of the problem of superior orders lies in the virtues of the soldier who is in a dilemma, the author attempts to examine soldiers' virtues, especially the supreme military virtues required

for officers as military professionals. He reviews three kinds of virtues which have been regarded as the supreme military virtues: loyalty, obedience, and moral integrity. Pointing out their inappropriateness, however, he suggests as an alternative the virtue of historical insight which can be defined as moral reflection based upon historical understanding. He tries to show that by this virtue, the soldier's choice or decision in the dilemma can be more clearly justified than any other virtues.

TABLE OF CONTENTS

CHAPTER	PAGE
I. INTRODUCTION	1
1. Morality of War and Morality in War	1
2. Collective Survival and Human Rights	5
3. An Agenda for the Inquiry	11
II. WAR CRIMES	15
1. The Concept of War Crimes	15
2. The Rules of War	29
3. Problems of the Current Laws of War	55
III. SUPERIOR ORDERS	67
1. The Plea of Superior Orders	67
2. The Responsibility of the Individual	96
3. Soldiers and Their Officers	117
IV. SUPREME MILITARY VIRTUES	128
1. Loyalty and Obedience	128
2. Moral Integrity	149
3. Historical Insight	168
V. CONCLUSIONS	193
1. Moral Conflicts and Military Virtues	193
2. Virtues for Military Officers	197
3. Further Problems	201
BIBLIOGRAPHY	208
VITA	215

CHAPTER I

INTRODUCTION

1. Morality of War and Morality in War

The history of war began with the history of mankind. It may fairly be said that nothing has influenced the life of mankind more than war. Nevertheless, philosophers have worried comparatively little about the subject of war. Discussions concerning war, especially the relation between war and morality, have attracted a small number of philosophers. As a result, the philosophical literature that is devoted to the topic of war and morality is less rich than that which focuses upon other analogous subjects.

The fear of the destruction of mankind by the invention of atomic and hydrogen bombs, as Richard Wasserstrom points out, has evoked some philosophers' attention to the topic of war and morality, and some recent wars like the war in Vietnam have succeeded in making

relevant and meaningful to all reflective persons the question: By what criteria are wars really to be assessed.¹

Moral reflections on warfare, as Malham M. Wakin classifies, can be separated into two major categories roughly referred to as considerations concerning the 'morality of war' and those concerning 'morality in war.'² When we ask about the morality of war, we ask "whether or not engaging in war is morally permitted or justified."³ If nations may use war as an instrument of national policy, then we can ask when and under what conditions it would be accepted as just. When we ask about morality in war, on the one hand, we ask "whether there are any moral restrictions on the way in which wars may be fought."⁴ In short, while the arguments on the morality of war are mainly concerned with those of the justification of war or the use of force, the arguments on the morality in war are largely related to the morality of the way in which a force is used.

For instance, the question, "Can the war of intervention or the war of reprisal be morally justified?" is in the category of the morality of war. The questions, "What are the crimes of war?" and "Can crimes from

1. See Richard Wasserstrom, "On the Morality of War: A Preliminary Inquiry," Stanford Law Review, Vol.21 (1969), p.1627.

2. See Malham M. Wakin (ed.), War, Morality, and the Military Profession (WMMP) (1986), p.220.

3. Ibid.

4. Ibid.

obedience to superior orders be exempted from moral responsibilities?" are in the category of the morality in war.

The answers to the question of the morality of war, especially to the question of the justification of war differ from philosopher to philosopher. Pacifists hold that all war or any use of force cannot be morally justified because the use of force is always morally wrong.⁵ Some philosophers and theologians like Ramsey, Taylor, and U.S. Catholic Bishops, however, maintain that a war declared by legitimate authority, or having a just cause can be morally justified.⁶ But the doctrines that a war can be morally justified may have various criteria of justification. Hugo Grotius, for example, supports the contention that all wars, conducted on both nations by authority of the sovereign power, are to be held just; in contrast, Mao Tse-tung declared that all wars waged by imperialism are unjust, and all communist and revolutionary wars are just.⁷

While discussion of the justification of war takes us into the considerations relevant to the morality of war, discussion of the right use of means in war takes us into those related to morality in war. Our considerations of the

5. Barrie Paskins & Michael Dockrill, The Ethics of War, University of Minnesota (1979), pp.112-113.

6. Wakin, Ibid., p.220.

7. Yehuda Melzer, Concepts of Just War, A.W. Sijthoff International Publishing Company (1975), p.13.

right use of means in war bring us immediately to the concepts of war crimes and the rules of war. Since we do not believe that all is fair in war, we need some strong guidance for the military forces regarding conduct in war: the rules of war. Some conventions which military men and statesmen are required to follow have been established: The Hague and Geneva Conventions, Kellogg-Briand Treaty, and The Law of Land Warfare, and so forth. The variety of rules of war deal with "treatment of prisoners, outlawing certain weapons, identifying and protecting noncombatants, superior orders, treatment of the sick and wounded, private property, hospitals, neutrality, espionage, aerial bombardments, etc."⁸

Some questions seem to be in both categories of the morality of war and of morality in war - the questions concerning the problem of innocent people's deaths, and concerning moral nihilism. One of the rationales for the stand that war is unjustifiable has been the inevitability of killing innocent people in warfare; the problem of killing innocent people has also been a topic for discussion of war crimes. Moral nihilism, the claim that it is not possible to assess war in moral terms because in matters of war morality has no place, will be related with both the morality of war and morality in war, if we can

8. Wakin, WMMP, p.223.

treat it as a moral problem.⁹ In this dissertation, however, morality in war will primarily be treated. For the main subjects of this dissertation are superior orders and supreme military virtues, and these topics will be chiefly connected with morality in war.

2. Collective Survival and Human Rights

According to Michael Walzer, "the world of necessity is generated by a conflict between collective survival and human rights."¹⁰ We find ourselves in that world. Whenever we are there, we experience the ultimate tyranny of war. War, however, has been not an aberration, but an integral part of the world. War, in nature, has been a means to defend and extend the values of societies.¹¹ In doing so, it also has inevitably eroded these values. Here is our dilemma. As Ken Booth points out, the "values of liberal

9. Wasserstrom suggests to call 'moral nihilism' the claim that in matters of war (but not in other matters) morality has no place. This expression needs a note. If moral nihilism means that war cannot be at all related to morality, there should be no point in going further. According to Wasserstrom, however, it means that a war can be neither immoral nor unjust - not because it is moral or right, but because these descriptions are in this context either naive or meaningless or inapplicable. See, Richard Wasserstrom, "On the Morality of War: A Preliminary Inquiry", War and Morality (1970), pp.78-79.

10. Michael Walzer, Just and Unjust War, Basic Books Inc.(1977), p.325.

11. See Willard C. Frank, Jr., "The Agony of Our Choosing: Military Power and Human Values," p.170.

societies are protected by their armed forces, as well as being threatened by them."¹² On the one side, human values are protected by the state and the military forces (power) it maintains. In this sense, war is a means to defend our values. On the other side, our values are threatened and corrupted by that power. For our values have been frequently depraved by war; the virtues of a soldier are often incompatible with the virtues of a person. The soldier is often required by the peculiar structure of military authority to surrender his moral autonomy and thus to abdicate the duty as a person. In short, human values which are not protected by the military forces are prone to be destroyed; values which are shielded by the military power are liable to be depraved. As Reinhold Niebuhr says, "Goodness, armed with power, is corrupted; and pure love without power is destroyed."¹³ How do we escape from this kind of dilemma?

"A military office makes very unusual demands on those who occupy it."¹⁴ The military office requires its holders to place collective ends and the commands of superiors ahead of their personal ends and their own judgments; it also demands soldiers to do these things when there is no self-advantage in doing them, even when they may have to

12. Quoted in Frank's article, Ibid.

13. Ibid.

14. E. M. Adams, "The Moral Dilemmas of the Military Profession", Public Affairs Quarterly, Vol.3 (1989), p.1.

sacrifice their lives. Furthermore, the state conscripts people for this office or extend their term of service against their will, and may not allow them to opt out when the judgments and orders of their superiors seem wrong or the risks and sacrifices seem too great.¹⁵ Any army by its very nature is founded on the basis of military discipline. "Discipline means that every subordinate must obey the orders of his superiors... Military discipline is designed, ultimately, to conduct men to battle, to lead them under fire to victory, and, if and when necessary, to impel them to sacrifice their lives for their country."¹⁶ Soldiers are disciplined to compel total and unqualified obedience without any hesitation or doubt. But when a soldier is confronted with an illegal order to perform an act constituting a criminal offence, the demands of military discipline come into conflict with the imperative need to preserve the supremacy of the law as manifested in the prescriptions of criminal law. "Military discipline requires unflinching compliance with orders; the supremacy of the law proscribes the commission of criminal acts."¹⁷ What should the soldier do in this dilemma? Some jurists like Stephen hold 'the double necessity of preserving on

15. Ibid.

16. Yoram Dinstein, The Defence of "Obedience to Superior Orders" in International Law, Sijthoff-Leyden (1965), p.5.

17. Ibid., p.6.

the one hand the supremacy of the law and on the other hand the discipline of the army.' They maintain that "these two basic values balance each other and also complement one another," and thus, "there is no contradiction between them."¹⁸ But as Dinstein points out, this conception is "too simplified."¹⁹ There seems to be no escape from the conclusion that the values of military discipline and the supremacy of the law would conflict with each other when a soldier is required to execute an illegal order. The position of the soldier in this case is really a difficult one. If he submits to an illegal order, and thereby commits a crime, this implies that he is violating the prescriptions of criminal law and would consequently be liable to the penalties it lays down. If he, in contrast, defies the order, and thereby abstains from commission of the crime, this means that he is infringing the dictates of military law and as a consequence is liable to the penalties it provides. What should the soldier do in that situation? According to Dinstein, the quest of jurists, legislators and judges for a better solution in this situation, has produced the following doctrine: "A soldier committing an offence in obedience to superior orders is relieved of responsibility for his wrong doing. If, however, the illegality of the order is clear on the face

18. Ibid.

19. Ibid.

of it, that is, manifestly and palpably, the soldier must refuse to obey it or else pay the penalty."²⁰ Dinstein suggests to call this solution 'the manifest illegality principle.' At a glance, this principle seems to be appropriate to solving that conflict, and was really applied in the course of the trials of the German war criminals of the First World War. However, there still seem to remain some problems in applying this principle to the conflict between the discipline of the army and the supremacy of the law. We shall discuss this more in chapters III & IV.

There are still more difficult questions in connection with this kind of dilemma. What solution could be possible when the order is an immoral one, not an illegal one? Legality and morality are not the same. "What is legal may be immoral, and what is moral may be illegal."²¹ If a soldier is required to submit to a legal but immoral order from his superior, what should he do? In this case, there could be a conflict between military discipline and human values or between military efficiency and moral virtues. If he submits to an immoral order, and does an evil deed, can

20. Ibid., pp.8-9.

21. Professor Sheldon Cohen suggests some examples for this distinction. The case may be legal but immoral, where a landlord evicts a tenant who is several months behind in her rent, even if it is winter and she has no place to go. In contrast, it may be illegal to walk on the grass in the park, but it is not immoral. See Sheldon M. Cohen, Arms and judgment, Westview Press (1989), p.7.

he be exempted from moral blame on the grounds that soldiers are merely the instrument of their superiors? When the immorality of the order is manifest in the face of it, should he refuse to obey it? If so, we will call this principle 'the manifest immorality principle.'

There still seems to remain another important question. If it is an officer and not just an enlisted soldier who is in the problem situation being issued an immoral order from his superior, what should he do? Can we simply say that there will be no distinction between the case of an officer and the case of a soldier? An officer's anguish will not differ from a soldier's, since they are all human beings prior to being military men. But an officer's decision in that situation may be different from a soldier's.

Michael Walzer says that "in the supreme emergencies, our judgments are doubled, reflecting the dualistic character of the theory of war and the deeper complexity of our moral realism."²² In that case, thus, we may say 'yes' and at the same time 'no', and 'right' and also 'wrong.'

22. In a case where the superior's order is an illegal one, the problem situation facing the subordinate may not be difficult to escape. For the code of ethical virtue for soldiers suggests that they should not obey an illegal order. In this case, it will be important to analyze the concept of loyalty. Loyalty to the superior implies loyalty to the country, but not always. We shall discuss this in detail in Chapter IV. See Richard A. Gabriel, To Serve With Honor, Greenwood Press (1982), Chapter VI.

But this kind of dualism makes us uneasy. We want to escape from this uneasiness. I believe that there could be at some point a way of solving the problem. Even though we cannot reach a perfect way of solving the problem, I believe there could be a way by which we can explain more appropriately our choice in that problem situation. To try to reach that point is one of the purposes of this dissertation.

3. An Agenda for the Inquiry

The body of this dissertation will be composed of three chapters: War Crimes, Superior Orders, and Supreme Military Virtues. In Chapter II (War Crimes), a general definition of war crime will be first discussed. But before we discuss the definition of war crimes, we will examine the concept of war, and discuss the limit and limitlessness of war. Since the ability to identify the crimes of war depends upon the existence of rules of war, the discussion of rules or laws of war will be continued. The rules of war should be made obligatory by the general consent of mankind.²³ What is, then, the general consent of mankind? What kind of rules of war should we formulate? What are the rationales of those rules of war? Are there any moral principles that provide a foundation for the rules of war?

23. Walzer, Op. Cit., p.47.

Many philosophers like R. B. Brandt and R. M. Hare have suggested a utilitarian viewpoint as the grounds of the rules of war. Thomas Nagel, however, holds an absolutist deontological position against the utilitarian viewpoint. Anthony E. Hartle argues that the pre-existing laws of war are based upon two moral principles: humanitarianism and utilitarianism. Arguments for and against the utilitarian standpoint of the rules of war, and some critiques of those arguments will be discussed. Finally, some problems of the current laws of war suggested by Richard Wasserstrom will be examined and discussed.

In Chapter III (Superior Orders), the problems connected with superior orders will be discussed. One of the most complex problems which have arisen in the trial of war crimes is the problem related to obedience to superior orders. The problem situations with which military men are often faced during wartime will be first acknowledged. We have already considered this situation in the previous section. The problem of obedience to superior orders is related directly to the problem of responsibility for crimes committed by subordinate soldiers. As answers to this problem, three different doctrines will be introduced and discussed: The doctrine of respondeat superior, the doctrine of absolute liability, and the mens rea principle. In relation to this, a crucial question, "Can soldiers be

treated as mere instruments for military efficiency?" will be suggested and argued. Finally, an argument that the officers should be charged with moral responsibility different from that of their soldiers will be discussed. Upon the basis of this argument, I shall suggest the shift of our concern, to get a key to the solution of the problem of superior orders, from ordinary combat soldiers to their superiors, namely, military officers as professionals.

In Chapter IV (Supreme Military Virtues), military virtues with which military men should be equipped will be debated. This chapter will actually be the core part of this dissertation. For when a military man is in a problem situation whether or not he is in war, his choice or decision by which he can escape from the situation will depend mainly upon his supreme military virtue. If a soldier's supreme military virtue is loyalty to his superior, he will choose immediate obedience to his superior's order whether or not it is moral or legal. If his supreme military virtue is moral integrity, he will have difficulty choosing an immoral order issued to him by his superior. Thus, what virtue he considers as his supreme military virtue seems to be very important for the military man. If we can find an ideal virtue that all can accept as the supreme military virtue for military men, we can expect

to solve all the problems with which military men often are faced.

Unfortunately, however, the supreme military virtue has been differently identified by every scholar. Clausewitz considers the corporate spirit as the supreme virtue for military men, Samuel Huntington and T. V. Smith, loyalty and obedience, and Malham Wakin and Michael Wheeler regard moral integrity as the supreme virtue. But none of these virtues seems to be appropriate to solve the problem that we have considered above. We shall see why these virtues are not proper as the supreme military virtue. I shall suggest another virtue as the military supreme virtue: "Historical Insight." This virtue means 'moral reflection based upon historical knowledge,' by which, I believe, our choice or decision in the problem situation can be more clearly explained than by any other virtues enumerated above as the supreme military virtues.

CHAPTER II

WAR CRIMES

1. The Concept of War Crimes

What is a "war crime"? It can be simply defined as a violation of the rules of war. But according to Telford Taylor, to define a war crime as a violation of the rules of war is true, but not very meaningful.¹ War consists mainly of acts that would be criminal if they were committed in time of peace. War consists of such acts as killing, wounding, raising a fire, destroying, and plundering public or private property. Because the state of war lays a blanket of immunity over soldiers, those acts are usually not regarded as criminal if they take place in the course of war.

But, as Taylor points out, the area of immunity is not unlimited. Its boundaries are marked by the laws or the rules of war. Although no one expects battle deaths to be

1. Telford Taylor, Nuremberg and Vietnam: An American Tragedy, The New York Times Company (1970), p.19.

eliminated by some knightly code, it can be hoped that the manner of the killing would become dignified by some rules of fair play. There will be no genuine objection to the proper violence in war, but we can believe that there are some moral limits to what soldiers should be expected to do. The ability to identify the crimes of war, crimes against humanity, and crimes against peace depends upon the existence of the rules of war.² It is, thus, not difficult to understand that war crimes are closely related to the rules of war. Can we say, then, that war crimes can be defined only when there exist the rules of war? In other words, can we discuss war crimes only after regulating the rules of war? As Donald Wells says, the rules of war should precede war crimes, as long as the identification of war crimes presupposes the existence of the rules of war.³ What, then, are the rules of war? Where do the rules of war come from? Are they formulated without considering some crimes committed in war? The answer to this last question could be yes and no. But it should be more negative than positive. We can establish rules of war,

2. See Donald A. Wells, War Crimes and Laws of War, University Press of America, Inc. (1984), Preface. Crimes under international law are normally divided into three different types of war crimes: Crimes against peace, Crimes against humanity, and War crimes. Since members of the armed forces are largely be concerned only with 'war crimes,' I shall use the term, war crimes, as a common designation of those offences. See The Law of Land Warfare, p.178.

3. See Wells, Ibid., p.95.

regardless of the list of crimes committed in war, on the basis of moral law, the conscience of mankind, and custom. These rules of war, however, are liable to be formal. Since the circumstances and techniques of warfare are rapidly altered, the rules of war are spasmodic and changeable. Crimes committed in war have become diverse in accordance with the development of techniques and the complexity of circumstances of warfare. Hence, the rules of war fixed by just moral law, regardless of war crimes committed in realities of war, are prone to be formal. For this reason, the rules of war should be formulated by considering not only moral law and conscience of mankind, but also the list of war crimes. Similarly, both the rules of war and the list of crimes committed in war are required for providing the concept of war crimes. The progress on the question of defining the concept of war crimes in the earliest stages shows us well the importance of the consideration of the list of war crimes.⁴

After the decision had been reached in October, 1943, to form the commission, several informal meetings of members-designate were held... Many questions as to ways and means of carrying out the assignment were discussed, and, among them, the question of what should be considered a war crime. The question was raised by the British member, later the first Chairman of the Commission, Sir Cecil Hurst. He pointed out that there was a choice between two

4. See History of the United Nations War Crimes Commission and the Development of the Laws of War, London (1948), p.170.

courses. One was to draw up a list of war crimes... The alternative was to attempt a general definition of the concept, for example, that it consisted in violations of the laws of war. Opinions in favour of the first course prevailed.

For a clear definition of war crimes, we need to enumerate, and analyze some crimes committed during war. But first we shall have to define the concept of war. For crimes committed in wartime should be differently treated from those in peacetime, even if they are the exact same crimes. There have been many definitions of what war is. As Manfred Lachs points out, however, none of them has actually hit the very essence of war.⁵ This means that defining the concept of war is far from easy. It has been even suggested that "war cannot be defined because it is so all pervasive, invades so many areas of human experience in so many different ways, that it transcends the categories in which we seek to organize the world and our experience of it."⁶ But it is necessary to define the concept of war for discussions of the ethical aspects of war. As Richard Wasserstrom points out, one of the ways to reach a clearer concept is to begin with analytical considerations of it.⁷ We will briefly consider the concept of war through Wasserstrom's analysis of it.

5. Manfred Lachs, War Crimes, London (1945), p.3.

6. Barrie Paskins & Michael Dockrill, The Ethics of War, University of Minnesota Press (1979), p.102.

7. Richard Wasserstrom, "On the Morality of War: A Preliminary Inquiry", Stanford Law Review, Vol.21 (1969), p.1629.

The nature of war, according to Wasserstrom, is to be apprehended by the following three characteristics: (1) "War is something that takes place between countries, nation-states, rather than lesser groups or individuals."⁸ (2) "Wars almost surely involve the use of a variety of forms of violence under a claim of right."⁹ (3) War is either "a circumscribed, clearly definable instrument of foreign policy" or "some indeterminate, indefinable, and unlimited fight or struggle between countries."¹⁰ In short, for Wasserstrom, war takes place between countries, involves the use of violence, and is either a limited or unlimited struggle.

Wasserstrom's analysis of the nature of war is similar to Quincy Wright's attempt to define war. According to Wright's definition, war is "a violent contact of distinct but similar entities."¹¹ But this kind of definition of war is too broad. For in this sense of war, as Wright himself says, a fight between a lion and tiger, and a battle between two primitive tribes would all be war as

8. According to Wasserstrom, 'private wars', if there still are any, are anomalies, and 'civil wars' are enough like the standard case of war to make it appropriate so to describe them. Civil wars are, in this respect, different from either insurrection or revolution. See Ibid., p.1632.

9. This characteristic is, for Wasserstrom, a minimal and necessary attribute of war. This means that a specialized group of persons must be prepared to kill the soldiers of the opposing army. Ibid.

10. Ibid., p.1633.

11. Quincy Wright, A Study of War, Chicago (1965), p.8.

well as hostilities between two modern nations. In regulating the concept of modern war, Wright employs a very narrow definition of war: he adds "the legal condition which equally permits two or more hostile groups to carry on a conflict by armed force."¹²

When Wright suggests a legal definition of war, his position is just related to the nature of war as a limited fight, not to that as an unlimited one. We need to consider more the characteristic of war as an unlimited fight. For although the concept of war crimes is the central topic in this section, our moral inquiry connected to them would be meaningless if we approve and justify the characteristic of war as unlimited struggle.

As Michael Walzer, as well as Wasserstrom, points out, the characteristic of limitlessness in war is from the Clausewitzian idea of war.¹³ According to Clausewitz, the concept of war is defined as follows:¹⁴

We shall not enter into any of the abstruse definitions of War used by publicists. We shall keep to the element of the thing itself, to a duel. War is nothing but a duel on an extensive scale... Each strives by physical force to compel the other to submit to his will: each endeavors to throw his adversary, and thus render him incapable of further resistance. War therefore is an act of

12. Ibid.

13. See Michael Walzer, Just and Unjust Wars, Basic Books (1977), p.33, and also see Wasserstrom, Op. Cit., p.1635.

14. Karl von Clausewitz, On War, Penguin Books (1984), pp.101-103.

violence intended to compel our opponent to fulfill our will... War is an act of force, and there is no limit to the application of that force.

For Clausewitz, the idea of war carries with it the idea of unlimitedness, whatever actual restraints are observed in our society. "If we imagine a war fought in a social vacuum, unaffected by accidental factors, it would be fought with no restraint at all in the weapons used, the tactics adopted, and the people attacked, or anywhere else."¹⁵ It is because "military conduct knows no intrinsic limits."¹⁶ As General Eisenhower once said, "When you resorted to force...you didn't know where you were going...If you got deeper and deeper, there was just no limit except...the limitations of force itself."¹⁷ This is, according to Clausewitz, the logic of war. In brief, since war is an act of force to compel one's opponent to do one's will, it has in itself no limit to the application of the force.

The Clausewitzian idea of war, however, seems to be a muddled view. He considers war as a duel, though it is a duel on a larger scale, and also he characterizes the limitlessness of war. As Wasserstrom points out, however, a duel is governed by some systemized rules. "It is hard to imagine," Wasserstrom says, "a more fully rule-governed,

15. Walzer, Op.Cit., p.23.

16. Ibid.

17. Quoted in Walzer, Ibid.

rule-defined, stylized way of fighting than a duel."¹⁸ Nevertheless, Clausewitz claims that there is no limit to the application of the force in war. Clausewitzian description of war can be useful for an account of how escalation in war works. But, if war is, as he says, a duel written large, then war is a sort of game. "War is one means - that of combat between competing armies - to decide which of two or more contesting countries shall win a particular dispute."¹⁹ If war is a sort of match, it should be governed by some rules. Whether or not war is a sort of game has been one of our controversial problems. But many anthropological and historical accounts as well as moral considerations agree that war should be governed by rules. They suggest that war be limited war: They have built certain notions about "who can fight, what tactics are acceptable, when battle has to be broken off, and what prerogatives go with victory into the idea of war itself."²⁰

18. Wasserstrom, Op. Cit., p.1634.

19. Ibid.

20. Walzer, Op. Cit., pp.24-25. Wasserstrom also suggests that three things are important about the concept of war: First, war is an encounter that directly involves only armies. Second, war is conducted in accordance with rules that determine how the game of war is to be played. And third, war is conducted in accordance with rules or standards concerning when it is appropriate to engage in war. In short, for Wasserstrom, war should be limited war governed by rules. See Wasserstrom, Ibid., p. 1634.

Many political and military leaders, however, might not agree to the claim that war is limited war. They still may believe that the Clausewitzian idea of war is right. They may argue that war is never an activity like a game constituted by its rules. Thus, it is absurd, they may think, that war should be governed by some rules. Still they believe that "All is fair in war." This so-called realist conception of war appears to be closely related to the notion of total war. Some political and military leaders consider war as total war. They derive the concept of total war from the Clausewitzian idea of absolute war. For Clausewitz, as we have seen just before, war is an act of violence intended to compel our opponent to fulfill our will. From this definition it follows logically that "every war ought to end in a complete victory of one side over the other, and also, moderation in war is an absurdity since failure to utilize all the force at one's disposal defeats the purpose of war."²¹ In war conceived in this way, "everything is the effect of its natural and necessary cause."²² This Clausewitz calls 'the absolute form of war' or 'absolute war.' The twentieth-century notion of 'total war' is similar to this concept of absolute war.²³ In the

21. Anatol Rapoport, "Introduction", On War, Penguin Books (1984), p.14.

22. Ibid., p.371.

23. Rapoport stresses the importance of the difference between Clausewitz's conception of absolute war and the twentieth-century notion of total war. According to

conception of total war, everything is made subordinate to the overmastering dictates of war. There would be no behavior that can properly be ruled out except on strategic grounds. There would be only a victory or a defeat. Thus, in this conception of total war, "the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity."²⁴ If we accept the conception of total war, our argument that war should be governed by its rules would be an impracticable proposition. Since the conception of total war has been faced in the past wars, especially in the Second World War, not only for the Axis powers but also even for the Allied powers, we may have to consider that conception in the future war. As I have argued in the previous chapter, however, war is a social creation. The ultimate end of war as a social creation cannot lie in the destruction of human values. War should be a means to defend and extend the values of societies. Though it is important, as Wasserstrom stresses, to keep two conceptions

Rapoport, in Clausewitz's absolute war, slaughter is confined to the battlefield, while it means genocide in the twentieth-century notion of total war. That is, the concept of the battlefield dissolved in twentieth-century war. But since Clausewitz himself says that everything is the effect of its natural and necessary cause in the absolute form of war, it is evident that he furnishes the first step of the argument that there is no behavior which can be ruled out except on strategic grounds, which is valid in the twentieth-century conception of total war. See Rapoport, *Ibid.*, pp.62-63.

24. Quoted in Richard Wasserstrom, *Op. Cit.*, p.1635.

of war (limit and limitlessness of war) distinct,²⁵ war should be governed by its rules since it is one of the crucial creations of society. This is the ground, I suppose, on which the task of moral assessment is requested in war.

Now, let us turn to the examination of the concept of war crimes. According to The Law of Land Warfare, the term 'war crime' is "the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."²⁶ This definition of war crimes seems to be very simple. The definition of war crimes in the London International Assembly draft appears to be more detailed. According to the draft, the definition of war crimes was given as "offences against the laws and customs of war, which have been committed by members of the armed forces, the civilian authorities or other persons acting under the authority of, or in concert with, a state or other political entity, engaged in war or armed hostilities with,

25. It would not follow from the distinction of the two conceptions of war that moral assessment is impossible in the conception of unlimited war while it is possible in limited war. As professor Betsy Postow suggests, an unlimited war against a monster can be necessary to preserve human values, and this war could be morally assessed. But in this case, the task of moral assessment may be different from that of moral assessment in limited war. This is, I suppose, why Wasserstrom keeps distinct these two conceptions of war. See Ibid., pp.1635-1636.

26. Department of the Army, The Law of Land Warfare (1956), p.178.

or in hostile occupation of territory of the United Nations."²⁷ The definition of war crimes by the draft appears at a glance to be more complex than the definition in The Law of Land Warfare. But the definition by the draft does not seem to be enough to explain the concept of war crimes. It will be worth examining here Manfred Lachs' attempt to define war crimes.

In his book, War Crimes,²⁸ Manfred Lachs endeavors to define war crimes by passing through many steps. The first step to define the concept of war crimes, for Lachs, was collecting and dividing into classes various examples of crimes committed during wars. Next, Lachs derived seven elements which were commonly featured in the crimes committed during past wars. Then, by analyzing those elements, he reached a definition of war crimes. Before introducing his definition of war crimes, it seems to be worth examining the seven elements that Lachs considered as features in common in war crimes. According to Lachs, the following seven elements are the essentials for qualifying war crimes:²⁹

- (1) They [crimes committed during war] are acts of violence...
- (2) They are committed under specially favorable circumstances created by the war...

27. History of the United Nations War Crimes Commission (1948), p.444.

28. Manfred Lachs, War Crimes, London (1945).

29. Ibid., pp.17-18.

- (3) They are committed by a special group of persons in connection with the war...
- (4) They are committed during war...
- (5) They are committed on the battlefield, behind it...
- (6) They are committed against soldiers and other members of the armed forces..., against the civilian population..., against the property...
- (7) They are not covered by the exceptions provided by the International Laws of Warfare...

In the second element, the term "specially favorable circumstances created by war" needs noting. These circumstances, according to Lachs, are understood as circumstances that make culprits believe that their deeds will not be punished due to war conditions: In these circumstances, they believe that they can escape from punishment because their deeds were done under either tacit or explicit consent by their superiors, commanding officer or government. In other words, war crimes in these favourable circumstances could be committed with deliberate brutality under "the blessing of their superiors."³⁰ But the seventh element shows that even crimes committed in those favorable circumstances cannot be unlimited: Crimes are limited by laws of war. Thus, we can know that, for Lachs, the criterion of regulating war crimes is ultimately the laws or the rules of war. Lachs' final definition of war crimes shows this well. His definition of war crimes is composed of ten articles. I do not believe that these all

30. See Ibid., pp.23. Actually this is one of the articles in the definition of war crimes. See. also pp.100.

articles are needed for our discussion. I will introduce only five articles: I, II, IV, V and VI. They are as follows:³¹

Art.I. A war crime is any act of violence, qualified as crime committed during and in connection with a war under specially favorable conditions created by the war and facilitating its commission; the act being directed against the other belligerent State, or its interests; against its citizens or their interests; against a neutral State, its interests, its citizens or their interests, as well as against Stateless individuals or their interests.

Art.II. The qualification accepted in Art.I ceases should the act not be contrary to the codified International Laws of Warfare or expressly permitted by them if contrary to the customary law or general principles accepted by civilized nations.

Art. IV. Persons guilty of war crimes may be any member of Armed Forces, of the Government, Administration, Police, at home or in occupied countries, any member of the administration of prisoners-of-war camps; any person entrusted with political, legal or economic functions connected with the war, members of party organizations or any other person acting on behalf of the belligerent, whether his national or not.

Art. V. The exemption provided in Art.II ceases, should the deed be committed by a person not enjoying the privileged status of a subject of warfare.

Art. VI. A war crime can be committed on land, on sea and in the air, beneath the surface of the earth, in territorial waters, closed seas, on the territories of the belligerent himself, the other belligerent or a neutral State.

Article I prescribes the qualifications of war crimes.

Article IV and VI define the qualification of persons

31. Ibid., pp.100-101.

committing war crimes, and of places where they are committed. According to Lachs, all persons connected to war can be war criminals, and war crimes can be committed in all places. Article II shows well the difference between crimes committed in peacetime and those in wartime. Insofar as, according to Article II, crimes committed in wartime are not contrary to the laws of war, they are not war crimes. This means that the qualification or prescription of war crimes ultimately depends upon laws or rules of war. However, the request for the establishment of the rules of war is not just for regulating the concept of war crimes; it is for distinguishing war from massacre. "Only when restrictions are established..," as Walzer emphasizes, "war is distinguishable from murder and massacre."³² We shall now turn to 'the rules of war,' and discuss the grounds for the rules of war.

2. The Rules of War

In his book, Moral Issues in Military Decision Making, Anthony E. Hartle asks if there are moral principles that provide a foundation for the laws of war.³³ According to Hartle, this question is very important. He says that

32. Walzer, Op. Cit., p.42.

33. Anthony E. Hartle, Moral Issues in Military Decision Making, University Press of Kansas (1989), Chapter 5-6.

"Since no set of rules or laws can provide specific guidance for every eventuality, the 'spirit of law' may be the deciding factor in those cases in which the letter of the law is not specific or not applicable."³⁴ This means that "the principles which support the laws must be applied in order to reach a justifiable decision when the laws themselves do not determine appropriate actions."³⁵ Accordingly, the principles, if any, that underlie the laws of war are particularly important for the consistent solution of new and unexpected problems not specifically covered by existing provisions. In addition to this practical aspect, it seems to me that there is an essential reason for our asking whether there are those principles as a foundation for the laws of war. The laws or rules of war, as Walzer advocates, should be made obligatory by the general consent of mankind.³⁶ When some restrictions on the conduct of warfare are defended, they have usually been on legal grounds alone. Their moral bases are often poorly understood. Actually, however, the reason why certain restrictions are neither arbitrary nor merely conventional is that their validity does not depend simply on their usefulness: They are based upon moral principles. Even when the validity of some restrictions depends upon their

34. Ibid., p.56.

35. Ibid.

36. Michael Walzer, Just and Unjust War, p.47.

usefulness, their validity is actually based upon a certain moral principle - utilitarianism. Thus, the suggestion that the rules of war should be made obligatory by the general consent of mankind can be satisfied by a moral basis for the rules of war. What are, then, the moral principles that underlie the rules of war?

Many philosophers as well as most statesmen have considered a utilitarian principle as a foundation for the rules of war. Utilitarianism certainly justifies some restrictions on the conduct of warfare. National interest and military necessity can be appropriately defended by the principle of utility. The principle of utility has a natural appeal to anyone who is not a complete skeptic about ethics. As is commonly known, utilitarianism holds that it is always right to promote "the greatest possible balance of good over evil," and always wrong not to do so.³⁷ Again, utilitarianism says that "one should try, either individually or through institutions, to maximize good and minimize evil," and that "if faced with the possibility of preventing a great evil by producing a lesser, one should choose the lesser evil."³⁸ Although it is a very hard philosophical task to define the concept of

37. William K. Frankena, Ethics, Prentice Hall (1973), p.34. See also Barrie Paskins and Michael Dockrill (ed.), The Ethics of War, University of Minnesota Press (1979), p.141.

38. Thomas Nagel, "War and Massacre," War and Moral Responsibility, Princeton University Press (1974), p.5.

'good' or 'evil,' and there are certainly problems about the formulation of utilitarianism, as Nagel admits, "its intent is morally transparent."³⁹ In other words, if we admit that maximizing good and minimizing evil is desirable for every one, then it is no wonder that we act toward maximizing good and minimizing evil. For this reason, the principle of utility justifies some restrictions on the rules of war. Another merit often claimed for utilitarianism is that "in every situation where moral claims appear to conflict, the principle of promoting the greatest happiness provides a decision-procedure."⁴⁰ If a theory enabling us to decide what to do is better than a theory that has no way of settling moral conflicts, utilitarianism may be the best theory.

However, although the principle of utility is morally transparent, and thus helpful for providing a decision-procedure, as Thomas Nagel points out, it continues to leave large portions of ethics unaccounted for.⁴¹ One of the crucial aspects of utilitarianism that Nagel criticizes is related to the scale of violence that war involves. According to Nagel, an exceptional measure which can be justified by its results in a particular conflict may create a precedent with disastrous long-term effect.⁴² In

39. Ibid.

40. Barrie Paskins, Op. Cit., p.142.

41. Thomas Nagel, Op. Cit., p.5.

42. Ibid.

other words, the principle of utility which created a precedent for using force can make war involve violence on such a large scale, but, for Nagel, this kind of large scale murder may never be justified on even utilitarian grounds.⁴³ He says that "Once the door is opened to

43. It seems to me that there is another kind of criticism against utilitarianism. Nagel suggests an argument as the reason why such large scale violence may not be justified - an argument that the consequences of refusing to go to war will never be as bad as the war itself would be, even if atrocities were not committed. His argument may be right. But the point of our question does not lie in a decision of whether or not we are going to war. War has already happened. Our question is concerned with whether or not the large scale murder can be justified by the principle of utility. Utilitarians will believe that such large scale murder can be justified by that principle if such scale murder produces, at least, better results. Taking this into consideration, Nagel's argument that violence on such a scale may not be justified on the utilitarian principle does not seem to be appropriate as a criticism against utilitarianism. It seems to me that his argument is based upon a faith that large scale murder can never be justified even during wartime. We shall discuss this in detail later.

We need note here the difference between act-utilitarianism and rule-utilitarianism. Although Nagel criticizes utilitarianism without distinguishing them, strictly speaking, they are very different from each other. When we utter 'utilitarianism,' generally speaking, it means act-utilitarianism. Act-utilitarianism, as we have seen in the definition of utilitarianism, is the view that the rightness or wrongness of an action is to be judged by the consequences of the action itself. Rule-utilitarianism is the view that the rightness or wrongness of an action is to be judged by the goodness and badness of the consequences of a rule that everyone should perform the action in like circumstances. In this respect, act-utilitarianism can be contrasted with rule-utilitarianism. Hence, a criticism against utilitarianism may be fatal for act-utilitarianism, but may not for rule-utilitarianism. We shall see this in Brandt's arguments. See J.J.C. Smart & Bernard Williams, Utilitarianism For and Against, Cambridge University Press (1978), pp.9-12.

calculations of utility and national interest, the usual speculations about the future of freedom, peace, and economic prosperity can be brought to bear to ease the consciences of those responsible for a certain number of charred babies."⁴⁴

Nagel's criticism against utilitarianism continues. Adherence of the principle of utility makes people defend it for even large-scale murder. Nagel, here, considers G.E.M. Anscombe's argument concerning the deliberate killing of noncombatants: for example, the dropping of atom bombs on Hiroshima and Nagasaki. According to Anscombe, the policy of deliberately killing large numbers of civilians did not originate with Truman, and was common practice among all parties during World War II. This policy of attacking the civilian population has been widely accepted in the civilized world, and, Nagel says, seems to be still accepted. He says that this policy "gives evidence of a moral conviction that the deliberate killing of noncombatants - women, children, old people - is permissible if enough can be gained by it."⁴⁵ Needless to say, this kind of moral conviction is based upon utilitarianism. In short, for Nagel, utilitarianism is not appropriate as a moral foundation for the rules of war, not only because it justifies some restrictions on the conduct

44. Nagel, Op. Cit., p.9.

45. Ibid., p.7.

of warfare simply through its results, but because by allowing an exceptional measure, it makes war involve large-scale murder, the justification of which would be difficult even from the utilitarian point of view.

What moral view, then, can be considered as a basis for the rules of war? For Nagel, it is an absolutist point of view.⁴⁶ According to Nagel, there are limits on what may be done even in the service of an end worth pursuing - and even when adherence to the restriction may be very costly.⁴⁷ The limits imply not allowing soldiers to do certain things, such as killing unarmed prisoners or civilians. While utilitarianism gives primacy to a concern with "what will happen," absolutism gives it to "what one is doing." It is of course not, Nagel says, that absolutism requires one to ignore the consequences of one's acts. It requires one not to justify one's acts by their consequences, for intentional acts "cannot be justified in terms of any consequences whatever."⁴⁸

46. We need note, here, the meaning of "absolutism" as used by Nagel. Normative ethical theories are generally divided into two categories: absolutism and relativism. Absolutism is normally classified into teleology and deontology. Utilitarianism is one of the teleological theories. Thus, utilitarianism, as well as deontological theories, belongs to absolutism. Nevertheless, Nagel calls his theory concerning the rules of war 'absolutism' in contrast to utilitarianism. Considering the meaning of 'absolutism' from the context, it refers to deontological absolutism.

47. Nagel, Op. Cit., p.4.

48. Ibid., p.8.

Nagel's argument concerning absolutism is very simple. He contrasts utilitarianism with his absolutism, and criticizes utilitarianism on the grounds that it can involve large-scale murder. Thus, for Nagel, utilitarianism is not appropriate as a moral basis for the rules of war. Actually, utilitarianism appeals to the usefulness of consequences, and the usefulness may make people ease their consciences of the responsibility for evils resulted from it. Indeed, as Nagel believes, and Walzer agrees, the moral foundation for the rules of war may not be satisfied by just usefulness.⁴⁹ There may be something else that we shall consider as the moral basis for the rules of war. It seems to me, however, that there are some questions about Nagel's argument that absolutism is more appropriate than utilitarianism as a moral basis for the rules of war. I shall ask two questions. (1) Nagel holds that "what absolutism forbids is doing certain things to people, rather than bringing about certain results."⁵⁰ In this respect, as he himself admits, he does not hold that absolutism never considers certain results of acts. His point is that we cannot decide what we have to do by considering the results of the acts which we shall do, because if we consider the results of acts, we can even choose such acts like intentional murder that we should

49. See Walzer, Op. Cit., p.45.

50. Nagel, Op. Cit., p.10.

never do. For Nagel, it is self-contradictory that we can do a certain act that we should never do. How can he prove, however, that not doing some acts like intentional murder is a duty that we should keep at all costs? It seems to me that Nagel's argument begs the question. His argument is based upon an assumption that one should not kill innocent people 'at any costs.' The argument that 'one should not kill innocent people' may not need justification. But the argument that 'one should not kill innocent people at any costs' needs justification. (2) Nagel also argues that "Absolutism requires that we avoid murder at all costs, not that we prevent it at all costs."⁵¹ If absolutism is an appropriate moral basis for the rules of war, it should be able to explain the problem regarding military necessity. As Nagel holds, however, if absolutism requires us to avoid murder, especially large scale murder, how can it solve the problem concerning military necessity which is often expected to allow soldiers to involve large scale murder whether or not it is intentional? Actually, the bombing of Dresden, Hamburg, Tokyo, Hiroshima, and etc. in World War II was based upon the principle of military necessity, and some of the bombing have been considered as just. How can Nagelian absolutism explain this?

51. Ibid., p.12.

In his article, "Utilitarianism and the Rules of War," Richard B. Brandt criticizes Nagel's absolutism, and defends a utilitarian view.⁵² Brandt argues that Nagel's argument for absolutism is very vague, and suggests a contractual or rule utilitarianism as a moral foundation for the rules of war. Brandt notes Nagel's proposition that what absolutism concerns is "what we deliberately do to people." According to Brandt, this is an important restriction for the rules of war.⁵³ Nevertheless, Brandt says, Nagel did not fully explain this point. Brandt, here, suggests an example of the bombs for destroying a munitions factory - surely a legitimate military target in a night raid. Brandt supposes that these bombs kill five thousand people, and asks whether this is a case of "deliberately doing" something to the people. According to Brandt, Nagel's argument is obscure because "it does not make clear whether attacks on munitions factories are legitimate, or whether attacks on persons involved in supporting services, say, the provisioning of the army, are acceptable."⁵⁴ In other words, Brandt believes, although Nagel may admit it to be legitimate to bomb to destroy munitions factories, it will be difficult for him to consider as legitimate the

52. Richard B. Brandt, "Utilitarianism and the Rules of War," Philosophy and Public Affairs (1971), Vol.1, No.1.

53. Ibid., p.148.

54. Ibid.

bombing of munitions factories involving the death of five thousand people.

A rule-utilitarian, however, according to Brandt, can make a clear answer to this question, still considering the notion of what we deliberately do to people. Brandt says that "A rule-utilitarian is certainly in a position to say that utilitarian considerations cannot morally justify a departure from these rules [of warfare]; in that sense they are absolute."⁵⁵ In this respect, a rule-utilitarian shakes hands with an absolutist.⁵⁶ The difference between the two positions is that a rule-utilitarian seeks from long-range utility the moral justification of rules, while an absolutist never does so. But a rule-utilitarian can answer the question of whether or not the attacks on munitions factories are legitimate, while an absolutist like Nagel cannot. Hence, for Brandt, it is obvious that a rule-utilitarian point of view is more appropriate than Nagel's absolutism for a moral basis for the rules of war.

For a clearer explanation for his argument that a rule-utilitarian point of view is appropriate for the rules of war, Brandt suggests that we suppose an initial situation where the rules of war are chosen by the representatives of various nations. Following John Rawls'

55. Ibid., p.147.

56. An absolutist is, here, of course a deontological absolutist.

terminology and methods for the justification of an ethical theory, Brandt tries to show that morally justifiable rules of war are those which would be preferred by rational persons choosing behind a veil of ignorance.⁵⁷ According to Brandt, rational, impartial persons would choose rules of war that would maximize expectable utility. Why would they prefer such rules? Brandt says that "if they [rational, impartial persons] are self-interested they will choose rules which maximize expectable utility generally, for then their chance of coming out best will be greatest...and if they are altruistic they will again choose that set of rules, for they will want to choose rules which will maximize expectable utility generally."⁵⁸ In other words, whether or not they are self-interested, they will choose utility-maximizing rules. For if they are

57. According to John Rawls, the principles of justice are chosen behind a veil of ignorance. This insures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. For Rawls, the principles of justice which would be chosen from this situation by the representatives of various classes are morally justifiable. For justification of rule-utilitarianism as a moral basis for the rules of war, Brandt suggests, we follow Rawls' method. Thus, Brandt supposes that the question which rules of war would be preferred by rational persons is roughly the question that bodies like the Hague Conventions tried to answer (actually, he believes that the situation in Hague in 1907 is similar to the initial situation suggested by Rawls). See Brandt, *Op. Cit.*, p.151. See, also, John Rawls, A Theory of Justice, Harvard University Press (1971), Chapter 3.

58. Brandt, p.152.

altruistic, it is natural that they want others to have better results; therefore, they will choose such rules. Even if they are selfish, they will again choose those rules; because they do not know how especially to favor themselves behind a veil of ignorance, it is rational for them to choose rules which will maximize expectable long-range utility. These rules will ultimately bring the satisfaction of a rational person's self-interest. According to Brandt, however, as we have already seen above, these utility-maximizing rules are not the general utility-maximizing rules. He says that "These rules are at least very different from a blanket permission for anything the military thinks might conceivably improve the chances of victory, irrespective of any human cost to the enemy."⁵⁹ In this respect, this kind of utility is clearly contrary to the general utility that any amount or manner of force be employed even when it is not necessary for victory. This is why Brandt calls his theory 'rule-utilitarianism.'

In order to support his argument that rule-utilitarianism is appropriate for the practical rules of war, Brandt classifies the rules of war into three types of restrictions, and tries to show that these restrictions are ultimately based upon expectable long-range utility. For a comparison of his argument with Nagel's, and with Hartle's

59. Ibid., p.158.

argument which shall be considered later, it seems to be worth delineating these restrictions in details. The restrictions are as follows:⁶⁰ (1) Humanitarian restrictions of no cost to military operation. These restrictions are, for example, rules against the murder or ill-treatment of prisoners of war. Following these rules does not bring a big loss to the captors; it will, rather, bring an advantage in returning troops having been encouraged to respect the lives of others. (2) Humanitarian restrictions possibly costly to military victory. These rules are, for instance, rules against uses of atomic weapons and area bombing. Different from the case of (1), this is the case where the stakes are very high. According to the principle of utility, a military action like a bombing raid is permissible if the utility is greater than the possible disutility of the action. These humanitarian restrictions, however, require good evidence that a military action will significantly enhance the prospect of victory. In other words, "substantial destruction of lives and property of enemy civilians is permissible only when there is good evidence."⁶¹ (3) Acceptance of military losses for humanitarian reasons. This case is related to the economics of warfare. When the prospective loser is continually recalcitrant despite the fact that the ultimate

60. See Ibid., pp.152-161.

61. Ibid., p.156.

outcome of war is almost expected, it might be thought permissible for the prospective victor, by general principle of utility, to use atom bombs in order to avoid prolonging a war with consequent casualties. But humanitarian restrictions forbid destroying a city by atom bombs to prevent friendly military losses. It must be permissible to inflict losses heavy enough to produce capitulation, but in this case the rules require judgments by long-range utilitarian considerations.

According to Brandt, all these rules based on humanitarian reasons prescribe that a belligerent be prepared to accept certain military disadvantages for the sake of the lives and welfare of civilians and prisoners. The disadvantages in question, however, he says, are not so serious as to affect the outcome of a war. Moreover, the military gains and losses are ones which are likely to be evenly distributed, so that neither side stands to gain a long-term advantage if the rules are observed by both. For this reasons, Brandt concludes as follows:⁶²

So, without affecting the outcome of the war and without giving either side an unfair advantage, a considerable benefit can come to both belligerents in the form of the welfare of their imprisoned and occupied populations. Thus the long-run advantage of both parties is most probably served if they accept forms of self-restraint which can work out to be costly in occasional instances. Such rules will naturally be accepted by rational, impartial people

62. Ibid., p.161.

in view of their long-range benefits.

In short, for Brandt, the question which rules of war are morally justifiable can be answered by rule-utilitarianism. For rule-utilitarianism can overcome some problems raised not only by general utilitarianism, but also by Nagel's deontological absolutism. As Nagel pointed out, an adherence to the principle of utility, by its depending upon just the results of acts, makes people approve as just even large-scale murder. But the rules of war based upon humanitarian restrictions forbid such large-scale murder, as well as killing or ill-treating prisoners of war; thus, these rules of war are not different from those based upon Nagel's absolutism. For Brandt, however, those humanitarian restrictions are ultimately explained in terms of long-range utility; hence, these rules of war founded upon long-run utility can solve the problems which cannot be answered by an absolutist. Therefore, rational, impartial persons would choose rules of war based upon rule-utilitarianism.

Brandt's arguments concerning his proposed rules of war founded upon rule-utilitarianism seem to be more persuasive in various aspects than Nagel's absolutist argument. Brandt showed that humanitarian restrictions which Nagel tried to finally suggest from the point of absolutism are no hindrance to military effectiveness on

the utilitarian view. In this respect, Brandt's proposed rules are not different from Nagel's deontological absolutist rules. But Brandt's argument that mutual agreement to observe those restrictions is in the interests of all parties to a war seems to be more persuasive than Nagel's absolutist argument that we should not murder prisoners of war simply because not killing innocent people at any cost is a duty. For, as Nagel himself admits, the utilitarian view has a natural appeal to anyone because it is rooted in sympathy of human nature. In other words, it seems to me that utilitarianism appealing to our natural inclination to prefer pleasure or interest to pain or loss is more persuasive than Nagelian absolutism simply emphasizing a moral duty. On the other hand, the problem of military necessity, which seems to be difficult to answer from the absolutist point of view, appears to be explained from Brandt's utilitarian point of view. Although Brandt adheres to the principle of utility in this way, he does not forget to emphasize that a good end justifies some means but not others. This is why he distinguishes his view from general utilitarianism, and calls it rule-utilitarianism.

For Brandt, however, the difficult problem seems to arise over the question of restrictions that impair military effectiveness. In this case, where restrictions

impair effectiveness, Brandt said that substantial destruction of lives and property of enemy civilians is permissible only when there is good evidence that it will significantly enhance the prospect of victory. As Brandt himself admits, however, application of the terms "good evidence" and "significantly enhance" is vague and requires considerable exercise of judgment in actual situations. Furthermore, it is necessary that this judgment require the soldier or strategist to calculate a total balance of good over evil from the long-range utilitarian point of view. As most anti-utilitarianists point out, such calculations are never easy, and thus, it will be difficult to say that to follow the judgment based upon this calculation is either right or desirable. For these reasons, Jonathan Glover's comment on Brandt's rule-utilitarian view seems to be appropriate. Glover says that Brandt's proposed rule is "persuasive as a general approach because it allows us to assign proper weight both to the aims of a justified war and to the desirability of limiting the horrors both of a present war and of future one," but it is "inadequate as an instruction to appear in army manuals," because "it leaves too much to the judgment of the soldier or strategist."⁶³ Furthermore, if we consider that circumstances in the course of war will not allow soldiers to have a sufficient

63. Jonathan Glover, Causing Death and Saving Lives, Penguin Books (1977), p.277.

time for getting to a calculated judgment, Brandt's rule may be impractical.

We have, so far, asked if there are moral principles that provide a foundation for the rules of war, and argued about two different types of moral principles as a moral basis for those rules: Nagel's absolutism and Brandt's rule-utilitarianism. Following Anthony Hartle, we shall now analyze the pre-existing rules or laws of war, and examine what moral foundation they have. We shall, then, discuss Hartle's view by comparing it with Nagel's and Brandt's views.

According to Hartle, any military group that is committed to adhering to the laws of war is bound by the two underlying humanitarian principles:⁶⁴

- (1) Individual persons deserve respect as such.
- (2) Human suffering ought to be minimized.

Following Hartle, we may call the first principle "Humanitarian Principle 1" (HP1), and the second principle "Humanitarian Principle 2" (HP2). According to Hartle, these two principles are derived from the spirit of the various pre-existing laws of war like the Geneva Convention, the Hague convention, the United States Air

64. Anthony E. Hartle, Moral Issues in Military Decision Making, University Press of Kansas (1989), p.71.

Force manual, and so forth.⁶⁵ Although these two principles are related to the protection of the rights of individual persons, they differ in their schemes of justification. The first (HP1) does not look to the consequences of deeds but concerns itself with human rights, while the second (HP2) invokes utilitarian considerations and depends upon evaluation of the results of contemplated actions. There are few cases, however, that are obviously attributable to only one of these two principles, and thus, HP1 and HP2 can conceivably come into conflict. What concerns Hartle is which principle has priority. To make it clear, he suggests that we consider a hypothetical example regarding killing of prisoners. The often-discussed prisoner case is filled out as follows:⁶⁶

The success of the small force in carrying out its mission will allow the seizure of a major transportation center without a significant battle which would affect a sizeable civilian population. If the battle does not occur, many combatant and noncombatant casualties will be avoided as well as extensive destruction of civilian property. The force carrying out the mission, however, captures several wounded enemy soldiers. The mission is such that accomplishment is not possible if the force keeps its prisoners in custody. If the commander releases the prisoners, the force will probably be compromised and unable to fulfill the mission. Under the circumstances, the commander of the force must decide

65. According to Hartle, roughly saying, the Geneva Conventions and the U.S. Air Force manual are largely concerned about human rights and respect for persons (HP1), while the Hague Conventions are more concerned about less human suffering (HP2). See Ibid., pp.71-73.

66. Ibid., p.74.

whether to kill the prisoners and whether he can justify such execution.

If we apply the two humanitarian principles directly in deciding what to do in a given situation, we should recognize that there can be a conflict between HP1 and HP2. According to Hartle, "consideration under HP2 indicates that the answer is 'kill the prisoners,' for in the short term this action will cause considerably less suffering than not killing them."⁶⁷ Under HP1, however, the decision to execute the prisoners cannot be justified. The leader's respect of his prisoners as individual persons cannot allow him to eliminate them solely as a means of expediting his mission, which he would be doing if he executed them. That is to say, "The prisoners, under HP1, have a basic right not to be treated cruelly or inhumanely."⁶⁸ In short, for Hartle, the two humanitarian principles appear to call for opposite courses of action in this prisoner example: One course of action is oriented to a choice of minimizing suffering; the other to a choice of respecting individual persons as such. When these principles are in conflict, what should we follow? As we have already discussed, the conflict between these two principles is the same conflict raised from the different points of view between utilitarianism and deontological absolutism. While Nagel

67. Ibid.

68. Ibid., p.75.

chose absolutism, Brandt supported utilitarianism. As we have seen, Hartle believes that these two principles are all required for a moral foundation for rules of war. When these are in conflict, however, he contends that HP1 has a priority over HP2. The grounds of his claiming the priority of HP1 over HP2 are based upon the analysis of the existing laws of war.

For a clearer understanding of Hartle's view, let me explain his argument a bit further. Hartle suggests two questions: first, what do the actual laws of war permit or prohibit? and second, from what moral principle is the applicable law of war derived? The answers to these questions, according to Hartle, would show that HP1 has a priority over HP2 in the prisoners example. To make it clear, he suggests us to consider two portions of the actual laws of war regarding killing of prisoners. These portions of laws of war are as follows: One portion from The Law of Land Warfare, and the other from International Law - The Conduct of Armed Conflict and Air Operations.

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance.., or because it appears certain that they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations...⁶⁹

69. Department of the Army, The Law of Land Warfare (1956), p.35.

These provisions prohibit killing or mistreatment of PWs whatever the military reasons...⁷⁰

None of these actual laws of war allows killing of prisoners. This fact supports, according to Hartle, that the laws of war concerning captured prisoners are derived from HP1 rather HP2, for an application of HP2 could justify the killing of prisoners in some circumstances. Therefore, Hartle concludes, "HP1 has priority over HP2 in framing the laws of war in this instance."⁷¹

Hartle has derived from the actually existing laws of war two humanitarian principles. One of them is based upon Nagelian deontological absolutism, and the other is based upon utilitarianism. This means, in other words, that the actual laws of war have had these two principles as a moral foundation for them. Hence, when soldiers come to be in trouble, and when there are no appropriate rules to apply, they can solve the problem by appealing to these two principles. But, when these two principles conflict with each other, what should the soldiers do? By analyzing some portions of the laws of war, again, Hartle showed that the existing rules of war are derived from HP1 based upon deontological absolutism rather than HP2 based upon utilitarianism. Thus, Hartle may say that there would be much less trouble in applying the laws of war, since we

70. Quoted from Hartle. See Hartle, Op. Cit., p.76.

71. Ibid.

have arrived at the spirit of the laws of war - the moral foundation for them.

Hartle's argument that the existing laws of war are founded upon the two humanitarian principles is very suggestive. When we are in trouble, we may, actually, need not adhere to simply one moral point of view, whether it is an utilitarian view or a deontological absolutist view. We will be able to get out of trouble by appealing to both principles. Taking this into consideration, we may say that Hartle's real intention is to find a common denominator between the two principles. But, when the two principles conflict with each other, Hartle himself, like Brandt and Nagel, had to choose one of the two principles, and chose Nagelian absolutism. Different from Nagel, however, Hartle appealed directly to the existing laws of war in order to decide which principle he should take. Hartle's appeal to the actual laws of war is again suggestive. Considering that the actual laws of war were formulated, as Brandt points out,⁷² by the representatives of various nations, we can say that Hartle's direct appeal to the laws of war is very persuasive. For this will lead us to an expectation

72. The representatives of various nations gathered together in 1907. Brandt holds that these representatives could be roughly compared to rational persons who shall choose rules of war behind a veil of ignorance. See Brandt, Op. Cit., p.151.

that people would agree to Hartle's final choice - Nagelian absolutism.

What is at least clear, as Hartle maintains, is that the two humanitarian principles - Nagelian absolutism and utilitarianism - have been favored and applied as a moral foundation for the rules of war. But, Hartle's argument that HP1 has priority over HP2 when they conflict with each other seems to be still controversial. As we have seen above, Hartle's claim of the priority of HP1 over HP2 is derived from the analysis of the actual laws of war concerning killing of prisoners. It seems to me, however, that Hartle's argument concerning the priority of HP1 over HP2 is not appropriate, as far as the analysis of the laws of war is limited just to killing of prisoners. In other words, Brandtian utilitarianism (HP2), as well as Nagelian absolutism (HP1), can be equally derived from the analysis of the laws of war, as long as it is limited to killing of prisoners. If HP2 can be derived at the same level as HP1 from the analysis of the prisoner example, then the priority of HP1 over HP2 cannot be asserted any more. As we have already seen above, Brandt's utilitarian rules of war were explained by three humanitarian restrictions. For Brandt, acts of killing of prisoners or civilians were forbidden by the first and third humanitarian restrictions based upon long-range utility. Just on the second

restrictions, acts like murder may be permissible only when there is good evidence at a high level of the stakes. The prisoner example is, however, related just to either Brandt's first or third restrictions, for the stakes are comparatively less high in the case of the prisoner example. Thus, the rule that prisoners should not be killed can be sufficiently explained under the rule-utilitarian view as well as the deontological absolutist view. Then, for Hartle, there is no reason any more to insist that HP1 has priority over HP2 in the case of the prisoner example.

I have so far reviewed Nagel's, Brandt's, and Hartle's arguments under the question of what principles are justifiable as a moral foundation for the rules or laws of war. According to their views, the pre-existing rules of war have been based upon the two humanitarian principles - utilitarianism and deontological absolutism. Although the question which one of the two principles has priority over the other is still controversial, it seems to me that Brandt's rule-utilitarian view is more defensible than others. For Brandt's approach seems to be able to explain, not perfectly but sufficiently, the problems which were raised by anti-utilitarians like Nagel and Hartle without losing any utilitarian merit. I believe I have already argued above about this.

3. Problems of the current laws of war

As has already been indicated in the previous section, Nagel and Brandt suggested deontological absolutism and rule-utilitarianism respectively as a moral foundation for the rules of war, and Hartle tried to show that these two humanitarian principles have become the basic spirit of the existing laws of war. According to Richard Wasserstrom, however, it is mistaken to consider that the actual laws of war uphold their moral importance and primacy, and that they can be plausibly understood as reflecting or embodying the morality of war in any coherent fashion.⁷³ The reason, roughly, lies in the immorality shown in the application of the current laws of war, and in the ambiguity resulting from their incompleteness and incoherence.

This criticism raised by Wasserstrom against the pre-existing laws of war seems to be significant. If Wasserstrom's indication is reasonable, as we shall review it further, some difficult problems will be likely to follow. One of the problems is related to the necessity of the existence of the laws of war. The other problem is concerned with the responsibility of individuals for war

73. See Richard Wasserstrom, "The Laws of War," The Monist (1972), vol.56, No.1. Reprinted in WMMP, Malham M. Wakin (ed.), pp.391-407. See also Wasserstrom, "The Responsibility of the Individual for War Crimes," Philosophy, Morality, and the International Affairs, Oxford University Press (1974), pp.47-70.

crimes. As we have already reviewed, war crimes are defined as violations of the laws of war. If there could be problems in the application of the laws of war, it is not difficult to imagine that the punishment of war criminals might be unjustifiable. In this section, we shall first review Wasserstrom's criticism against the current laws of war. Then, questions concerning the necessity of the laws of war, and the responsibility of individual for war crimes, will be discussed.

According to Wasserstrom, one of the widely held views is a view "which accepts the moral significance and urges the primacy of the laws of war."⁷⁴ The notion of the primacy of the laws of war means that they are "important and deserving of genuine respect and rigorous enforcement because they reflect, embody, and give effect to fundamental moral distinctions and considerations."⁷⁵ It means, also, that they merit a dominant role as laws and conventions because general adherence to them has important and desirable effects. In other words, the laws of war have a close connection with our basic moral ideas, and adherence to them makes us expect to bring the beneficial consequences that flow from their presence and acceptance.

For Wasserstrom, however, such a view is a mistaken one: "mistaken in the sense that this conception of the

74. Wasserstrom, "The Laws of War," WMMP, p.392.

75. Ibid.

laws of war is a morally unattractive one and one which has no special claim upon our attention or our energies."⁷⁶ He cannot find from the existing laws of war any of the moral distinctions often claimed for them, nor the beneficial effect frequently attributed to them because of two problems which are derived from their incompleteness and incoherence.⁷⁷ One problem is that the distinction between combatants and noncombatants is not respected by the current laws of war. For instance, an aerial bombing can lead to the death of many noncombatants. Despite the fact that it is surely an immoral or inhumane act to kill innocent people, Wasserstrom says, "most forms of aerial warfare are legal because of the importance of aerial warfare."⁷⁸ "There is nothing illegal about bombing

76. Ibid.

77. The notions of incompleteness and incoherence of the laws of war need noting. If any criminal code omitted to punish something that ought to be included in the criminal law, then it would be incomplete. If it contained a code that made criminal only various thefts, then it would be also incomplete. The latter can be distinguished from the former. The latter would be systematically incomplete in the sense that it omitted to forbid many types of behavior that ought to be prohibited. Thus the latter would be rather incoherent in that it could not be rendered intelligible either in terms of the moral principles that ought to underlie any criminal code or even in terms of the moral principles that justified making theft illegal. The current laws of war, according to Wasserstrom, are incomplete and incoherent in the same sense. See Wasserstrom, "The Laws of War," pp.396-397.

78. Wasserstrom, "The Responsibility of the Individual for War Crimes," p.51. Telford Taylor, who was the United States Chief Counsel at Nuremberg, suggested two reasons that the bombing of cities was not treated as a war crime, and thus not punished at Nuremberg tribunals. One of the

population centers; there is nothing impermissible about using antipersonnel bombs."⁷⁹ It is not a war crime "because aerial bombardments were not punished at Nuremberg."⁸⁰ But aerial bombing can cause many noncombatant deaths, which means violations of the general prohibition against the killing of noncombatants. Nonetheless, no aerial bombings were treated as war crimes at Nuremberg. This is why Wasserstrom argues that the existing laws of war are incoherent, and thus morally unattractive.

The other problem, which is likely to be related to the first problem, concerns the doctrine of military necessity. According to Wasserstrom, this problem comes also from the incompleteness and incoherence of the laws of war, especially from the ambiguous interpretation of the notion of military necessity. For the conception of military necessity, in many cases, leaves room for breaching the laws of war. The definition of war crimes at Nuremberg shows this possibility of breach. At Nuremberg, war crimes were defined as "violations of the laws or customs of war," and the following acts were included in

reasons not punished is that the bombing of the cities was engaged in by the Allies; the other, more importantly, is that it is an important instrument of war. See Telford Taylor, Nuremberg and Vietnam: An American Tragedy, A National General Company (1970), pp.35-37.

79. Wasserstrom, "The Laws of War." WMMP, p.396.

80. Ibid.

such violations: "murder or ill-treatment of prisoners of war..., plunder of public property, wanton destruction of cities..., or devastation not justified by military necessity."⁸¹ In other words, this definition implies that devastation is not a war crime if it can be justified by military necessity. Justification of aerial bombardment is actually based upon the doctrine of military necessity. Even killings of prisoners have never been, as Taylor mentions, declared to be war crimes by the operation of the principle of military necessity.⁸² But the claim that devastation may not be treated as a war crime by virtue of military necessity is unlikely to be reasonable. Wasserstrom's indication of this is worth noting. According to him, military necessity has nothing whatsoever to do with the legitimacy of devastation by the aerial bombardment or by other weapons. For "the appeal to the doctrine of military necessity is in fact an appeal to a doctrine of military utility."⁸³ The laws of war should prohibit some wrongful practices that also lack significant

81. Quoted in Wasserstrom, "The Laws of War," p.393. See, also, Yehuda Melzer, Concepts of Just War, Leyden (1975), p.61.

82. Killings of prisoners are surely illegal. Nevertheless, according to Taylor, even killings of prisoners can be justified by virtue of military necessity. According to him, the prisoners can be killed by operation of the principle of military necessity, and "no military or other court has been called upon...to declare such killing a war crime." See Taylor, Op. Cit., p.36.

83. Ibid., p.401.

military value. Only provided that there is an important military advantage to be secured, can these practices be permitted and treated as legitimate. Taking this into consideration, neither aerial bombardment nor killings of prisoners can be justified (with only a few minor exceptions) even in terms of military necessity. Nevertheless, according to Wasserstrom, the current laws of war leave too much room for the breach of the laws by military necessity.

A consideration of the notion of the military necessity that the army field manual, The Law of Land Warfare, specifies may render some hopes to ease Wassestrom's pessimistic view of the existing laws of war. At a glance, the notion seems to be strict about any exception to the laws of war by military necessity. The army manual says that:⁸⁴

The prohibitory effect of the law of war is not minimized by "military necessity" which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defence for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.

84. Department of the Army, The Law of Land Warfare (1956), p.4.

Nevertheless, as Taylor points out, the conception of military necessity still reveals the great dilemma.⁸⁵

Since we are not convinced that there are measures which are indispensable for securing the complete submission of the enemy, it is not difficult to imagine situations in which the application of military necessity can conflict with the laws of war. In the reality of war, Lowes Dickinson's flat verdict may still have power - the verdict that "no rules to restrain the conduct of war will ever be observed if victory seems to depend upon the breach of them."⁸⁶ However humanitarian in their foundations the laws of war may be, they will be useless if they can be frequently breached in the course of war, and especially, if the grounds for the breach of them might be based upon the laws themselves. This brings in question the necessity of their presence.

But Wasserstrom's argument that the existing laws of war are neither morally attractive nor substantially beneficial does not seem to lead to the whole negation of the laws of war. Rather, he emphasizes the importance and

85. In reality, Taylor's indication concerning the problem of military necessity is directed to its definition shown in the Lieber rules of 1863. But the meaning is substantially the same. In the Lieber rules, military necessity was defined as "those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war." See Taylor, Op. Cit., p.33.

86. Quoted from Taylor. See Ibid.

value of the laws of war. This is because he accepts fundamentally "the idea that even in war morality has some place,"⁸⁷ and believes that its realization is possible through the laws of war. The importance and value that, Wasserstrom thinks, the existence of the laws of war may have, whether in moral or in beneficial aspects, are explained by three following points:⁸⁸ The laws of war can have (1) the intellectual confidence that comes from dealing with rules that are written down and that are reasonably specific and precise, (2) the enforcibility that induces soldiers and leaders not to perpetrate war crimes, and (3) the effect upon the moral sensibilities of individuals which would be diminished rather than enhanced, if the laws of war do not exist. Such importance and value of the laws of war surely secure the necessity of their existence. But the current laws of war fail in realizing the genuine value of their existence because of their incompleteness, incoherence, and irrationality.

Wasserstrom's emphasis upon the importance and value of the laws of war through a unique way of criticism of the existing laws of war seems to be very persuasive. For since war is a kind of social creation, and since the laws of war are formulated to save human life, it is natural to claim that they should embody the moral values of a human being.

87. Wasserstrom, "The Laws of War," p.398.

88. See Ibid., pp.402-404.

Wasserstrom's criticisms seem to be also reasonable because they, as has already been seen in Taylor's indication, exposed problems that come from the law's incompleteness.

It seems to me, however, that the incompleteness, incoherence, and even irrationality of the laws of war, which were indicated by Wasserstrom and Taylor, come from the nature of the laws of war. These problems concerning the laws of war could be surely to a certain extent solved by further studies and considerations of them. But the fundamental problem is unlikely to be solved. It is from this fundamental problem, I think, that their incompleteness, irrationality, and incoherence derive. What is, then, the fundamental problem of the laws of war? In my opinion, it lies in the fact that, as opposed to criminal laws in peacetime, the laws of war may be, by nature, incomplete, incoherent, and irrational. It will be helpful for explaining this to consider a conflict between the attainment of an important military object and the prohibitions of the laws of war. This kind of conflict, I believe, is one of the most difficult problems soldiers and leaders confront. When they attain the military object by violating the laws of war, this breach of the laws has been often justified, as has already been indicated, by the principle or concept of military necessity. But, if soldiers or leaders gave away the attainment of the

military object by deciding to follow the laws, and thus caused military loss to their country, by what could their acts be justified? By moral praise? Or by respect for law? May they not be rather reproached for their acts if the loss is serious? What if their acts resulted in their country's loss of the war? What will be required for soldiers and leaders to choose by the reality of war, when an important military object is denied by a legal prohibition? It may be absurd to expect perfect compliance with the laws of war, even if they are formulated without any deficiency. For the reality of war may force soldiers and leaders to break the laws of war. This is why I believe the laws of war are by nature incoherent and irrational. And this is what makes obscure the concept of military necessity, which is surely justified by the laws of war.⁸⁹ Indeed, I think, the ambiguity of military necessity is derived from this fundamental problem of the laws of war.⁹⁰

89. It seems to be worth noting professor Cohen's argument that military necessity does not conflict with the law of war. According to Cohen, the destruction or seizure of enemy property can sometimes be justified by military necessity under the Hague conventions as well as the Geneva conventions. But killing prisoners is absolutely forbidden. Military necessity cannot be invoked to justify it. Thus, for Cohen, since military necessity can justify only what the law says it can justify, there is no conflict between the law and military necessity. But in the reality of war, as Taylor has already indicated, it may be possible to kill prisoners, and it has been justified in virtue of military necessity. See Sheldon Cohen, Arms and Judgment, Westview Press (1989), pp.35-36. See also Taylor, Op. Cit., p.36.

90. This kind of incoherence and irrationality of the laws of war are actually based upon Clausewitzian viewpoint

The principle of military necessity is certainly required by the laws of war for defining war crimes. No one (except pacifists) would deny that to kill enemy combatants in wartime is justified in terms of military necessity. But most persons may not agree that killing of prisoners can be also justified on the ground of military necessity. It seems to me very difficult to define the limit of justification regarding the breach of the laws of war by virtue of military necessity - the limit between permissible and impermissible military necessity. As I have argued, if the difficulty in defining the limit of military necessity is founded upon the nature of the laws of war, then it would be still hard to solve it even by further studies and reflections of the laws of war.

This fundamental problem, if I am right, may bring forth another problem concerning responsibilities of individuals for war crimes. For by adhering to a vague

of war. I agree, partly, to the Clausewitzian conception of war: war cannot be explained by rationality because of its friction - the discrepancy between real and idealized mechanical processes; thus, psychological factors are important determinants of decisions made by men. Nevertheless, I do not think that my point of view concerning irrationality of the laws of war makes trivial rational and moral judgments in wartime. As Wasserstrom emphasizes, I believe that even in war, morality has some place; there are some things that on moral grounds ought not be permitted even in time of war. The problem, I think, that I confront is to narrow a gap between the reality of the laws of war and moral place that they should have. I shall discuss this at length in Chapter IV. See Clausewitz, On War, Penguin Books (1984), pp.14-15. See also Wasserstrom, "The Laws of War," p.397.

doctrine of military necessity, similar crimes committed in wartime may be judged differently from one another. For instance, killing civilians by the bombing of cities and killing them in other ways may be treated differently from each other: Persons who do the latter may be punished, while persons who do the former unpunished. In fact, as Taylor mentioned, no bombing of cities was treated as a war crime at Nuremberg tribunals, while other killings of civilians were treated as war crimes. Thus, unless the former can be distinguished from the latter for sufficient reasons, the punishment for the latter seems to be hard to justify. (Even if my argument is not sound, the problems raised by Wasserstrom and Taylor concerning the irrationality, incompleteness and incoherence of the laws of war will give rise to the same problem, for the same reason.) Now we shall turn to the problem concerning the responsibility of individuals for war crimes, the most prominent of which is the problem of superior orders. We shall discuss this in the next chapter.

CHAPTER III

SUPERIOR ORDERS

1. The Plea of Superior Orders

Most soldiers and officers believe that their first duty is to give instant obedience to orders given by their military superiors. Well disciplined soldiers obey willingly orders issued by their superiors, even if those orders might require their lives. Indeed, any army is by its very nature founded on the basis of discipline, and subordinates' instant obedience to orders given by their superiors is often a measure of discipline. Military discipline is ultimately designed to conduct soldiers to battle, to lead them to victory, and to impel them, if necessary, to sacrifice their lives for their country or for a great cause. The success of the military objective and the security of the nation, therefore, will "compel 'total and unqualified obedience without any hesitation or

doubt' to orders in time of war and emergency."¹ In order to maintain military discipline within the national army, "the national legal system, through the decrees of military law, imposes upon soldiers a legal duty to obey orders, and threatens them with the direst sanctions in case of insubordination, especially in time of war and in the presence of the enemy."²

It is no wonder that the national legal system, to maintain discipline, imposes upon soldiers a legal duty to obey orders issued by their superiors, and punishes them when they do not. The problem, however, arises when a soldier is confronted with an order, especially an illegal order to carry out an act constituting a criminal offence. While military discipline requires compliance with orders, the supremacy of the law proscribes the commission of criminal acts. In this case, a subordinate's performing orders given by his superior will constitute a criminal offence, and his act will be involved in responsibility for the crime, even if his act was carried out under superior orders. On the other hand, if he refuses to carry out the orders, he might be punished by his superior on the grounds that his refusing to obey orders will weaken military discipline. In other words, he is in trouble choosing

1. Yoram Dinstein, The Defence of "Obedience to Superior Orders in International Law, A. W. Sijthoff-Leyden (1965), p.5.

2. Ibid., p.6.

between military discipline and the supremacy of the law. This practical dilemma of the soldier has gained almost universal recognition, and it is occasionally described as a "tragic dilemma."

When the soldier obeyed orders issued by his superior, and in the sequence committed a criminal offence, could he expect that the fact that he acted in accordance with his superior orders would relieve him of responsibility for the crime? Whether or not he knew that his carrying out superior orders would constitute a criminal offence, can he be free from the responsibility for the crime? Is his act not exculpated if he was compelled by his superior to do it? These are the questions about the problem of the so-called "superior orders." And the plea of superior orders in Court, according to N.C.H. Dunbar, "has proved to be the most controversial, as well as the most important, matter incidental to the punishment of war crimes."³

Many philosophers and jurists have discussed, and tried to solve the problem of obedience to superior orders. As one of these attempts, in the book, The Defence of "Obedience to Superior Orders" in International Law,⁴ Yoram Dinstein introduces some actual cases concerning the

3. N.C.H. Dunbar, "Some Aspects of the Problem of Superior Orders in the Law of War," Juridical Review (1951), Vol. 63. p.234.

4. Yoram Dinstein, The Defence of "Obedience to Superior Orders in International Law, A. W. Sijthoff-Leyden (1965).

problem of superior orders, and suggests three kinds of answers to the question of whether superior orders can defend the subordinate's criminal offence. After analyzing four cases involved with the problem of superior orders,⁵ Dinstein derived from them the three following conclusions:⁶

(1) As a general rule, a subordinate committing a criminal act pursuant to an order should not incur responsibility for it.

(2) This rule is inapplicable if the subordinate knew that the order entailed the commission of a crime, and obeyed it nonetheless.

(3) To determine whether the subordinate was aware of the fact that he had been ordered to perform a criminal act, the Court may use the auxiliary test of manifest illegality.

According to Dinstein, however, these principles are derived from the application and interpretation of German national law, not of international law, in dealing with the problem of obedience to orders. Hence, he tries to seek

5. The four historical cases, introduced by Dinstein, involved with the problem of superior orders are as follows: (1) Robert Neumann's Case, in which the accused was charged with ill-treatment of British prisoners-of-war, (2) The Dover Castle Case, in which the accused, Karl Neumann, a German submarine commander, was charged with torpedoing the British hospital-ship Dover Castle, (3) The Llandoverly Castle Case, in which the accused, Patzig, another commander of the German Submarine, was charged with torpedoing the British hospital-ship Llandoverly Castle despite the fact that he had identified it as a hospital-ship, and (4) Stenger and Crusius Case, in which General Stenger was charged with issuing an order to execute French prisoners-of-war, and Major Crusius was accused of killing wounded prisoners while carrying out that order. See Ibid., pp.11-19.

6. Ibid., p.19.

more universal solutions for the problem of superior orders, which he expects would be appropriately applied in the sphere of international law. Dinstein suggests three kinds of answers to the question of superior orders. The first is the doctrine of respondeat superior proposed by Oppenheim, the second is the doctrine of absolute liability, and the last is the application of the mens rea [criminal intent] principle which is established by Dinstein himself. In this section, I shall introduce these doctrines, and examine their appropriateness from the critical point of view.

But, before examining these three doctrines, it is worth noting that they are mostly concerned about manifestly illegal orders. As Sheldon Glueck points out, however, in respect to the duty of obedience, there are gradations that make the task of the soldier especially difficult.⁷ According to Glueck, three situations are at least possible: (1) The order appears to be regular and lawful on its face, (2) The order is so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of its unlawfulness, and (3) There is room for reasonable doubt as to whether or not the order on its face is lawful. Although the case (3) - where the subordinate may have some suspicion about the lawfulness of

7. Sheldon Glueck, War Criminals, New York (1944), pp.142-143.

orders - may be the principal difficulty in reality, we shall here mainly discuss the case (1) and (2). For whether or not the subordinate can discern the lawfulness of orders given by his superior is a quite different problem from that of his responsibility for a criminal offence committed while he is carrying out superior orders.

The first answer to the question concerning the problem of obedience to superior orders is the doctrine of respondeat superior. According to this doctrine, the orders of a superior authority constitute an absolute defence for the crimes committed in pursuance of them. In other words, according to this doctrine, all responsibilities for the crimes committed by complying with superior orders are called onto the superiors who issued them, not onto the subordinates who followed them. I shall allow more space for this doctrine than other doctrines because some philosophers, like Wasserstrom⁸ and Levinson⁹ have argued its validity, while most jurists have rejected it. This doctrine was first advocated by Lassa Oppenheim in 1906. He formulated the following rule:¹⁰

8. See Richard Wasserstrom, "The Responsibility of the Individual for War Crimes," Philosophy, Morality, and International Affairs, Oxford University Press (1974).

9. See Sanford Levinson, "Responsibility for Crimes of War," War and Moral Responsibility (ed. by Thomas Nagel), pp.104-133.

10. Lassa Francis Lawren Oppenheim, International Law, London (1906), Vol.2, pp.264-265.

If members of the armed forces commit violations by order of their Government, they are not war criminals and cannot be punished by the enemy; the latter can, however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.

But, as Dunbar points out, this doctrine shown in the first edition does not have any rationale.¹¹ In the third edition published in 1921, a footnote was inserted by Oppenheim to the effect that "The law cannot require an individual to be punished for an act which he was compelled by law to commit."¹² This exposition seems to be ambiguous. It does not seem to be obvious whether the term 'law' appearing twice in the sentence has one and same meaning or has a different meaning. According to Dinstein, the term 'law' has one and same meaning in both instances, namely, that of international law. In other words, for Dinstein, Oppenheim meant that since international law compels the military to carry out orders, it cannot penalize any individual soldier who discharges his obligation and obeys orders. But it seems to me that Dinstein's comment is inappropriate. For if the term 'law' has the same meaning, namely international law, in both instances, then it implies that international law may have room for compelling the military to do unlawful things. The

11. Dunbar, Op. Cit., p.242.

12. Oppenheim, Op. Cit., p.343.

conception of punishment by law upon a soldier's act in time of war implies that he offended a crime. Nevertheless, the claim that he cannot be punished because he was compelled by the same law to commit seems to imply that the crime committed by him was compelled by law. This simple interpretation for that term 'law' does not seem to help indicate Oppenheim's intention with which he inserted the footnote. Oppenheim seems to have intended to give a rationale for the doctrine of respondeat superior by adding that footnote. Taking this into consideration, it will be helpful to note the soldier's dual obligation. According to Glueck, the ordinary soldier has a dual obligation: "to the ordinary criminal law which prohibits certain acts on pain of punishment, as well as to the military law which compels him to obey the orders of his superior."¹³ As we have previously delineated, this is an unenviable position for the ordinary soldier in time of warfare. If we apply this position to the footnote suggested by Oppenheim, we will be able to understand the term 'law' appearing twice in the sentence: the former implies the ordinary criminal law (or international criminal law¹⁴), and the latter, the military law (or international military law). Oppenheim's real

13. Glueck, Op. Cit., p.142.

14. I wonder if we can classify international law into the criminal law, the military law, and so forth, as in national law. But Oppenheim's footnote inserted in the third edition, I believe, will be with ease understood when it is classified like that.

intention, I believe, will be sought in this reinterpretation of the sentence.

As we have already pointed out, Oppenheim did not disclose the legal basis, or the logical reason for his doctrine of respondeat superior. His footnote also did not give any obvious rationale for the contention that international law really compels soldiers to obey the orders of their superiors in the national army. On what grounds, then, is the doctrine of respondeat superior based? What reasons make some jurists have still supported this doctrine? According to Dinstein, there could be two rationales for Oppenheim's doctrine: the demands of military discipline and the element of bona fide mistake of law.

Although Oppenheim did not give any legal basis, or the logical reason for his doctrine, according to Dinstein, Oppenheim probably held a view that international law ought to care about "the maintenance of discipline and good order in the national army."¹⁵ In other words, for Oppenheim, the maintenance of discipline would be the most important rationale for his doctrine. James Garner's emphasis on a soldier's obedience to orders reflects that the maintenance

15. Dinstein, Op. Cit., p.41.

of discipline can be one of the strong rationales for the respondeat superior doctrine. Garner says that¹⁶

Obedience to orders is the first duty of a soldier, and it is absolutely necessary to military discipline. He cannot discuss or question the commands that are given him, he is not the judge of their legality or illegality; and if he were, his ignorance of the laws of war would in many cases make him an incompetent judge.

In short, according to the doctrine of respondeat superior, a soldier's unconditional obedience to orders is desirable and required for the maintenance of military discipline. Since a soldier's absolute obedience to orders is necessary to military discipline, the maintenance of military discipline will require the doctrine of respondeat superior. Furthermore, according to this doctrine, every solution except this will be detrimental to military discipline. For "authorizing a soldier to judge the legality of superior orders will be tantamount to undermining military discipline."¹⁷ Thus, the supporters of the doctrine of respondeat superior hold that the application of this doctrine would be a key to solving the problems of superior orders.

The other rationale for this doctrine is the element of bona fide mistake of law on the part of the recipient of

16. James Wilford Garner, International Law and the World War, London (1920), Vol.2, p.484.

17. See, August Knieriem, The Nuremberg Trials, Chicago (1959), p.244.

the order. Since no one can maintain that the laws of war are engraved upon the memory of every soldier, soldiers acting pursuant to an order can be ignorant of the illegality of the order, and thus, they should not be punished. In other words, soldiers acting pursuant to their superior orders are entitled to be exculpated, on the grounds that their acts depend either upon the ignorance of the illegality of the orders, or upon their bona fide mistake of law. As Clyde Eagleton, one of the supports for the respondeat superior doctrine, says, "it is repugnant to the average person to think of punishing a soldier who, in the first place, would be ignorant of the illegality of his act."¹⁸

According to Dinstein, however, these two rationales fail to steer the doctrine of respondeat superior safely into harbor. Dinstein's objections to this doctrine are roughly summarized into the three following arguments. To begin with, according to Dinstein, the argument that it is practically impossible for a soldier to refuse to obey an order because military discipline is very strict (especially, in times of war) is not reasonable. This argument depends upon a wrong conception of a soldier. This conception of soldier is implied in Carlyle's expression:

18. Clyde Eagleton, "Punishment of War Criminals by the United Nations," American Journal of International Law, Vol. 37 (1943), p.497.

"If a man becomes a soldier, his soul and his body thereby become the property of his commanding officer."¹⁹

According to this approach, a soldier is nothing but a puppet losing his independent thinking ability, and simply reacting to his master's order. Dinstein says that²⁰

the training of the soldier and his mentality, the habit of obedience which military discipline infuses into his blood after recurrent drilling and which in time becomes second nature, paralyze all his independent will-power and thinking capacity, and convert him into a sort of a puppet reacting automatically to any whim of its master who is pulling the strings.

But, although soldiers of this kind, of course, do exist in certain armies, according to Dinstein, there is no ground for the contention that whoever dresses in military uniform undergoes a phase of metamorphosis and loses his human autonomy. Even the interests of military discipline itself require that the soldier will not act, and will not be trained to act, as a machine. For "blind obedience, without any qualification or reservation undermines the efficiency of the army... and consequently defeats its own purposes."²¹ As Stephen states, "The doctrine that a soldier is bound under all circumstance whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the

19. Quoted in Dinstein, Op. Cit., p.52.

20. Ibid.

21. Ibid., p.53.

colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior."²² Therefore, for Dinstein, the argument that a soldier's act cannot be punished because his act was automatically performed pursuant to orders issued by his superior loses its ground.

Dinstein's first objection to the doctrine of respondeat superior can be supported by Michael Walzer's argument. Walzer, of course, does not refuse the argument that no military force can function effectively without routine obedience. According to Walzer, "Soldiers are taught to obey even petty and foolish commands. The teaching process has the form of an endless drill, aimed at breaking down their individual thoughtfulness, resistance, hostility, and waywardness. But there is some ultimate humanity that cannot be broken down, the disappearance of which we will not accept."²³ Walzer continues,²⁴

Soldiers can never be transformed into mere instruments of war. The trigger is always part of the gun, not part of the man. If they are not machines that can just be turned off, they are also not machines that can just be turned on. Trained to obey 'without hesitation,' they remain nevertheless capable of hesitating...These are internal confirmations of our external judgments...[I]t is a mistake to treat soldiers as if they were automatons who make no judgments at all.

22. Quoted in Dinstein, Ibid., p.53.

23. Michael Walzer, Just and Unjust War, Basic Books (1977), p.311.

24. Ibid.

If, as Walzer argues, it is a mistake to regard soldiers as automatons, it should be a mistake to shift the responsibility for the crimes committed by them to their superior on the simple ground that they acted in pursuance of orders.

Secondly, according to Dinstein, it is not persuasive to argue that a soldier's act performed by compulsion should not be punished. The supporters for the respondeat superior doctrine argue that orders are often issued at the point of the sword or the muzzle of the gun, or by the threat that disobedience will entail capital punishment, especially in wartime. Hence, the supporters hold, a soldier acting pursuant to orders cannot be punished since he performs under compulsion. But, according to Dinstein, "the fact that orders are sometimes attended with compulsion does not signify that every obedience to orders is invariably accompanied by compulsion."²⁵ Obedience to orders is possible without compulsion. Dinstein says that "a soldier may obey the orders of his commanders, not willy-nilly, but gladly and of his own volition."²⁶ Dinstein exemplifies some hypothetical instances of obedience to orders, which cannot be regarded as crimes committed under compulsion, but the offender maintains that

25. Dinstein, Op. Cit., p.53.

26. Ibid., p.54.

they were performed under compulsion.²⁷ In brief, for Dinstein, since there can be obedience to orders without compulsion, since subordinates actually act of their own free will, the argument that a soldier acting pursuant to orders is entitled to be exculpated is not appropriate.

Thirdly, according to Dinstein, the argument that the doctrine of respondeat superior establishes automatic relief from responsibility in every instance of an offence being committed in compliance with orders because the offence is committed by mistake of law is also unreasonable. He says that "there is no inherent link between obedience to orders and ignorance of the law: on the one hand, a soldier acting pursuant to an order may know right well that it is illegal; on the other, a soldier acting on his own may be ignorant of the law."²⁸ In other words, a soldier acting pursuant to order may either know or not know that it is illegal. Then, the doctrine should answer the question, since it is founded on the basis of mistake of law, why a soldier obeying an illegal order with full knowledge of the law is also entitled to be exculpated.

27. For example, a case where a soldier (A) murders a civilian (B) on purpose, but under the pretext of the order of his superior (C) because he (A) hated him (B); a case where a subordinate who is willing to kill all the prisoners kills them by inducing the order of his superior who did not want to kill them at first. See Ibid., pp.54-55.

28. Ibid., pp.50-51.

We have so far examined the rationales for the doctrine of respondeat superior, and some objections suggested by Dinstein against this doctrine. The rationales for the doctrine were explained by the concepts of military discipline and of ignorance or mistake of law. And Dinstein refused to consider these rationales to be reasonable by counterarguing that blind obedience undermines military discipline, that subordinates may obey orders without compulsion, and that they may know that the orders are illegal. Dinstein's arguments seem to be quite reasonable. The validity seems to be supported by the fact that, as Alexander Sack points out, "The Oppenheim rule is not, and has never been, International Law. The United Nations...rightly and properly rejected this fallacious and harmful doctrine."²⁹ According to Sack, the reason that UN rejected this doctrine is that³⁰

Any such approval [of the defence of superior order] would destroy entirely any effectiveness of its rules of humane warfare, and help a lawless government in maintaining discipline and morale in its armies of murderers and despoilers, by assuring them that their crimes, since they are ordered or sanctioned by their superiors or their government, may not or should not be punished by their victims.

29. Alexander N. Sack, "War Criminals and the Defence of Superior Order in International Law," Lawyers Guild Review, Vol.5 (1945), p.16.

30. Ibid., p.15.

It does not seem to me, however, that Dinstein's objections did reject entirely the doctrine of respondeat superior, even if they are reasonable. It is obviously unreasonable, as he pointed out, to argue that any soldier who committed crimes in compliance with orders issued by his superior should not be punished, since he may have pursued the orders without any compulsion, and since he may have known that the orders are illegal. However, despite the fact that we acknowledge that Dinstein's objections to the doctrine are reasonable, we can still, I think, ask the following questions: When a soldier acting pursuant to orders committed a crime without knowing their illegality, can he not be discharged of the responsibility?; When his act was performed by orders under compulsion, is he in responsibility for the crime? Although Dinstein has objected to the doctrine of respondeat superior, he has not answered to these questions. All that he has argued is that soldiers may follow orders given by their superiors without compulsion, and that they may know the illegality of the orders when they are required to perform them. But this argument is not the answer to the question concerning the cases where a soldier did not know the fact that orders are illegal, and where a soldier committed a crime under compulsion. I shall discuss this at the end of this section.

Another answer to the problem of the plea of superior order is the doctrine of absolute liability. According to this doctrine, "the fact of obedience to orders does not create a defence per se, nor can it be taken into account within the compass of any other defence."³¹ This means that the duty of the soldier to obey superior orders exists only when lawful orders are involved, and thus, only such orders relieve the person who obeys them of criminal responsibility. In other words, responsibility for crimes committed by a soldier belongs to the very soldier who committed crimes, even though they are committed by performing orders issued by his superior. This is the direct opposite view of the doctrine of respondeat superior. Hence, the doctrine of absolute liability is immune to all the problems suggested above, by Dinstein, against the doctrine of respondeat superior. For since the doctrine of absolute liability assigns responsibility to the soldier who committed crimes, the problems discussed against the respondeat superior doctrine will not arise.

What is the rationale for the doctrine of absolute liability? One of the rationales for this doctrine would be the supremacy of the law. "The supremacy of the law requires the imposition of sanctions in case of a violation of its provisions."³² If an offender is not accountable

31. Dinstein, Op. Cit., p.68.

32. Ibid., p.70.

for his act in any case of obedience to superior orders, the supremacy of the law will be frustrated. If an offender refuses to bear responsibility for crimes on the grounds that they were committed by performing superior orders, the escalated shift of responsibility in the hierarchy of command will probably follow. As Dinstein delineates, "the swinging of responsibility from one echelon of command to another"³³ is possible. The result of this process is all but total immunity or reductio ad absurdum of the subjection to the supremacy of the law. Therefore, according to the doctrine of absolute liability, an offender should be accountable for his act in any case of obedience to superior orders.

The doctrine of absolute liability should also support the view that the soldier does act of his own will even if he carries out an illegal order issued by his superior. The conception of the soldier in this doctrine should not be the same conception as in the doctrine of respondeat superior, according to which every soldier is a sort of tame, subhuman creature or mechanical contraption without self-control. Indeed, this point is of great importance, and this is why the doctrine of absolute liability has attracted some scholars' attention.

33. Ibid., p.71.

But, as the doctrine of respondeat superior is defective, so the doctrine of absolute liability, though in a converse way, seems to be defective. According to Dinstein, the doctrine of absolute liability "starts from the presupposition that in no case may obedience to orders contribute to relieving the offender of responsibility."³⁴ All that this doctrine establishes is that the fact of obedience to orders may never be used for defence purposes. In other words, according to this doctrine, whatever the defence of the offender may be, it will fail if it rests on the foundation of obedience to orders. Should it be, then, concluded that the doctrine of absolute liability totally denies the factors of mistake of law and compulsion in substance? By no means. They never will be able to be denied, as far as they are the real problems brought out frequently in time of war. And this is one of the most difficult problems facing the doctrine of absolute liability. How does, then, this doctrine answer to the question about mistake of law and compulsion?

Some proponents of the doctrine of absolute liability argue that the fact of obedience to orders under mistake of law or compulsion should be taken into account among other extenuating circumstances when sentence is passed.³⁵ They

34. Ibid., p.73.

35. Actually, U.S. Army's Law of Land Warfare recognizes this kind of suggestion. It says that "The fact that the law of war has been violated pursuant to an order of a

hold that "the fact of obedience to orders may play a part in extenuation or mitigation of punishment, even though it cannot prevent criminal conviction as such."³⁶ This argument seems to adopt partly the doctrine of respondeat superior. That is to say, this argument recommends, though it is based upon the doctrine of absolute liability, appealing to the doctrine of respondeat superior in case of mistake of law and compulsion. I shall tentatively call this intermediate solution 'the modified doctrine' of absolute liability.³⁷ If we adopt this modified doctrine in Court, it may be helpful for solving the problems of superior orders, for it will allow appealing to the doctrine of absolute liability in some cases, and also to the doctrine of respondeat superior in other cases. But, as long as this modified doctrine adopts the doctrine of respondeat superior, it is still faced with some problems suggested against the doctrine of respondeat superior. Above all, even this modified doctrine still cannot answer

superior authority...does not deprive the act in question of its character of a war crime, nor does it constitute a defence in the trial..., unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful." But in the Law of Land Warfare, the fact that the individual was acting pursuant to orders "may be considered in mitigation of punishment," not regarded as fully exculpatory. See Law of Land Warfare, par.509, p.182.

36. Dinstein, Op. Cit., p.74.

37. According to Dinstein, indeed, the proponents of this argument are writers who do not endorse the doctrine of absolute liability but, on the other hand, do not adopt the doctrine of respondeat superior. See, Ibid., pp.74-75.

the hypothetical instances suggested earlier so as to demonstrate the unreality of the generalization that every obedience to superior orders is involved with compulsion.³⁸ Since the soldier claims that he was compelled to commit such a crime by superior orders, and since the respondeat superior doctrine holds that a soldier acting in pursuance of orders cannot be punished, he can be excused from responsibility for the crime.

We have so far examined the doctrine of respondeat superior and the doctrine of absolute liability as the attempts to solve the problem of obedience to superior orders, and discussed rationales of and objections to those doctrines. Although we have rejected both the doctrines, we still believe that the fact of obedience to superior orders may be taken into account in appropriate cases for the purposes of defence within the scope of defences of mistake of law and compulsion. What is important and obvious is that the fact of obedience to superior orders per se cannot be the defence for an offender. For the purposes of defence, the plea of obedience to superior orders may be taken into account only within the cases of mistake of law and compulsion. If the plea of obedience to superior order can be taken into consideration within the scope of the defences of mistake of law and compulsion, what is the

38. Supra., footnote 27.

common denominator of mistake of law and compulsion?

According to Dinstein, their common denominator is lack of mens rea. He believes that this common denominator will help solve the problem of obedience to superior orders.

The last attempt to solve the problem of superior order is the mens rea principle suggested by Dinstein himself. But, before starting to discuss this principle, it should be noted that some philosophers and jurists have been of the opinion that the factor of compulsion is never a reason for the acquittal of an offender. If their arguments are valid, we will not have to discuss the problem of compulsion. According to Glueck, compulsion or coercion cannot be taken into account as a reason for the acquittal for an offender. Glueck says, "[W]hen coercion is a justification, the reason lies in the recognition of the strength of the instinct of self-preservation...but a soldier's entire work involves the suppression of the instinct of self-preservation."³⁹ Nathan April also maintains that although a soldier may appeal to the factor of compulsion by saying that if he had refused to obey, he might have been shot for insubordination, "it has always been known that the military profession was an

39. Glueck, Op. Cit., p.242, Note 45.

extrahazardous occupation."⁴⁰ By the same token, Michael Walzer emphasizes soldiers' obligation of self-sacrifice:⁴¹

The war convention requires soldiers to accept personal risks rather than kill innocent people... The rule is absolute: self-preservation in the face of the enemy is not an excuse for violations of the rules of war. Soldiers...stand to civilians like the crew of a liner to its passengers. They must risk their own lives for the sake of the others...the crucial point is that soldiers cannot enhance their own security at the expense of innocent men and women. This might be called an obligation of soldiering as an office...

As Dinstein points out, however, the conception espoused by Glueck and April seems to be over-simplified. Dinstein argues, against the conception suggested by Glueck and April, that in their way of thinking, there is a latent preconception that as soon as a person chooses to be a soldier, he stops being an ordinary human being, and becomes sub-human. We have already discussed the problem of this kind of preconception.

It seems to me that Dinstein's dispute on the arguments of Glueck and April is appropriate. But Dinstein's contention does not seem to be persuasive for Walzer's argument. Walzer's argument appeals to the conception of self-sacrifice, a duty for soldiering as an

40. Nathan April, "An Inquiry into the Juridical Basis for the Nuremberg War Crimes Trial," Minnesota Law Review, Vol. 30 (1946), p.325.

41. Michael Walzer, Just and Unjust Wars, Basic Books (1977), p.305.

office. The argument that self-sacrifice is required as a duty for soldiering is quite different from those arguments that soldier's work involves the suppression of self-preservation, or that the military profession is a hazardous occupation. In this respect, Walzer's view seems to be more persuasive than that of Glueck or April. But if Walzer's conception of self-sacrifice implies a self-sacrifice through compulsion, his view would be inappropriate. For self-sacrifice as a duty is one thing, and compulsive self-sacrifice is another. Self-sacrifice as a duty is an honorable military virtue because a soldier himself chooses it, but self-sacrifice through compulsion does not seem to be so worth as voluntary one. Nobody, I suppose, can be forcibly required to sacrifice himself, whatever good result it may bring. We are, I believe, autonomous persons. As Kant considered the autonomy of the will as the supreme principle of morality,⁴² if we admit that we are free and rational beings, then we cannot, I believe, forcibly demand other person's sacrifice even in the military society. For the same reason, we cannot be forcibly demanded to sacrifice ourselves. Self-sacrifice will be worth and honorable when it is chosen by a person

42. See Immanuel Kant, Groundwork of the Metaphysic of Morals, Trans. by H. I. Paton, Harper Torchbooks (1964), p.108.

himself. For this reason, I suppose, self-sacrifice as a duty is more meaningful than compulsive one.

We shall turn now to the last attempt to solve the problem of superior order. According to Dinstein, the key to solving the problem of obedience to superior orders does not lie in the fact that an offender acted pursuant to the orders given by his superior, but lies in whether or not the soldier acted with mens rea, criminal intent. Suppose a case where a soldier murdered a civilian on purpose because he hated him, but under the pretext of the order of his superior. It may be of course difficult to prove the fact that the soldier killed him with criminal intent. But if it is proved, then the soldier should be charged for the killing. The fact of obedience to orders constitutes not a defence per se but only a factual element that may be taken into account in the compass of a defence based on lack of mens rea. In the cases of mistake of law or compulsion, according to Dinstein, only lack of mens rea, of which obedience to orders constitutes circumstantial evidence, serves to protect from criminal responsibility.⁴³ He calls this 'the mens rea principle.' We can quote from him this principle in detail:⁴⁴

This, I think, is the proper, logical and effective solution of the question of obedience to superior

43. Dinstein, Op. Cit., p.88.

44. Ibid.

orders in international law, and it may be termed 'the mens rea principle.' According to this principle, obedience to superior orders should be regarded as a factual detail germane to the offence, just like the time when, and the place where, the offence was committed; just like the weapon by which it was carried out; and just like myriads of other circumstantial minutiae. None of these factual details standing alone and out of context is endowed with special traits which radiate special legal significance.

In other words, according to this principle, the fact that an offender who committed crimes in pursuance of his superior orders is nothing but an element like other circumstantial minutiae, which may or may not influence the exculpation from responsibility for crimes. Again, for this principle, the mere fact that a defendant obeyed orders does not render him immune from criminal prosecution under international law. Since obedience to orders ought not to create any defence per se, therefore, even if a subordinate committed an offence in compliance with his superior orders, he may be convicted just as he may be acquitted. In the sequel, Dinstein says that "The choice between conviction and acquittal is dependent upon the circumstances of the case and is derived from them."⁴⁵ In short, for Dinstein, a soldier who committed a crime in compliance with orders given to him by his superior cannot be discharged of responsibility for the crime on the simple ground that he acted pursuant to orders; he can be either

45. Ibid., pp.89-90.

acquitted of responsibility for the crime, or be culpable, and the decision depends upon the elements constituting circumstances of the event; the fact that he acted in compliance with orders is simply one of the elements.

Dinstein's conclusion may be, as he himself says, a "proper, logical and effective" solution of the problem of superior orders. This is because the mens rea principle requires a sufficient examination of all the facts and circumstances related with the case, and appeals to the fact of obedience to orders only when lack of mens rea is established; thus, this approach seems to complement the defects of either the doctrine of respondeat superior or the doctrine of absolute liability, which is attached to the fact of a soldier's obedience to superior orders. For this reason, Yehuda Melzer admits that Dinstein's approach is plausible. Melzer says that "This approach definitely seems the right one in that it accounts for the basic intuitions we probably share as to what actually is involved in situations which give rise to questions of obedience to orders."⁴⁶

It seems to me, however, that Dinstein's answer to the cases in which a soldier's offence was committed under compulsion and he did not know the illegality of orders issued by his superior is still controversial. In these

46. Yehuda Melzer, Concepts of Just War, A. W. Sijthoff Company (1975), p.76.

cases, according to Dinstein, the fact of obedience to orders may contribute to the proof of lack of mens rea in conjunction with the other circumstances of the cases, and consequently bring about the acquittal of the soldier.⁴⁷ Although Dinstein assumes a premise, like "in the conjunction with the other circumstances of the case," a more important concept for the acquittal of the soldier is "the proof of lack of mens rea." This implies, in other words, that if we prove lack of mens rea in a case where a soldier committed a crime in pursuance of orders given by his superior, he will be able to be acquitted of responsibility for the crime. To this approach, two difficult questions come immediately to my mind. Firstly, how do we guarantee that we can prove lack of mens rea?⁴⁸ Secondly, even if we can prove it, can we admit that the fact of lack of mens rea really requires the acquittal of the accused who committed crimes? In other words, if lack of mens rea is established, is an offender discharged of all responsibility? The first question is related to the problem of cognition concerning lack of mens rea, and the second is related to the problem of legal and moral

47. See, Dinstein, Op. Cit., p.90.

48. If we consider that the proof of lack of mens rea is done all the time in Court, then the word, "prove" may be too strong. But insofar as Dinstein asserts that lack of mens rea serves the defence of superior orders, and that this is the proper solution of the question of superior order, he assumes that we can prove lack of mens rea.

responsibility. These questions are not easy to answer, and Dinstein may object on the ground that the question of cognition of mens rea is a philosophical one, and thus is beyond his interest as a law scholar, and that the problem of legal responsibility should be distinguished from that of moral one. But, I believe, the real solution of the problem regarding obedience to superior orders will require the answer to these questions. I shall return to this in the next section.

2. The Responsibility of the Individual

In the previous section, we have examined and rejected the doctrine of respondeat superior advocated by Oppenheim. As the grounds for the rejection of this doctrine, we have suggested the three following arguments: (1) The wrong conception of the soldier, (2) The soldier's non-compulsive obedience to orders, and (3) The soldier's recognition of illegality of orders. As we have already indicated, the plea of obedience to superior orders is never a defence in itself. For, to automatically excuse every atrocious act as shielded under the claim that it was committed pursuant to orders would certainly block any serious hope to keep war human. Nevertheless, some philosophers, like Wasserstrom

and Levinson,⁴⁹ still believe that it would be grossly unfair to soldiers to ignore the grave realities in which criminal situations occur. In other words, they say, if we take into account the realities in war, namely, the demands of military discipline, military efficiency, and combat circumstances, there is still room for reflecting liability of superior officers for the crimes committed by their soldiers. Furthermore, if we take into consideration the problems of the current laws of war, as Wasserstrom points out, it may be much more difficult to formulate and apply a defensible mens rea requirement to the typical combat soldiers.⁵⁰ In this section, I shall introduce, and examine from the critical point of view Wasserstrom's argument that ordinary soldiers have a proper defence for their exculpability of war crimes, taking into account the mens rea requirement toward leaders.

In his article, "The Responsibility of the Individual for War Crimes," Wasserstrom attempts to demonstrate that the conception of the actual laws of war makes it very difficult to apply a defensible mens rea requirement to the combat soldier in the problem of superior orders. In order

49. In his article, "Responsibility for Crimes of War," Sanford Levinson, like Wasserstrom, tries to establish liability of superior officers for the acts of their subordinates. See, Cohen Marshall (ed.), War and Moral Responsibility, Princeton University Press (1974), pp.104-133.

50. Wasserstrom, Op. Cit., p.56.

to establish this view, Wasserstrom suggests several arguments, some of which, like the maintenance of military discipline and the soldier's cognitive ability of the laws of war, have been sufficiently discussed in the previous section from Dinstein's point of view. Besides these, Wasserstrom suggests some more arguments, which I believe are worthwhile to discuss. I shall discuss here two of them suggested by Wasserstrom: the arguments concerning "moral choice," and obscure character of the existing laws of war. I shall first discuss the argument of moral choice.

According to Wasserstrom, while the Charter of the International Military Tribunal at Nuremberg took what is a hard line in respect to the problem of superior orders (the Charter rejected the plea of superior orders as an excuse), the Tribunal modified the position of the Charter by only half-accepting its rejection. According to the Charter,⁵¹

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 determined that justice so required.

And the Tribunal said that⁵²

[The fact] that a soldier was ordered to kill or torture in violation of the international law of war

51. The Charter of the International Military Tribunal, Article 8.

52. "Judgment of the International Military Tribunal," Trial of the Major War Criminals I, pp.223-224.

has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the experience of the order, but whether moral choice was in fact possible.

Comparing the Charter with the Tribunal, we can find a clear and important difference between them: The Tribunal accepted, though under the condition of "no moral choice," superior orders as an excuse (as absolving the defendant of guilt), while the Charter granted simply mitigation of punishment. The main point of the Charter and the Tribunal was formulated as a principle by International Law Commission at Nuremberg as follows:⁵³

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.

This principle implies that a soldier acting pursuant to his superior orders can be excused from responsibility for crimes if he establishes that he could not have any moral choice at the situation. In this context, the idea of 'moral choice' seems to be unclear.

According to Wasserstrom, two interpretations of the idea of moral choice, which the Tribunal might have meant, are possible. One interpretation of "moral choice" focuses heavily on the degree of choice exercisable by the actor.

53. See, Melzer, Op. Cit., pp.60-61.

Suppose a case where soldiers are ordered by their general to kill rather than capture all enemy prisoners. Where the penalty for disobedience is very great (for example, execution), and believed to be such, then there is a rationale for permitting the defence of superior orders. In such circumstances, a person will naturally, and perhaps inevitably, act so as to avoid the penalty. In this case, according to Wasserstrom, the person "does not really have any choice, and so he is for this reason to be exempted from punishment."⁵⁴ In brief, in a case where a soldier complied with superior orders because he worried about a great penalty, like execution, we think this case to be of "no moral choice." Different from this interpretation, according to Wasserstrom, the other idea of "moral choice" is based upon the view that human beings, when caught up in such circumstances, simply ought not be blamed for opting so as to save their own lives at the cost of other lives. In other words, failing to behave heroically, or with such altruism that they bring consequences of a severely detrimental character upon themselves, is not the focus for blame. In either case, accordingly, Wasserstrom says, "the defence of superior orders would be a defence provided the accused could show that the choice involved was an illusory or unduly difficult one."⁵⁵

54. Wasserstrom, Op. Cit., p.58.

55. Ibid.

The idea of "moral choice" shown in the Tribunal seems to be very difficult to understand. It seems to be unclear whether or not the conception of "no moral choice" implies that of "compulsion" or "mistake of the law," which we have considered as proper defence in the previous section. In this respect, Wasserstrom's considerations concerning the idea of moral choice are suitable. But his argument regarding the idea of moral choice seems to be controversial, if we consider the conception of the soldier suggested by Walzer. It appears to me that Wasserstrom's interpretation of moral choice is based on the conception of self-preservation, although he suggested two rationales for the defence.⁵⁶ If my understanding of Wasserstrom's interpretation of moral choice is right, his view can be contrasted with Walzer's view: Wasserstrom's view is based upon the conception of self-preservation, while Walzer's view is upon the conception of the soldier's self-sacrifice. According to Walzer, as has already been

56. Wasserstrom's first rationale for the defence does not seem to be different from the second one, although he distinguishes the former from the latter. His first rationale, as well as the second, seems to be based ultimately upon the conception of self-preservation, as far as he argues that where the penalty for disobedience is very great (e.g. execution), the defence for obedience to an illegal order is excused. This argument implies that where the penalty for disobedience is not great (e.g. demotion in rank), the defence may be not excused. Accordingly, the argument that only a heavy penalty, like execution, can be permitted for the defence for obedience to an illegal order seems to be established by the conception of self-preservation. See, Ibid., pp.57-58.

indicated, "self-preservation in the face of the enemy is not an excuse for violations of the rules of war."⁵⁷ Thus, soldiers, for Walzer, like the crew, "cannot enhance their own security at the expense of innocent men and women."

Walzer's argument that soldiers cannot improve their own security by killing others seems to have a very powerful ground: They are moral agents as human beings, even if they are regarded as coerced moral agents. In other words, their obligation as human beings "is not in practice mediated by the office of soldiering." That requirement "shapes the whole pattern of their rights and duties in combat"; thus, "when they break out of that pattern...they were not at the moment of their 'crime,' moral agents at all."⁵⁸ Therefore, they must either risk their own lives for the sake of the others, or take responsibility for the crimes committed by themselves.

It is certain that they are human beings before they are soldiers. Since they are human beings, they should act as moral agents, and thus, when they do not act as moral agents, they should be charged for the result of their acts. In this respect, Walzer's argument seems to be right. But his emphasis on the soldier's self-sacrifice⁵⁹ seems to

57. Walzer, Op. Cit., p.305.

58. Ibid., p.306.

59. Walzer's ultimate intention concerning the problem of superior orders may not be the emphasis upon the soldier's self-sacrifice. For he concludes that the responsibility for the crimes committed by soldiers is

be inconsistent with the conception of the moral agent as a human being. Walzer's point appears to be that soldiers cannot enhance their own security at the cost of the other lives, even if they would be in danger if they did not. It is certain that self-sacrifice is one of the noble military virtues, but it, I believe, should not be compelled. Self-sacrifice coerced by something cannot have the same worth as self-sacrifice as a moral virtue. As military men, soldiers can be encouraged to have the spirit of self-sacrifice, but they cannot be, as moral agents before military men, demanded forcibly to have it. Self-sacrifice is certainly a noble virtue, and may be, as Walzer says, an honorable duty, for the military man. But it cannot be compelled, even for a military man, to sacrifice himself as long as he is, as Kant says, a free and rational moral being before a military man. For this reason, it seems to me that Walzer's emphasis on self-sacrifice, if it is understood as compulsive one, is inconsistent with his

divided and distributed to both the soldiers and their officers. But it is certain that Walzer rejects the conception of the soldier's self-preservation, and rather emphasizes acting as moral agents. (See *Ibid.*, p.309. pp.305-306.) The footnote shown on p.305. seems to explain well Wasserstrom's such assertion. In this footnote, Walzer criticizes Telford Taylor's suggestion that killing the prisoners can be justified in virtue of military necessity, and holds, against Taylor's view, that "There may be risks in doing that, but these are exactly the sorts of risks soldiers must accept." It seems to me, for this reason, that Walzer emphasizes the conception of the soldier's self-sacrifice.

conception of the soldier as a moral agent. For a free and rational moral agent will not be forcibly demanded to sacrifice himself: He will choose it himself when it is considered as his duty.

On the other hand, Wasserstrom's conception of the soldier's self-preservation, as well as Walzer's conception of self-sacrifice, seems to be controversial. As Wasserstrom indicates, people would not be blamed for opting to save their own lives at the cost of other lives in such circumstances illustrated above. We can understand their situations and their acts. But we can still ask them a question, "Was the act of securing their own lives at the expense of other lives desirable?" Suppose a case where a soldier killed innocent people for the sake of his own life. Can we expect that he can live for his rest life without any suffering from a guilty conscience coming out of the fact that he murdered innocent people even if he acted, against his will, in pursuance of superior orders? There could be persons who never morally care what result their acts will bring forth. If we borrow Moore's word, we can call them "morally blind" persons. I do not think that they are normal. Normal persons, I believe, do morally care about the result of their acts. As a normal, moral agent, the soldier who kills innocent people for his life would suffer from his action, even if he was compelled to commit

the crime by superior orders. For a normal person, as Aristotle says, "to act under compulsion and against one's will is painful."⁶⁰ Both self-sacrifice and self-preservation seem to be controversial. This is an unavoidable but unsolvable dilemma. How to escape from this dilemma will be the most important question. But our present discussion is not much concerned about it. We shall meet this question in the next chapter.

The other argument suggested by Wasserstrom for the defence of superior orders is related to the character of the existing laws of war, and the soldier's capacity to assess them. According to Wasserstrom, military training requires the soldier to have "habits of obedience to command." For an army functions successfully "only if habitual, unquestioning obedience is forthcoming on the part of the ordinary soldier."⁶¹ As a result, according to Wasserstrom, even if a soldier is instructed that he ought not obey illegal orders, "the dominant thrust of his training will have consisted in efforts directed toward transforming him into a person who will obey without question and without hesitation."⁶² For this reason, "he ought, perhaps, to be excused whenever he does what he is told to do because this is what he will have been trained

60. Aristotle, The Nicomachean Ethics, Trans. by J.A.K.Thomson, Penguin Books (1978), p.113.

61. Wasserstrom, Op. Cit., p.59.

62. Ibid.

to do."⁶³ We have already discussed some objections to this kind of argument in the previous section. I do not think that we need to discuss them again. But, according to Wasserstrom, there is still a powerful argument that obedience to superior orders ought to be a complete defence. This argument is concerned with two related characteristics of the system of the laws of war. The first characteristic lies in the fact that war crimes are often "extremely vague and imprecise."⁶⁴ It would be, for example, in reality, very difficult for an ordinary soldier to decide when he is using a weapon calculated to cause unnecessary suffering. Furthermore, the doctrine of military necessity, which is conceived as a general justifying condition, "makes it virtually impossible for the soldier to determine from his limited perspective whether an ostensible war crime comes under an exemption." Accordingly, Wasserstrom says, "it is often a fiction that the soldier in the field is in any position to ascertain to which situations the laws of war apply and to which they do not."⁶⁵ The second characteristic is the problem of knowledge which is compounded by the fact that the "laws of war are not a rational, coherent scheme of rules and

63. Ibid.

64. Wasserstrom, Op. Cit., p.60.

65. Ibid.

principles."⁶⁶ According to Wasserstrom, there is no intelligible rationale to the laws of war, recourse to which might assist the soldier in his attempt to determine which of his actions are war crimes and which are not. As there is no readily applicable general principle to which he can appeal for guidance, he cannot reach in any simple, straightforward way to the idea, for instance, that the intentional killing of non-combatants is a prohibited act.⁶⁷ In short, for Wasserstrom, since the existing laws of war are incoherent and irrational, and thus, the soldier's capacity to assess them is further limited, the ordinary soldier's plea of superior orders is quite appropriate. Moreover, according to Wasserstrom, consideration of contemporary ideas about warfare, for example, the idea that modern war is "extraordinarily corruptive of the capacity to behave morally," supports the defence of superior orders. He concludes that⁶⁸

If the distinctions between what is obligatory and what is prohibited appear to rest on no intelligible grounds or persuasive principles, if one is encouraged in war to neglect as morally uninteresting just those distinctions which in any other context are of utmost moral importance, and if one has no reasonable assurance (as one cannot in time of war) that others will behave with a careful regard for the

66. We have already discussed in Chapter II Wasserstrom's argument that the current laws of war are not rational and coherent. See his other article, "The Laws of War."

67. See Wasserstrom, "The Responsibility...", p.60.

68. Ibid., pp.61-62.

moral point of view, then it is not surprising if persons lose interest in and concern for even the minimum demands of morality. They are somewhat excusable, even when they do terrible things, because war has, in some important ways, made psychopaths of them all.

Wasserstrom's argument that the ordinary soldier's defence for obedience to superior orders is proper, if we consider the problem of the existing laws of war and the limit of the ordinary soldier's capacity to assess them, seems to be very plausible. His assertion is based on the realities of war. If we consider the situations of real war, it does not seem to be difficult for us to understand how the soldier's terrible acts are possible. But understanding the soldier's difficult position in war is one thing, and demanding excuse for his criminal acts is another, even if he was compelled to commit the crime. For since war is a social creation, and a social activity requires responsibility for its results, any act committed in war should require responsibility for its results.

Wasserstrom, actually, does not seem to reject all responsibility for the criminal acts committed by soldiers. What Wasserstrom wants to argue is that soldiers can be excused from responsibility for crimes committed under superior orders. Who should, then, take responsibility for the crimes? According to Wasserstrom, responsibility for

the crimes should be called onto the leaders, not onto their ordinary soldiers. He says,⁶⁹

When we turn to the leaders - both civilian and military - we come to those persons to whom many principles of responsibility most obviously and plausibly apply, and to whom culpability most fairly and appropriately appears to attach. For these are the persons who are least subject to formal military discipline; they have substantially more discretion in respect to their own behavior; they are the ones who give orders and formulate battle plans and objections; they are in a position more accurately to assess the consequences of their action; they are removed from combat and can, therefore, reflect and deliberate.

In other words, according to Wasserstrom, responsibility for war crimes actually depends upon the presence of these conditions, and these are satisfied in leaders, not in combat soldiers. He calls this kind of requirements for responsibility the mens rea requirement. And this mens rea requirement is, indeed, reflected in the principles and the practices of Nuremberg. Wasserstrom says that "In terms of what was done at Nuremberg, as well as what was said, it was leaders and not ordinary soldiers who were held most responsible for the commission of war crimes..."⁷⁰ In brief, for Wasserstrom, taking into consideration the mens rea requirement, responsibility for crimes committed in

69. Ibid., pp.62-63.

70. Ibid., p.63. It is true that at Nuremberg only the leaders were tried. But in subsequent trials ordinary soldiers also were tried.

pursuance of superior orders should not be called onto combat soldiers but onto their leaders.

Wasserstrom's argument concerning the shift of responsibility for crimes from ordinary soldiers to their leaders raises at least two questions. One question is that can we hold the leaders responsible for crimes committed by their subordinates on the simple ground of the mens rea requirement, and if so, what are the criteria of the mens rea requirement to be applied to the leaders? The other question is that if we can hold the leaders responsible for crimes committed by their subordinates, to what degree can we hold them responsible for crimes? The first question is concerned with the problem of culpability of criminal intent, and with the criteria for the test of leaders' criminal intent. The second is related to the scope of responsibility of the leaders. Wasserstrom tries to answer the first question. According to him, criminal intent is, as proved at Nuremberg, obviously liable for the crimes. He also suggests some criteria for testing leaders' criminal intent. However, he does not discuss the second question at all. He might think that as far as the mens rea requirement is considered as a defence for obedience to superior orders, the question of the limit of responsibility is less important. Probably he would believe that in that case, responsibility for crimes can be shifted to the leaders.

But, as we shall see later, the second question may have significance, as well as the first question.

Before considering the criteria for the test of the leader's mens rea, we need to compare Wasserstrom's conception of the mens rea requirement with Dinstein's conception of lack of mens rea. They are both a condition, according to which ordinary soldier's criminal act committed in compliance with superior orders can be excused from responsibility. According to Dinstein, as has been indicated in the previous section, the proof of lack of mens rea brings about the acquittal of the accused, and thus, in the problem of obedience to superior orders, the cases of compulsion or mistake of the law could be excused from responsibility for crimes. In those cases, for Dinstein, the subordinates were not considered to be culpable. But Dinstein did not argue that, instead of them, their superiors were culpable. He did not discuss the continuum of responsibility.⁷¹ In other words, for Dinstein, what is important was simply to prove lack of mens rea in the problem of superior orders, and to him the

71. Melzer criticizes Dinstein's ignorance of a continuum of responsibility. Melzer holds that Dinstein's solution that ignores the presupposition of a continuum of responsibility cannot be fair to everyone involved. "In Dinstein's case," Melzer asserts, "it is definitely unfair to the victims." It seems to me that Melzer suggests a question, "Who is then responsible for the crimes? if the factor of lack of mens rea may be excused the accused from responsibility for crimes." See Yehuda Melzer, Concepts of War, p.80.

question, "who is then responsible for crimes?" was not even suggested. Insofar as the proof of lack of mens rea is defence for exculpability of criminal acts, Dinstein might think that responsibility for crimes should be automatically called onto the persons who have mens rea. In contrast with Dinstein's way of solving the problem of superior orders, the mens rea requirement, for Wasserstrom, was invented from the start for the purposes of calling to leaders, not to combat soldiers, responsibility for crimes. Thus, for Wasserstrom, the question of the appropriate test for the culpability of leaders for crimes - even if they were committed by their subordinates - necessarily follows the question, "How to find the leader's mens rea?"

According to Wasserstrom, to find the criteria for the mens rea requirement is never easy. We must know whether the leaders intended to do criminal acts. But this is not clear. For it may be possible that they did not intend to do those acts, and even if they intended them, it would still be difficult for us to prove that they had intended these acts, as we could see this difficulty in the case of General Yamashita.⁷² Hence, Wasserstrom suggests the

72. According to Walzer and Wasserstrom, the case of General Yamashita is still controversial. General Yamashita was sentenced to death for the charge of failure to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities. But, defending himself, he claimed that he had been entirely unable to exercise control over his troops. The commission, however, refused to accept this

following questions, according to which we may get some help to find mens rea responsibility of leaders.⁷³

(1) Is it sufficient if the leaders simply adopted or knowingly permitted the adoption of policies and objectives the realization of which were likely to lead to the commission of war crimes?

(2) Is it necessary...that the leaders should have known that such a policy was likely to have such consequences?

(3) Is the test more stringent, still? Must we inquire into the actual state of mind of leaders to see whether they in fact knew that such a policy was likely to have such consequences?

It appears to me that this test suggested by Wasserstrom would help us to a some extent judge whether or

defense and sentenced him to death even though no direct proof was offered. Against the commission's refusal, the defence lawyers argued that the standard to which Yamashita was held by the commission was one of strict liability, and radically inappropriate in cases of criminal justice. If it is the case, as Wasserstrom says, that Yamashita was unaware of the brutalities committed by his troops, and was in no position to have prevented them from so behaving, then we may be tempted to conclude that he was unjustly held liable for the conduct of his subordinates. But how can we prove that? It is not quite as easy as that. See Walzer, Op. Cit., pp.319-320. See also Wasserstrom, Ibid., p.68.

Another argument concerning the justification of Yamashita's case seems to be possible. It may be held that General Yamashita as a commander is responsible for knowing about widespread activities of his troops. In other words, Yamashita as a commander should have known the conducts of his subordinates. According to this argument, Yamashita should be liable for crimes committed by his troops regardless of his having intended them. Sheldon Cohen says that in the case of Yamashita, "The legal point was clear: A commander must take those measures that are within his power to control his troops and ensure that they do not violate the law of war. Failure to do so is a crime of omission." See Arms and Judgment, pp.24-25.

73. See Wasserstrom, Ibid., pp.69-70.

not leaders have mens rea responsibility. Suppose that leaders have taken a policy of "body counts." Under the first test, as Wasserstrom argues, the leaders who took it as a policy are properly held liable for the ensuing war crimes. For an emphasis upon "body counts" would lead to the killing rather the capture of enemy soldiers who wish to surrender. The second test, that is to say, the suggestion that the leaders should have known that such a policy would have such consequences is likely to help hold leaders responsible for crimes committed by their subordinates. The fact that the leaders did not expect the results of atrocities cannot be any more a defence under this second test for their excuse from responsibility. It appears to me natural that leaders as policy makers or as commanders issuing orders should have known or expected the consequences of the policy or orders. Accordingly, it seems to me plausible that where they fail to know the consequences of the policy or orders, they should be charged of the crimes committed by their subordinates.

Two questions, however, come to mind against Wasserstrom's suggestions. Firstly, in a case where leaders establish a policy which may lead to atrocities under the plea of military necessity or supreme emergency, can we still hold the leaders' mens rea liability for crimes resulted from that policy? As Wasserstrom admits, the

conception of military necessity in the current laws of war is very obscure. If, as Wasserstrom pointed out, ordinary soldiers cannot be charged with crimes committed by themselves on the grounds of the vagueness and irrationality of the current laws of war, especially of the conception of military necessity, then why can the leaders not be discharged of the mens rea responsibility for the crimes on the same grounds?

It may be immediately argued against this suggestion that we can still hold the leaders responsible for crimes since there can be the difference of cognition or knowledge of the laws of war between ordinary soldiers and their leaders. It is absolutely true that the range of leaders' knowledge of the laws would be much wider than that of their subordinates. But it may be also true that leaders' cognition of the laws of war would not be sufficient for appropriate judgments, insofar as the laws of war, especially the regulation of military necessity, are irrational and incoherent. In spite of this, can we still hold the leaders responsible for all the crimes committed by their subordinates?

Secondly, if neither subordinates nor leaders can be charged with war crimes, who is responsible for them? This question seems to be unreasonable. It should be presupposed that responsibility is on a continuum, whether it is

charged onto a higher-ranking person or to a lower-ranking person. In other words, as Taylor says, "the consequence of following superior orders as a defence is not to eliminate criminal responsibility for what happened, but to shift its locus upwards."⁷⁴ If this presupposition is ignored, as Melzer points out, it will be definitely unfair to the victims.⁷⁵ To what degree, then, can the leaders be responsible for the crimes committed by their subordinates? Wasserstrom, as has been indicated above, does not ask this kind of question. He has just tried to demonstrate a defensible mens rea requirement to the leaders. But if my first question is meaningful, we can consider the continuum of responsibility, whether or not it is mens rea, and then, the question concerning the limit of responsibility of either subordinate or superior, and of either low-ranking or high-ranking persons becomes also meaningful. This question is naturally connected to the relation between soldiers and their officers. I shall discuss this question in the next section.

74. Telford Taylor, Nuremberg and Vietnam: An American Tragedy, A National General Company (1970), p.52.

75. See Melzer, Op. Cit., p.80. Supra., footnote, 71.

3. Soldiers and Their Officers.

In the previous section, I have discussed the mens rea requirement for leaders, the consideration of which would make it possible to thrust upon them responsibility for crimes committed by their subordinates. This argument of the mens rea requirement for leaders suggested by Wasserstrom is much the same as the doctrine of respondeat superior advocated by Oppenheim in that both arguments hold the ordinary soldier's exculpation from responsibility for war crimes. But they are, I believe, very different from each other in the degree of plausibility: Oppenheim, as has already been indicated, did not suggest sufficient rationales⁷⁶ for the ordinary soldier's defence for obedience to superior orders, while Wasserstrom suggested as its rationale the mens rea requirement for leaders. In this respect, we may say that Wasserstrom's argument of the mens rea requirement for leaders is a much more developed doctrine of respondeat superior.

It seems to me, however, that Wasserstrom's argument is not successful, insofar as he tries to shift onto leaders all the responsibility for war crimes committed by

76. It is true that we have considered as rationales for the doctrine of respondeat superior the maintenance of military discipline and the ordinary soldier's mistake of law. But we have already argued that these rationales are not so much reasonable as the supporters of the doctrine suppose.

the subordinates. If the mens rea requirement is the only proper key, as Dinstein has held, to solving the problem of obedience to superior orders, Wasserstrom's suggestion might be suitable for looking for persons holding responsibility for crimes. I do not, of course, suppose that it is an easy job even to look for those persons. But, if the mens rea requirement is the only pertinent key to the solution of the problem, it is not difficult to imagine that most responsibility for war crimes would be imposed, as Wasserstrom supposes, not upon combat soldiers, but upon their leaders, whether they are civilians or military men. But it is still dubious that the mens rea requirement is the only suitable key to solving the problem. Two questions could be suggested against Wasserstrom's assertion. The first question would go like this⁷⁷ : If the mens rea requirement can be thrust onto only leaders, or to put it another way, if we cannot find any mens rea requirement from the ordinary soldiers, can we not place upon the soldiers any responsibility for the crimes committed by themselves, even if we admit that they did so in compliance with orders? In other words, can the soldiers not be accountable for the crimes at all, if it is proved that they did not have any criminal intent? Again, can the

77. I have already suggested this question in the previous section, while I criticized Dinstein's argument of the mens rea principle. I have also compared Wasserstrom's view concerning the conception of mens rea with Dinstein's.

soldiers who committed crimes under compulsive orders or in ignorance of laws of war be discharged of all responsibility, so long as they are proved not to have had any mens rea? When they prove that they did not have any criminal intent, are they really discharged of not only legal but also moral responsibility for the crimes committed by themselves? I do not suppose that they are discharged of responsibility. My argument depends upon two reasons. One reason is based upon the conception of the soldier as a moral agent, which was supported by Walzer. As a moral agent, the soldier should be liable for the crimes. I have already discussed it, but shall return to this point later. The other reason is based on Aristotle's definition of compulsory acts. According to Aristotle, an act is compulsory "when the cause is external, and the agent contributes nothing to it," whereas acts are voluntary when they "are in themselves involuntary but are preferable at a given time and at a given cost," and "have their origin in the agent, although they are involuntary in themselves."⁷⁸ In other words, for Aristotle, if acts have their origin in the agent or are preferable, then they are voluntary even if they are involuntary in themselves. It may be difficult, as Aristotle himself admits, to decide what sort of acts are to be preferred, and what cost to the agent. Judging

78. Aristotle, The Nicomachean Ethics, Trans. by J.A.K.Thomson, Penguin Books (1978), p.112.

from Aristotle's conception of the compulsory act, the soldier's act at issue is clearly involuntary, but does not seem to be so compulsory as in the Aristotelian definition. For in this case, it might have been preferred even if his alternative would have been the cost of his life. For this reason, I suppose that the soldier would not be discharged of responsibility for his act.

The second question is concerned about the difficulty of identifying the mens rea requirement. We have, of course, already reviewed Wasserstrom's suggestions which may help to detect that requirement for leaders. But, as we have already indicated, the incompleteness and vagueness of the laws of war may stand in the way of identifying that requirement for leaders. In this case, who should be charged with the crimes? If these two questions suggested above are reasonable, and if Wasserstrom's view that leaders should be responsible for war crimes committed by their subordinates is still significant, it would be worthwhile, I suppose, to try to reconstruct his argument.

It is unclear to me that to what extent Wasserstrom wants to thrust on the leaders the responsibility for crimes committed by their soldiers. He does not seem concerned about the limit of responsibility. But, as we have indicated in the previous section, the problem of responsibility should be treated on the conception of its

continuum. Responsibility for crimes may be divided or distributed, but it cannot be remained uncharged. Taking this into consideration, we may say that Wasserstrom's mens rea requirement for leaders is an instrument to shift all the responsibility from their subordinates to the leaders.⁷⁹

As I have already pointed out, however, it is not only difficult but also inappropriate to apply the mens rea requirement only to leaders. Accordingly, Wasserstrom's assertion does not seem to be successful, insofar as he claims to place only upon leaders the responsibility for war crimes. But it seems to me that Wasserstrom's support of the mens rea requirement is still meaningful in that he has at least verified that leaders cannot be excused from the responsibility for war crimes, even if they were committed by their subordinates. We could suppose here a moderated argument concerning the responsibility of the individual for war crimes, the rationale of which depends basically upon the views suggested by Wasserstrom and Walzer. This moderated argument, if we may name it that, implies that liability for war crimes should be distributed

79. It may be argued that Wasserstrom's view concerning the mens rea requirement could be applied to both leaders and subordinates. In this case, we can also consider the continuum of responsibility in Wasserstrom's argument. In that case, we can expect that responsibility for crimes is distributed to both leaders and subordinates. But I am not sure that this kind of interpretation is proper for him.

to both superiors and subordinates. But, then, this moderated view requires other rationales in addition to the mens rea requirement. If the mens rea requirement is, as Wasserstrom supposes, a rationale for thrusting responsibility for crimes on leaders, the moderated view would need other rationales for calling subordinates to account. In my opinion, two arguments can be probably considered as rationales for bringing subordinates to account. One is the assertion, suggested by Levinson, that there should be direct evidence of participation in the criminal acts.⁸⁰ In other words, direct participation in the criminal acts, regardless of the existence of criminal intent, constitutes an element of punishment for crimes. Moreover, the criminal acts themselves were most often performed by the ordinary soldiers. Hence, it seems to me that subordinates who took part directly in the criminal acts cannot be excused from the responsibility, even if they did not have any criminal intent. This argument would be helpful to answer the question regarding the

80. Levinson's fundamental intention is that officials of governments should be charged of responsibility for war crimes. For the establishment of his argument, Levinson suggests two linked principles which the war trials stand for: (1) Officials should not be allowed to claim the act-of-state doctrine in justification; (2) Direct evidence of participation in the criminal acts themselves is necessary. I quoted just the second from these two principles, for the first does not concern soldiers' responsibility for war crimes. See Sanford Levinson, "Responsibility for Crimes of War," War and Moral Responsibility (ed.) Princeton (1974), p.117.

responsibility of a soldier who committed crimes under compulsive orders, or in ignorance of the laws of war. We could judge that the soldier should be charged for the crimes, for he participated directly in criminal acts even if he had no criminal intent when he committed them; but in holding him liable for the crimes committed by him, he will share guilt with his superiors who are convicted by the mens rea requirement.

It may be instantly disputed that the soldier should not be legally charged of the crimes insofar as he had no mens rea while he committed them. This dispute may be plausible. But no one will deny the soldier's moral responsibility for the crimes committed by himself. And if we consider that legal responsibility is based ultimately on moral blame or moral disapproval, that dispute is not always reasonable. The law of war, as professor Cohen comments, "was not framed in a moral vacuum. It was framed in consideration of moral questions."⁸¹ This fact leads us to the second argument for calling soldiers to account for war crimes. This argument is that soldiers are still moral agents even if they dress in military uniform and thus simply act under orders. This argument has been supported by Walzer, and we have already discussed it in detail.⁸²

81. Sheldon Cohen, Arms and Judgment, Westview Press (1989), p.9.

82. See Walzer, Op. Cit., p.309.

We do not need to discuss it repeatedly. What is crucial in this argument is that "soldiers can never be transformed into mere instruments of war," for they are still moral agents as human beings, and thus, when they committed crimes even under orders, "despite their oath, we blame them for the crimes..."⁸³

But it may be still debated that even if we admit that the soldier should act as a moral agent even under illegal or immoral orders, he is as unfairly treated as ever, since he can act morally only by disobeying those orders. As a combat soldier, as Wasserstrom stresses, he can never imagine disobedience to superior orders, even if the laws of war urge him not to obey illegal orders; but he may also be threatened with loss of his own life in a case of disobeying them. Furthermore, as many philosophers have argued,⁸⁴ ordinary soldiers are not experts in international laws, and thus it may go beyond their capacity to require them to be morally sensible. Nevertheless, does the moderated view hold that he is still legally and morally responsible for his criminal act? If it does, on what ground?

It is surely difficult to answer this question. Walzer's argument of the soldier as a moral agent does not

83. Ibid., p.311.

84. Cohen, Op. Cit., p.22. See also Wasserstrom, Op. Cit., pp.59-61.

seem to be sufficient to counter the problem. Walzer says that the soldiers are responsible for what they do insofar as they choose "freely."⁸⁵ But Walzer's term, "freely," is vague. Walzer seems to agree to the conception of "a rational, free moral being" suggested by Kant. In other words, for Walzer, insofar as a soldier did not refuse to obey illegal or immoral orders, and acted himself in pursuance of them, he did act freely regardless of the situation where he was threatened, if he disobeyed, to be killed. This assumes that it is impossible for a human being as a moral agent to do a coerced act, for all acts he does would be freely done. But I am not sure of the truth of this assumption. One thing that is clear is that we have still not reached a definite point by virtue of which we can solve the tragic dilemma, the problem of obedience to superior orders.

It may be absurd for us to ask for a perfect solution of that sort of the problem. Nonetheless, we should attempt to solve it. In the next chapter, I shall suggest a way to arrange the problem. This suggestion is just an attempt to approach the problem from a different point of view. This approach assumes that there is no objectively perfect solution to the problem of responsibility for war crimes, namely, here, the problem of obedience to superior orders.

85. Walzer, Op. Cit., p.314.

Insofar as there is no objective solution to the problem, what is important for solving it is our subjective attitudes. In other words, the moral attitude of the person who is in the dilemma, especially the attitude of the military officer (I shall suggest a reason for this at the end of this chapter), is the key to the solution of the problem. That is to say, the response of the person to the dilemma situation and its justification would depend upon his moral beliefs or moral virtue. As Malham Wakin says, "Persons of good moral character make the right moral choices even when doing right can carry severe personal consequences."⁸⁶

My approach to the problem of obedience to superior orders shall be set forth on another assumption that there should be strict differentiation between ordinary soldiers and their officers. I believe that Walzer is completely right in arguing that soldiers can never be transformed into mere instruments of war, and thus they cannot be excused from the responsibility for crimes committed by themselves. But, as Walzer himself admits, no military force can function effectively without soldiers' routine obedience.⁸⁷ They need to obey any orders, whether or not the orders are illegal or immoral, for the maintenance of

86. Malham M. Wakin, "Wanted: Moral Virtues in the Military," Hastings Center Report, October (1985), p.25.

87. See Walzer Op. Cit., p.311.

military discipline and military efficiency. They may not be asked to act as moral agents. But the same, I suppose, cannot be said of their officers. Officers simply order their soldiers to act pursuant to their orders, but do not participate directly in acts. This means that officers can have time to reflect on or to seek after the justice of orders issued by their superiors. This implies that they can be asked to be moral agents. But above all, officers, I suppose, should be asked to be moral beings because they are, unlike enlisted soldiers, military professionals. This is very important, for if officers act as moral agents, and reflect on or seek after the justice of orders issued to them, then they would be expected not to issue soldiers illegal or immoral orders. Then our discussion needs to be focused on officers, not on ordinary soldiers, and especially on their moral virtue in accordance with which they act when they are in a difficult situation. In brief, a key to the approach to the problem of obedience to superior orders may depend upon military officers' moral virtue. We shall discuss this in the next chapter.

CHAPTER IV

SUPREME MILITARY VIRTUES

1. Loyalty and Obedience

In the last two chapters, I have discussed war crimes, the rules or laws of war, and the problem of obedience to superior orders, one of the most prominent problems regarding the responsibility of the individual for war crimes. And at the end of the former chapter, I proposed that we need to be concerned, as a different way of solving the problem of superior orders, about the leader's - especially the military officer's - moral attitudes or moral virtues rather than the ordinary soldier's. Malham M. Wakin's comment upon immorality of American soldiers and officers shown at the "My Lai Massacre" seems to be in this context worth noting:¹

Some refused to believe that young American soldiers could have killed unarmed prisoners, many of them

1. Malham M. Wakin, "Wanted Moral Virtues in the Military," Hastings Center Report, October (1985), p.25.

obviously noncombatants, in large numbers... Some refused to believe that American officers could have given such orders in direct violation of our own laws, international agreements, and the obvious moral prohibitions against such killing, even in war. Some refused to believe that officers and noncommissioned officers could have been present at My Lai and participated in the killing of noncombatants. Some refused to believe that officers in each succeeding rank from lieutenant on up to major general in the division's chain of command had some knowledge of the events as required by regulation to higher headquarters, and may have participated in some fashion in covering up the details. But all these things happened.

The My Lai episode that occurred during the Vietnam war in 1968 has raised a lot of moral issues, and evoked the importance of professional military ethics, and especially of morality for professional military officers. On the most generous accounts, according to Wakin, the orders given by Lieutenant William Calley to his platoon at that time were ambiguous on whether all inhabitants of My Lai were to be killed. But Wakin says that "If the order was clearly to kill without discriminating between combatant and noncombatant, then it was both immoral and illegal. If it was ambiguous, then it ought not to have been; where innocent life is at risk, combat leaders are morally obliged to train and control their men..."² But in time of war, since many human lives and the success of military operations are at stake, and obedience to orders in the military hierarchy is a compelling obligation, it

2. Ibid.

may be difficult to ask ordinary soldiers to disobey the orders rightfully, even if it is lawful for them not to obey illegal orders. The dominant thrust of ordinary soldiers' training will have consisted in efforts directed toward transforming them into persons who will obey without question and without hesitation. Furthermore, they are instructed that disobedience entails serious penalties. Hence, it would be difficult to expect ordinary soldiers to disobey illegal or immoral orders. But as Wakin says, "in some contexts the obligation to avoid doing evil overrides the obligation to obey."³ Then, who decides? "Persons of good moral character make the right moral choices even when doing right can carry severe personal consequences."⁴ If we consider the conception of military discipline and situations facing ordinary soldiers, it may be impossible to require them to be persons of good moral character. This is not because they cannot be persons of upright moral character but because their situations make it difficult to be those kind of persons. Who decides, then? Officers, not ordinary soldiers, would have the obligation to avoid doing evil by disobeying or by not issuing illegal or immoral orders.⁵

3. Ibid.

4. Ibid.

5. It will be reasonable to evaluate not only the morality of military officers but also that of civilian officials as the makers of policies required to be performed by the military. Although I shall not discuss the

But some scholars and statesmen have argued that unconditioned obedience in not only ordinary soldiers but also officers should be stressed more than morality in the military. As we shall see later, Samuel Huntington, as well as T. V. Smith, holds that loyalty and obedience are the most important virtues which the professional military officers should cultivate. Dean Acheson warns that moral judgment or moral assessment in decision-making in time of war may misdirect us.⁶ These assertions imply that the solution of the problem of obedience to superior orders based upon moral point of view would be still controversial. In other words, the conflict between the choice of military efficiency as military men and moral choice as human beings is never easy to solve even if we shift our attention from the morality of ordinary soldiers to that of their officers. The professional military officers issue orders to their subordinates, and also carry out orders given by their superiors. As opposed to ordinary soldiers, as I have argued in the previous section, officers can choose military efficiency as military men or can choose as moral beings disobedience to illegal or immoral orders given to them. Their final choice or

morality of civilian officials, it can be discussed in the same context as the morality of military officers.

6. See Richard Wasserstrom, "On the Morality of War: A Preliminary Inquire," War and Morality, Wadsworth Publishing Company (1970), pp.78-79.

decision depends, I believe, upon the supreme military virtue. What are the virtues that military officers should cultivate? What is the most important and desirable virtue for them?

Many military virtues such as corporate spirit,⁷ courage, honor, loyalty, obedience, moral integrity and so forth have been considered as the supreme virtues for military men, especially for professional military officers. But the supreme military virtue has been differently identified by every scholar. I shall discuss as the supreme military virtues loyalty, obedience, and moral integrity. The reason that I treat these virtues as the supreme military values is not only that they have been more discussed than others by many scholars and statesmen, but also that these virtues have been widely claimed to be the most important values in the military professional. In this section, I shall discuss loyalty and obedience as the supreme military virtue advocated by Huntington and Smith. In the next section, I shall discuss moral integrity

7. According to Clausewitz, the military virtue of an army is "one of the most important moral powers in war," and "the crystals of military virtue have a greater affinity for the spirit of a corporate body than for anything else." He continues that "This corporate spirit forms the bond of union between the natural forces which are active in that which we have called military virtue." Taking this into account, it may not be false to hold that the corporate spirit, for Clausewitz, is regarded as the supreme military virtue. See Carl Von Clausewitz, On War, Penguin Books (1832), pp.255-257.

supported by Malham Wakin and Michael Wheeler, and then compare their arguments in view of the conflict between the military value and the moral human value. In the final section, I shall attempt to suggest an alternative as the supreme military virtue. I shall argue about the importance of "historical insight" as one of the most crucial virtues for the military professional in addition to loyalty, obedience, and moral integrity.

In his book, The Soldier and the State,⁸ Samuel P. Huntington posits the thesis that modern military officership is a profession in an analogous sense to medicine and law. According to Huntington, "The distinguishing characteristics of a profession as a special type of vocation are its expertise, responsibility, and corporateness."⁹ He argues convincingly that military officers meet these criteria of professionals as medical doctors and lawyers meet them. The professional man is defined as "an expert with specialized knowledge and skill in a significant field" of human endeavor.¹⁰ The professional man's expertise is acquired only by prolonged education and experience. This is why he is separated from

8. Samuel P. Huntington, The Soldier and the State, The Belknap Press of Harvard University Press (1957).

9. Samuel P. Huntington, "Officership as a Profession," Malham M. Wakin (ed.), War Morality, and the Military Profession (Hereafter cited as WMMP), Westview Press (1979), p.12.

10. Ibid.

laymen. Similarly, the officer corps contains many varieties of specialists: for example, "the captain of a cruiser and the commander of an infantry division appear to be faced with highly different problems requiring highly different abilities."¹¹ This distinct sphere of military competence is summed up in Harold Lasswell's phrase "the management of violence."¹² The professional man bears a social responsibility because he is a practicing expert, working in a social context, and performing a service, which is essential to the functioning of society. Similarly, the expertise of the officer imposes upon him a special responsibility because society insists that the management of violence be utilized only for socially approved purposes. The members of a profession share a sense of organic unity and consciousness of themselves as a group apart from laymen. The sense of unity comes from their sharing lengthy discipline and training necessary for professional competence, and from their sharing of a unique social responsibility. Similarly, the officer corps comes to be an autonomous social unit. The officer corps is a public bureaucratized profession and a bureaucratized organization: the legal right to practice the profession is limited to the members of a carefully defined body. "The functional imperatives of security give rise to complex

11. Ibid., p.16.

12. Quoted from Huntington, Ibid.

vocational institutions which mold the officer corps into an autonomous social unit."¹³ And entrance into this unit is restricted to those who complete the requisite education and training. Consequently, according to Huntington, as medical doctors and lawyers are professionals, so military officers are professionals.

By equating the social position and the role of the officer corps with those of medical doctors and lawyers, Huntington seems to aim at two purposes. One thing is that he intends to emphasize the right and the duty of the officer corps by ensuring their social positions and roles. The other is that he intends to limit the roles of the officer corps to the roles of the military profession as the roles of medical doctor and lawyer groups are limited to their professions. The latter makes clear the difference of roles between the statesman and the military man. Huntington says that "The military man has no concern with the desirability or undesirability of political goals... He is concerned with the relation between political goals and military means since this directly affects the military security of the state."¹⁴ As a service group for the country, in other words, the military man is just concerned with the military security of the state, and with the

13. *Ibid.*, p.21.

14. Huntington, "The Military Mind: Conservative Realism of the Professional Military Ethic," *WMMP*, p.34.

greatest military efficiency as a means to acquire the goal given by the statesmen.

According to Huntington, therefore, the responsibilities of the military man to the state are summed as follows:¹⁵ (1) A representative function to represent the claims of military security within the state machinery, (2) an adversary function to analyze and to report on the implications of alternative courses of state action from the military point of view, and (3) an executive function to implement state decisions with respect to military security even if it is a decision which runs violently counter to his military judgment. In brief, the statesmen set the goal and allocate to the military man the resources to be used in attaining that goal, and it is then up to the military man to do the best he can. In order to attain effectively the goal given by the statesmen, the entire profession and the military force must be a hierarchy, and this hierarchical system asks the military man to have virtues of loyalty and obedience. Huntington says¹⁶

The military profession exists to serve the state. To render the highest possible service the entire profession and the military force which it leads must be constituted as an effective instrument of state policy. Since political direction comes only from the top, this means that the military profession has to

15. Ibid., p.38.

16. Ibid., p.39.

be organized into a hierarchy of obedience. For the profession to perform its function, each level within it must be able to command the instantaneous and loyal obedience of subordinate levels. Without these relationships military professionalism is impossible. Consequently, loyalty and obedience are the highest military virtues: "the rule of obedience is simply the expression of that one among the military virtues upon which all the others depend." When the military man receives a legal order from an authorized superior, he does not argue, he does not hesitate, he does not substitute his own views; He obeys instantly... His goal is to perfect an instrument of obedience...

In short, for Huntington, the responsibility of the officer corps to the state is the highest efficient service. This highest possible service for the state requires an effective hierarchy system of the military, and thus, the supreme military values are loyalty and obedience.

In the same line of thought as Huntington, T. V. Smith also emphasizes loyalty as the chief military virtue. Smith tries thoroughly to differentiate the labor of statesmen from that of military men. According to Smith, soldiers fight wars; they do not declare wars or make treaties of peace. Similarly, no civilian feels it his right to tell a soldier precisely how to fight a war or just how to plan for one that he may have to fight. By the same token, Smith continues, "It is not the soldier's business to invent causes for which to fight or reasons for the fighting that he does. He fights because he is told to fight, and he

fighters for the causes that are handed him."¹⁷ When soldiers are called in, the policy is already foregone: strategy is now invoked, and tactics impend. "What ties these all together is loyalty by each to the system which gives to all a part."¹⁸ In short, for Smith, as well as Huntington, since the military man executes commissions given to him by statesmen, loyalty to the total system of which he is the fighting part is the chief military virtue. What does loyalty mean for Huntington and Smith, then? We need here to note the conception of loyalty. For the conception of loyalty may be differently understood in accordance with the object of loyalty.

Loyalty is an often "confusing, much abused concept."¹⁹ The meaning of loyalty can be changed according to the object of loyalty. Loyalty to a superior, in a certain case, may not result in loyalty to the country: For example, loyalty to a higher officer who intends to overthrow the government is contrary to loyalty to the country.²⁰ What is the real meaning of loyalty?

17. T. V. Smith, "Ethics for Soldiers of Freedom," Ethics, Vol. 60 (1950), p.163.

18. Ibid.

19. Michael O. Wheeler, "Loyalty, Honor, and the Modern Military," WMMP, p.179.

20. There may be, of course, a case where loyalty to a superior's coup d'etat scheme is judged to be ultimately loyal to the country. This is an exceptional case. But it is not difficult to imagine that there would be a case where loyalty to a superior is in conflict with loyalty to the country. The officers of the former Soviet Union, who refused to join some superiors' coup d'etat scheme,

What person is a loyal soldier? What does loyalty mean for a military officer as a professional? According to Josiah Royce, who is one of the most famous advocate of loyalty, loyalty comes out of the basic recognition by a human being that there is real value, namely, "a cause," outside the self. Loyalty is, for Royce, defined as "the willing devotion of the self to its cause."²¹ We should, thus, find a good cause, and a final cause, for Royce, is "loyalty to loyalty."²² Since the military man has chosen as a cause to serve his country, the meaning of loyalty for him is to willingly devote himself to his country. This conception of loyalty for the military man, as Smith points out, implies "acceptance of duties" and "obedience to orders."²³ In this respect, for Smith, as well as for

probably thought that their loyalty to superiors would conflict with their loyalty to the country.

21. Josiah Royce, Philosophy of Loyalty, The Macmillan Company (1920), pp.109-110. See also "Loyalty to Loyalty, Truth, and Reality," John J. Stuhr (ed.), Classical American Philosophy, Oxford University Press (1987), p.245.

22. According to Royce, loyalty to loyalty entails the duty to respect commitments: It entails the duty to promote the happiness of persons to whom we are bound by loyalty; it entails the duty to respect justice, constitution, and law in the society to which we are loyal. In other words, for Royce, loyalty is simply one way of focusing the whole duty of man. I shall not inquire into the broad meaning of loyalty. I shall focus simply on the question, "What is a cause to which the military man should be loyal?" That is to say, "What is loyalty to loyalty for the military man?" Ibid., pp.247-258. See also Lisa H. Newton (ed.), Ethics in America, Prentice Hall (1989), pp.151-152.

23. Smith, Op. Cit., p.163.

Huntington,²⁴ there is no difference between the conceptions of loyalty and of obedience to orders. Since loyalty for the military man connotes obedience to orders, a loyal officer would be an officer who obeys willingly the orders of the country. A loyal military officer would dedicate himself to his superior. Actually, the notion of the loyal military professional is often substituted by the notion of an officer "who gives his unthinking consent to all orders issued to him, whose very honor is a function of his unquestioning obedience."²⁵

This conception of loyalty, however, can create problems. When superiors give the subordinates legal and moral orders, this conception of loyalty will not create a problem. In this case, there will be no conflict between loyalty to superior or country and morality. But when a higher officer issues an illegal or immoral order, the conception of loyalty can be involved in conflict. The subordinate who has to perform the order would be in a difficult situation. He should choose between loyalty to the country and loyalty to morality. As an officer loyal to his superior, he will have to follow his superior's orders even if they are immoral; however, as a moral human being, his loyalty to morality will order him not to follow the

24. Huntington does not try to define the conception of loyalty. Loyalty, for him, as for Smith, appears to imply obedience to orders.

25. Wheeler, WMMP, p.179.

illegal, immoral orders. "As a soldier, he owes obedience; as a man, he owes disobedience."²⁶

Insofar as the military profession exists to serve the state, obedience to orders, as Huntington and Smith emphasize, may be the highest military virtue. However, it will not be necessary to obey all kinds of orders. There are limits of obedience to orders. What are the limits of obedience? According to Huntington, this question arises in two separate connections. The first concerns the relation between military obedience and professional competence, the moral and intellectual virtues of the officer. The second concerns the conflict between the military value of obedience and nonmilitary values. The former is classified again into operational and doctrinal senses. The latter is divided into four groups; the conflict between military obedience and political wisdom, between military obedience and military competence, between military obedience and legality, and between military obedience and basic morality. They are summarized as follows:²⁷

MILITARY OBEDIENCE versus PROFESSIONAL COMPETENCE

(1) In Operations: The disruption of the military organizations caused by disobedience to operational orders

26. Huntington, WMMP, p.44.

27. Ibid., pp.40-44.

will outweigh the benefits gained by obedience. Ready obedience cannot conflict with military competence.

(2) In Doctrines: Rigid and inflexible obedience may well stifle new ideas and become slave to an unprogressive routine. If the subordinate's new technique can increase military efficiency, his disobedience will be justified. Professional competence must be the final criterion.

MILITARY OBEDIENCE versus NONMILITARY VALUES

(1) Conflict with Political Wisdom: The criteria of military efficiency are limited, concrete, and relatively objective; the criteria of political wisdom are indefinite, ambiguous, and highly subjective. Politics is an art; military science a profession. Thus, the superior political wisdom of the statesman must be accepted as a fact.

(2) Conflict with Military Competence: When military competence is threatened by a political superior, the military man's disobedience is justified. The existence of professional standards justifies military disobedience.

(3) Conflict with legality: The military officer as the servant of the state is the servant only of the legitimately constituted authorities of the state. If the statesman in ordering his action recognizes himself that he is acting illegally, then the military officer is justified in disobeying. If the statesman claims to be acting

legally, but the action seems illegal to the officer, then the issue is one of the relative competence of the officer and the statesman to judge what is legal and illegal. If there are two governments in the state, the military officer cannot escape the political choice between them.

(4) Conflict with basic Morality: What does the military officer do if he is ordered by the statesman to commit genocide, to exterminate the people of an occupied territory? The statesman may well feel compelled to violate commonly accepted morality in order to further the political interests of the state. For the officer, in this case, this comes down to a choice between his own conscience on the one hand, and the good of the state, plus the professional virtue of obedience, upon the other. "As a soldier, he owes obedience; as a man, he owes disobedience." Except in the most extreme instances it is reasonable to expect that he will adhere to the professional ethic and obey.

After all, for Huntington, just three cases of disobedience can be justified: (1) a case where the subordinate's disobedience will be expected to bring remarkable military efficiency in doctrines, (2) a case where the statesman invades the military professional competence, and (3) a case where the statesman requires the military man to obey an illegal order. In short, for

Huntington, the final criterion for the justification of disobedience is military efficiency based upon the conception that the military is the servant of the state.

We have so far examined the conception of loyalty as the most important military value for the professional officers with the central figures of Huntington and Smith. We have noted that, for Huntington and Smith, the conception of loyalty has been understood as obedience to orders on the grounds that the cause for the military man is to serve the country. We have also noted that disobedience to immoral orders has not been considered as justifiable in Huntington's view of the limit of obedience. If we consider that loyalty to the country is the basic cause for the military man, and if we assume that there is no conflict between loyalty to the country and loyalty to superiors, then loyalty to the cause, namely, obedience to superior orders would be the most valuable virtue for the military officer as a professional. But the arguments supported by Huntington and Smith are based upon some presuppositions. The first is an assumption that there is clear distinction of the limit of responsibility between statesmen and military men. Huntington says²⁸

He [the military man] is judged not by the policies he implements, but rather by the promptness and efficacy with which he carries them out. His goal is

28. Ibid., p.39.

to perfect an instrument of obedience; the uses to which that instrument is put are beyond his responsibility. His highest virtue is instrumental not ultimate... [T]he justice of the cause is more than he should 'know' or 'seek after.'

In other words, since the cause for the military man is to serve the country, questioning the justice of orders from the country is beyond the sphere of his concerns. Smith also argues in the same context as Huntington that "Soldiers are not, as soldiers, in on the ethically creative phase but in on the phase of execution."²⁹ Two questions can be raised against the argument concerning this principle of divided labor between the statesman and the military man: (1) There would be no question in asserting that the cause for the military man is to serve the country. But it is questionable that there would be no conflict between loyalty to the country and loyalty to the statesman as the superior of the military man. Suppose a case where the statesman or government issue orders to the military man for the purposes of his own political interests. But according to the principle of divided labor, the military man cannot know whether or not the orders were issued from the superior's own political interests. Should the military man obey the orders issued by the statesman even in this case on the grounds of loyalty to the country? According to General George Marshall, "an officer's

29. Smith, Op. Cit., p.163.

ultimate commanding loyalty at all times is to his country and not to his service or his superiors."³⁰ Even if the officer bears in his mind Mashall's comment, however, according to the principle of divided labor, how could he know the fact that the orders were issued by the superior's own political interests? (2) If the military man performed the orders given by the statesman's own political interests, and if the performance resulted in war crimes, who is responsible for the crimes? Is the statesman alone responsible for the crimes committed by the military man, as Huntington and Smith suggest? Is the military man not charged with the crimes on the grounds that he simply acted in accordance with orders? The answers to these questions would be negative. As we have discussed in the last chapter, this is one of the arguments of the superior respondeat doctrine, and we have already rejected it. In brief, so long as there could be conflict between loyalty to the country and to the statesman or government as the superior of the military man, it is not so simple as Huntington and Smith suppose that there is an obvious distinction between the limits of responsibility of the statesman and the military man.

The second assumption for Huntington and Smith is that loyalty to the country as the final cause for the military

30. Quoted in Richard A. Gabriel, To Serve With Honor, Greenwood Press (1982), p.180.

man either implies or is prior to loyalty to morality as the cause for a moral human being. If loyalty to the country implies loyalty to morality, this means that there is no conflict between them. Nevertheless, the following question is still meaningful: If a subordinate officer is issued an immoral order by his superior officer on the grounds that its carrying out will bring great military efficiency, should he follow that order? If the military man is given an immoral order by the statesman on the grounds that its performance will bring a great political benefit for his country, should he carry it out? If loyalty to the country is prior to loyalty to morality, it is not difficult to answer the question suggested above. The military man would be expected to carry out the order by the priority of loyalty to the country to loyalty to morality. Indeed, as has been already indicated, for Huntington the answer to these questions was positive. Insofar as the military is a service group for the country, absolute obedience is emphasized for the military. Immoral orders cannot be excepted. Huntington said that "Only rarely will the military man be justified in following the dictates of private conscience against the dual demand of military obedience and state welfare."³¹ But this kind of assertion is controversial.

31. Huntington, Op. Cit., p.44.

The third and last assumption is that loyalty is defined as obedience to orders. Loyalty to the country as the cause for the military man does not always seem to mean obedience to orders. There could be a case where loyalty is incompatible with obedience to orders. Disobedience to the statesman's orders based upon his own political interests may be compatible with loyalty to the country. Loyalty to the country of course would not conflict with obedience to orders if the orders are given by the country. But what does "the country" designate in this case? Does it denominate the government? Even if "the country" denominates its government, and thus loyalty to the country means obedience to orders given by its government, there could be a problem. For example, suppose that there is a government staying in power by force or terror, and thus, that people are hostile to it. In this case, it would be difficult for us to hold that loyalty to the country means loyalty to its government. Furthermore, suppose that there are two governments in the state, each claiming to be duly constituted and to be deserving of military obedience. In this case, as Huntington says, the military officer cannot escape the political choice between the two governments. Which orders from the two governments should the military man obey? What justifies the choice and the obedience of the military man? These are very difficult questions to

answer. The answer to these questions seems to be beyond the virtues of loyalty and obedience which Huntington has considered as the supreme virtues for the military man. This implies that another virtue in addition to loyalty and obedience is required for the military man. Wakin and Wheeler suggest "moral integrity" as an alternative virtue for the military man. We shall discuss in the next section moral integrity as the supreme virtue for the military man.

2. Moral Integrity

In his article, "The Ethics of Leadership,"³² Malham M. Wakin argues deeply about the conflict between obedience and morality. He asks if military efficiency can put aside the human value of morality. In other words, he examines the possibility of moral neutrality in the military command. The human value of morality, for Huntington, as we have seen in the previous section, was neutral to the political benefits of the state. Since the military exists for the purposes defending the state, Huntington argued, morality should be neutral to the military command. But this moral neutrality is controversial. There have been many arguments for and against it.

32. Malham M. Wakin, "The Ethics of Leadership," WMMP, pp.197-217.

According to Wakin, one of the most extreme views approving moral neutrality in military command is the view voiced by Dean Acheson. According to Acheson, those military leaders who provide advice to civilian policy makers need not concern themselves with ethical issues. For the only relevant considerations for them are practical, not moral. In a speech bearing on the use of military force, Acheson emphasizes the irrelevance of the moral consideration. He says³³

[T]hose involved in the Cuban crisis of October, 1962, will remember the irrelevance of the supposed moral considerations brought out in the discussions. Judgment centered about the appraisal of dangers and risks, the weighing of the need for decisive and effective action against considerations of prudence... Moral talk did not bear on the problem. Nor did it bear upon the decision of those called upon to advise the President in 1949 whether and with what degree of urgency to press the attempt to produce a thermonuclear weapon. A respected colleague advised me that it would be better that our nation and people should perish rather than be party to a course so evil as producing that weapon. I told him that on the Day of Judgment his view might be confirmed... It was not, however, a view which I would entertain as a public servant.

In short, for Acheson, military men who have to advise the statesman do not have to concern themselves with ethical issues; they are as public servants morally neutral in decision making policies.

33. Dean Acheson, "Ethics in International Relations Today," The Vietnam Reader, M. Raskin and B. Fall (eds.), New York (1965), p.13.

In the view of the relationship of the moral to the military, unlike Acheson, Lieutenant General John Hackett emphasizes the intimate relationship between moral and military virtues. Hackett, like Acheson (and of course like Huntington), argues that "the legitimate military function is to furnish to a constituted authority...in situations where force is, or might be, used the greatest possible number of options."³⁴ Unlike Acheson and Huntington, however, Hackett suggests that those options are not devoid of moral considerations. According to Hackett, the principal task of the military today is not merely "the management of violence"; it is "the containment of violence." Therefore, according to Hackett, "while loyalty, courage, and fortitude may well be and are desirable virtues in other walks of life, they are critically indispensable to the military function."³⁵ Furthermore, he says that "the major service of the military institution to the community of men it serves may well lie neither within the political sphere nor the functional. It could easily lie within the moral."³⁶ In brief, for Hackett, since the principal task of the military today is to avoid war (in other words, the containment of violence), the moral and the military virtues cannot be of a different nature;

34. Quoted from Wakin, WMMP, p.199.

35. Ibid., pp.199-200.

36. Ibid., p.200.

hence, the moral never can be neutral in the military command.

Wakin sympathizes with Hackett's view. Like Hackett, Wakin supports the view that moral virtues are indispensable to the military function. In the light of the view that the moral cannot be neutral in the military command, Wakin reexamines Huntington's view regarding obedience to orders in the military. As was noted previously, loyalty and obedience are, for Huntington, the highest military virtues, and for Hackett, these virtues are absolutely critical to the military function. In this respect, their views are on the the same ground. But the difference between their views is that while the former approves moral neutrality in military command, the latter does not. The grounds on which Huntington approves moral neutrality in military command are military efficiency or the political benefits to the state. The highest value of the military man is instrumental not ultimate. Thus, when the military man receives orders from an authorized superior, for Huntington, the justice of the cause is more than he should "know" or "seek after" on the grounds that "if the king's cause be wrong," his obedience to the King "wipes the crime of it" out of him.³⁷

37. See Huntington, Op. Cit., p.39.

According to Wakin, however, Huntington's claim is inappropriate for the military professional. It is especially improper for military leadership. To make this clear, Wakin directs our attention to The Law of Land Warfare. It shows us that "The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful"³⁸ It is critical and appropriate, as Huntington as well as Hackett asserts, for the maintenance of military discipline and military efficiency, to emphasize instant obedience and total loyalty to the military ideal of subordination to military superiors and civilian leaders. Ordinary soldiers in a battle context may well be unable to examine orders for legality. It may be difficult, as Wasserstrom has argued,³⁹ to expect them to refuse the orders in combat situations even if they know the orders to be illegal. But according to Wakin, military professionals, officer

38. Department of the Army, The Law and Land Warfare, U.S. Government Printing Office (1956), par.509. p.182.

39. See Richard Wasserstrom, "The Responsibility of the Individual for War Crimes," pp.58-60.

leaders, have to question the justice of the cause. Wakin argues that⁴⁰

[T]he military professional, the officer leader, ought in fact "to seek after" the "justice of the cause." Obedience to orders is not in itself either a legal or a moral claim of right action although it is certainly a mitigating circumstance. Military leaders cannot be merely instrumental to the state. They are instrumental, yes; but they must at the same time accept a portion of the responsibility for the uses of the military instrument.

In short, for Wakin, the argument that obedience to the King wipes the crime of it out of soldiers cannot be appropriate for the military leader. Since the military professional should accept a portion of the responsibility for the use of the military instrument, he ought to consider the justice of the orders given to him by authorized superiors.

Seeking after the justice of the cause may often raise inefficiency in the military command. This is why some military officers, as well as civilian leaders, suppose that they are possibly divorced from moral considerations to seek after the right cause. They insist that the contractual nature of service to the state is merely legal, not moral. For them, efficiency in the military command is prior to anything else. According to Wakin, however, this position fails to recognize the strongest moral claims

40. Wakin, Op. Cit., p.205.

generated by a freely given commitment.⁴¹ Indeed, Wakin supposes, the efficiency of the military due to this moral claim is more powerful than would result from the mere legal claim. In other words, military efficiency is not achieved by the simple virtue of obedience based upon legal duty. For example, it is not difficult to imagine that spontaneous obedience based on moral duty will bring more powerful military efficiency than compulsive obedience. Similarly, a loyalty derived from moral claims would be more efficient in the military command than a forcibly demanded one. Therefore, real loyalty and obedience are not demanded but encouraged. What makes loyalty encouraged loyalty, then? What makes obedience voluntary obedience? According to Wakin, it is our moral integrity. Taking as examples the case of Lieutenant Cally and My Lai, and LaVelle affairs,⁴² Wakin emphasizes the importance of integrity for military efficiency.

What is integrity? To explain the meaning of integrity, Wakin quotes a letter from General John Ryan, former Air Force Chief of Staff, to his commanders.⁴³

Integrity - which includes full and accurate

41. See Ibid., p.206.

42. This indicates the affairs involved falsified reports in the military command. General John LaVelle was accused of ordering falsified reports of bombing strikes which violated the written rules of agreement when he commanded in Southeast Asia. See Ibid., p.207.

43. Quoted from Wakin, Ibid., p.208.

disclosure - is the keystone of military service... In any crisis decisions and risks taken by the highest national authorities depend, in large part, on reported military capabilities and achievements... Therefore we may not compromise our integrity - our truthfulness. To do so is not only unlawful but degrading. False reporting is a clear example of a failure of integrity. Any order to compromise integrity is not a lawful order.

Integrity is the most important responsibility of command. Commanders are dependent on the integrity of those reporting to them in every decision they make. Integrity can be ordered but it can only be achieved by encouragement and example.

Insofar as the highest national authorities depend on reported military capability, and the exact reports are based upon integrity, integrity is the keystone of military service.⁴⁴ It can be ordered, but it can only be achieved by encouragement and example. Accordingly, integrity is one of those critical moral qualities which makes loyalty and obedience possible. For this reason, according to Wakin, integrity is one of the most important virtues the military professionals should have. "Integrity rather than obedience may well be that one among the military virtues upon which all of the others depend."⁴⁵ In brief, for Wakin, integrity is "the foundation virtue for military leaders" not only because of its emphasis on the moral but also its functional necessity. Integrity in military leaders

44. In this sense, integrity means truthfulness, trustworthiness or uprightness. See Nicolai Hartmann, "Truthfulness and Uprightness," WMMP, pp.191-195.

45. Ibid., p.209.

develops loyalty and obedience in their subordinates, and these virtues make possible success in battle.⁴⁶

I have so far reviewed Wakin's arguments regarding moral neutrality in military command and regarding integrity as the most foundational virtue for military officers. By claiming that military professionals must seek after the justice of the cause since they should be responsible for the uses of military forces, Wakin disapproved moral neutrality in military command. Wakin also emphasized the virtue of integrity rather than loyalty and obedience on the grounds that encouraged loyalty is much more efficient than forcibly demanded obedience. Encouraged loyalty or spontaneous obedience is derived from integrity, and thus, for Wakin, it is the keystone in the military service. Wakin's argument for the virtue of integrity seems to be very suggestive and persuasive. If we consider this virtue of integrity required for the military officer as a key to solving the problem of obedience to superior orders, we may well expect that integrity could be a proper answer to that question. For the military leader's moral integrity would not allow him to give illegal or immoral orders to his subordinates, and also would not let him carry out immoral orders from his superior. But it does not appear to be so easy. There could be a conflict between

46. Wakin, "The Ethics of Leadership II," WMMP (1986), p.208.

moral integrity and military efficiency. Although by introducing the conception of encouraged loyalty or spontaneous obedience, Wakin has argued that moral integrity would bring military efficiency, we can still ask the following questions. Can the virtue of integrity in fact be compatible with military efficiency as Wakin supposes? Is the virtue of integrity really "that one among the military virtues upon which all of the others depend"? Michael O. Wheeler who, like Wakin, also considers integrity as the most important virtue for the military leader, attempts to answer these questions. Through an example of the commandership of General George Marshall, Wheeler tries to demonstrate the harmony of moral integrity with military efficiency.

In his article, "Loyalty, Honor, and the Modern Military,"⁴⁷ Wheeler argues that the moral virtue of integrity is compatible with military efficiency. Wheeler, like Wakin and Hackett, claims that the moral virtues are indispensable to modern military efficiency. According to Wheeler, the moral virtues, like integrity, can be very persuasive to today's young soldiers who are skeptical of war and ask why they should obey their superiors' orders. This is why Wheeler believes that the moral virtues are compatible with military efficiency. To make this clear,

47. Michael O. Wheeler, "Loyalty, Honor, and the Modern Military," WMMP, pp.179-188.

Wheeler takes as an example the military commandership of General George C. Marshall. In fact, Wheeler aims at the harmony of military efficiency demanding absolute obedience with human value emphasizing morality. He shows this through a function between integrity and trust, between trust and obedience, and between obedience and loyalty. The commandership of General Marshall, for Wheeler, is the best example for showing this. For General Marshall was a morally truthful and upright person, and at the same time brought victory in the war.

If you are a commander, you may ask yourself an important question about military ability, "What inspires men to be loyal to me?" According to Wheeler, a single theme which forms the answer to this question is "trust." Wheeler's explanations of the function between trust and loyalty are as follows:⁴⁸

If a commander can inspire trust, he will at the same time inspire loyalty. Without trust, he may be able momentarily to compel compliance with his orders, but this compliance will not be the same as loyalty. Loyalty is not compelled; it is inspired. Where loyalty exists, obedience to orders is characterized by a certain kind of superior-subordinate relationship.

What is it, then, that inspires trust? According to Wheeler, what inspires trust is the commander's personal integrity. According to Wheeler, we can see this from

48. See Ibid., p.183.

General Marshall's example. Wheeler quotes several persons who had known Marshall when he was the commander. Some quotations would be worth noting.⁴⁹

"He[Marshall] would tell you what he wanted and then you would do it. There was something about him that made you do it, and of course you wanted to do it the way he wanted - which is the trait of a commanding officer." -- Colonel Truman Smith, one of Marshall's former subordinates at the Infantry school, Fort Benning, Georgia.

"Born in an era which spoke often of responsibility, duty, character, integrity, he was marked by these so-called 'Victorian' virtues." -- Forrest Pogue, the writer of the biography of Marshall.

Dean Acheson speaks of "the immensity of his integrity, the loftiness and beauty of his character."

"During my long and close association with successive American administrators, there are few whose qualities of mind and character have impressed me so deeply as those of General Marshall." -- Sir Winston Churchill.

General Marshall valued loyalty. He was recognized by friend and foe alike as a man of imposing moral integrity. And also, he brought his nation victory. In fact, he was one of the most successful military persons in this century. His success was, as many persons who knew him say, due ultimately to his moral integrity. In short, according to Wheeler, General Marshall's victory in war was based upon his military ability. His military ability is largely dependant on loyalty of subordinates. Their loyalty was

49. Ibid.

inspired by their trust in him, and the trust was rooted to his moral integrity. Thus, integrity was one of the most crucial factors that brought victory in war to General Marshall. According to Wheeler, we can say that the moral virtues, like integrity, are indispensable to military ability: The moral virtues are compatible with military efficiency.

Wheeler, like Wakin, has argued that the moral virtues are indispensable to military ability through the example of General Marshall.⁵⁰ For Wheeler, as we have reviewed, the harmony of military ability with moral virtues is explained by the relation between trust, loyalty, and integrity. Integrity, for Wheeler and Wakin, was emphasized as the most crucial factor in military command. Wheeler and Wakin are absolutely right in arguing that moral integrity is one of the most important elements in military command. But I still fear to hold that moral integrity is the most crucial factor in the military command. It seems to me still controversial to uphold Wakin's assertion that moral integrity is "that one among the military virtues upon

50. The argument that moral virtues are indispensable to military ability may need a larger sample of commanders who inspired loyalty in addition to General Marshall's case. There should be, I believe, a number of practical examples that commanders' moral virtues encouraged their subordinates' loyalty. Without enumerating those cases, however, I suppose, it would not be difficult to imagine that subordinates could be readily inspired to be loyal to their virtuous commanders.

which all of the others depend." Wheeler has argued that the harmony of moral virtues, like integrity, with military ability, was possible in General Marshall. In this respect, Wheeler seems to be right. But his argument that Marshall's victory in war was ultimately dependant upon his moral virtue, namely moral integrity, seems to be logically flawed. It may be true that Marshall's moral integrity inspired his subordinates' loyalty; thus, this made him to some extent better able to command the military. But it would go too far to explain Marshall's victory in war simply by his moral integrity. Even if Marshall's victory was totally dependant upon his subordinates' loyalty, how can we be convinced that their loyalty was simply encouraged by his moral integrity? Although loyalty or spontaneous obedience can be inspired by the moral integrity of the military leader, they are not encouraged simply by his moral virtues. Loyalty and spontaneous obedience for military man can be also inspired by honor, by faith, and above all, by the great cause. For this reason, I strongly wonder if Marshall's victory in war was based, as Wheeler supposed, upon his moral integrity. For this reason, again, I fear to uphold Wakin's argument that integrity is the virtue on which all other virtues depend. I shall now return to some questions suggested in the previous section. Discussions of them, I believe, will

support my critique against Wakin's argument that integrity is the most important virtue in the military on which all others depend.

The following questions are still meaningful: Firstly, when a subordinate officer is issued an immoral order by his superior on the grounds that its performance will result in great military efficiency, should he carry it out? Secondly, when there are two governments in the state, each claiming to be duly constituted and to be deserving of military obedience, which one should the military officer choose? What answers to these questions are possible for Wakin and Wheeler? They have not discussed these questions. But I suppose that we can infer their answers from their arguments regarding the moral virtues of the military man.

Insofar as Wakin and Wheeler argue that the military leader's moral virtue, namely integrity, is compatible with military efficiency, their possible answers to the first question would be one of the following three alternatives: (1) If superior officers are persons of moral character, and they uphold that moral integrity is the supreme virtue in the military command, they should not issue immoral orders to their subordinates. If subordinate officers receive immoral orders, and if they are men of virtue as well as their superiors, they might respond in the two

different ways: (2) They should refuse to obey the orders on the grounds that the orders are immoral, or (3) they should execute the orders not by compulsion, but voluntarily. In this case, their spontaneous obedience is based upon loyalty encouraged by their trust in the superior's moral integrity. There seem to be no possible answers for Wakin and Wheeler except these three. It seems to me, however, that none of these is plausible. The first answer (1) is really desirable, but, I suppose, unrealistic. It is desirable in that superiors's moral integrity would not allow themselves to issue immoral orders to their subordinates, even if the execution of those orders could result in great military interests. Thus, there would be no problem of obedience to superior orders. But if we consider the realities of war, it is not difficult to imagine that there could be cases where immoral orders are needed to obtain great military benefits. Although bombing a hospital is immoral and illegal, as Glover supposes, it may be justifiable to order destroying the hospital where Hitler is lying ill.⁵¹ Without dropping nuclear bombs on Hiroshima, could the Allies have ended the Second World War so early? In this respect, the answer that military leaders bearing moral integrity would not issue immoral orders seems to be

51. See Jonathan Glover, Causing Death and Saving Lives, Penguin Books (1977), p.279.

unrealistic. If it is realistic, there would often be cases where military leaders' moral integrity is in conflict with military efficiency. In this case, the argument, supported by Wheeler and Wakin, that the military leader's moral virtue is compatible with military efficiency should be given up. For the same reason, the second answer (2), the refusal to obey immoral orders, would be also considered as implausible. Disobeying immoral orders may result in great military loss, and in this case, morality is not harmonized with military efficiency.

The third answer (3) that the subordinate's trust in his superior should make him voluntarily obey immoral orders appears at first glance to be plausible. For this answer is likely to support the claim that the military leader's moral virtue is compatible with military efficiency. In other words, since the subordinate carries out orders voluntarily, he may be able to achieve military goals more effectively than performing orders by compulsion; moreover, the trust that makes him fulfill the orders would be based upon his superior's moral integrity. In this case, the superior's moral integrity makes possible the subordinate's execution of orders, namely, the achievement of the military goal, even if they are immoral. But this answer also seems to have a problem. The argument that the subordinate's loyalty based upon trust in his

superior's integrity makes him execute orders even if they are immoral is actually unreasonable. The fact that the superior ordered his subordinate to fulfill immoral orders implies that his moral integrity is not the most crucial virtue in military command. In other words, in this case, for the superior, something that made him issue immoral orders would be more important than his integrity in the military command. Thus, we cannot hold that integrity is the most crucial virtue in the military command. We need to turn our concern to the subordinate's decision. But the same can be said of the subordinate. The fact that the subordinate did not refuse to perform immoral orders implies that his moral integrity is not the most important military virtue for him. What made him obey immoral orders would be something that he considered as more important than his moral integrity. What would, then, make the military man order or carry out even immoral orders? Military efficiency? The great cause? Honor? It is not easy to answer this question. What is obvious, in a case where the military man issues or carry out immoral orders, is that there would be something that is considered by him as more crucial to military command than moral integrity. We shall discuss this in the next section.

It may still be argued that loyalty based upon trust in the superior's moral integrity should make the

subordinate obey even immoral orders. In other words, respect for the superior's integrity should encourage the subordinate's obedience to even immoral orders. This argument appears to be very persuasive, and Wakin's and Wheeler's intention may be directed to this.⁵² But this argument does not show that integrity is the virtue "upon which all of the others depend." For in this case, moral integrity would be simply a means to achieve military goals by encouraging the subordinate to obey even immoral orders. In other words, the virtue of integrity is nothing but a means to get military efficiency. This leads us to another major question, "Do military virtues, like integrity, have just instrumental value to achieve military goals?" This seems to be a very difficult question. I shall not discuss this here, but return to this in the final chapter. Besides, if integrity, for Wakin and Wheeler, is just instrumentally valued, namely it is simply useful for inspiring the subordinate to have loyalty or voluntary obedience to even immoral orders, and it is, in this sense, the virtue upon which other virtues depend, then their argument does not seem to be persuasive. For as has been

52. Wheeler, actually, compares loyalty demanded by force with loyalty inspired by trust, and argues that the latter is much stronger than the former. He may be right, but this example shows the instrumental value of integrity as the basis of trust. See Wheeler, Op. Cit., p.184. Wakin also emphasizes the functional necessity of loyalty, obedience, and integrity. See also Wakin, "The Ethics of Leadership II," WMMP (1986), p.208.

indicated above, loyalty or spontaneous obedience can be more powerfully encouraged by something such as honor, or the great cause, than by integrity.

Furthermore, on the other hand, integrity does not seem to answer properly the second question, "Which government claiming to be legitimately constituted and to be deserving of military obedience should the military man choose?" Indeed, it seems to me that no virtue, suggested above, such as loyalty, obedience, or integrity, can answer this question. This implies that the military man as a professional, especially the military leader, needs to have another military virtue. I shall suggest "historical insight" as an alternative military virtue for the military officer. In the next section, I shall discuss the importance of historical insight as the supreme military virtue, and argue that all the questions suggested above would be more properly answered by this virtue than by any other virtues.

3. Historical Insight

In the previous sections, I have reviewed the arguments concerning the military virtue of loyalty, obedience, and integrity. On the grounds that the military is a service group for the state, and thus that there are

clear limits of responsibility between civilian leaders and military men, Huntington and Smith supported the view that the supreme military virtues for military professionals are loyalty and obedience, for military efficiency.

Accordingly, for Huntington and Smith, considerations of morality are secondary for military men. The primary task for the military professional is the attainment of military goals given by civilian leaders, and seeking after the just cause is beyond his business and responsibility. Unlike Huntington, Wakin argued that since military professionals should be partly responsible for military uses, it was one of their duties to ask the just cause of orders issued by their superiors. Furthermore, Wakin argued that military goals given to them could be more effectively attained by the subordinate's spontaneous obedience than by a forcible one. And the subordinate's voluntary obedience was derived from loyalty rooted upon his trust in the superior's moral integrity. Thus, for Wakin, integrity was the most important virtue required for the military professional. For Wakin, as well as Wheeler, morality, unlike for Huntington, was one of the crucial factors which could effectively achieve military goals. In other words, for Wakin and Wheeler, moral reflections and limits in the military command were compatible with military efficiency.

There should be room for morality in military command. Sometimes, considerations of morality may stand in the way in attaining military goals. In these cases, morality will ask the military man to limit his obligations of obedience, and this limit will impose another burden on him. But as Richard A. Gabriel holds, "The doctrine of ethical limit is not a threat to democracy, it may indeed be the only thing that saves democracies from themselves."⁵³ In other words, it would be reflection on morality "which is really at the foundation of the guarantees that the military will remain loyal in its proper social role."⁵⁴ In this respect, Wakin's claim concerning the necessity of moral integrity for the military professional seems to be more persuasive than Huntington's. For Huntington, reflections of morality were not a primary theme for the military professional; in contrast, for Wakin, they were the most crucial theme for him. But though Wakin's attempt to make room for morality even in the military command was excellent, his argument for integrity as the supreme virtue required for the military officer, as I debated earlier, was controversial. As an alternative supreme military virtue for the military officer as a professional, I suggest historical insight. But this does not mean that other virtues such as

53. Richard A. Gabriel, To Serve With Honor, Greenwood Press (1982), p.181.

54. Ibid.

obedience, loyalty, and integrity would not be needed in the military command. As Wakin emphasized, "success in battle" would be impossible "without them."⁵⁵ The point is that the most crucial moral virtue required for the military officer as a professional is historical insight rather than loyalty, obedience, and integrity. For historical insight would be the virtue on which all other virtues depend. In this section, I shall first define the conception of historical insight. Then, I shall introduce three types of problem situations shown in military history, and review and compare them from the point of view of historical insight. Finally, I shall attempt to answer the questions left from the previous chapters, such as the problem of obedience to superior orders or responsibility for war crimes.

What is historical insight, then? The conception of historical insight can be defined from three different points of view. Firstly, historical insight is a kind of judgment or reflection. It would be worth here noting the concept of judgment. According to the Oxford English Dictionary, judgment is defined as "the action of mentally apprehending the relationship between two objects of thought; predication as in the mind; the critical faculty in the information of personal or individual opinion as

55. Wakin, WMMP (1986), p.208.

opposed to acceptance of doctrine or authority." Gabriel comments on the conception of judgment as follows:⁵⁶

[S]oldiers must be able to judge not only what obligations take precedence over others under certain circumstances, but also why one obligation takes precedence... [A] soldier who has judgment must be able to discern the connections between events as they occur in the empirical world and to discern the connections between his actions and their consequences; and, of course, he must be able to choose among them.

In short, judgment is the ability to give correct precedence to some obligations over others, the ability to discern the connections between acts and their consequences, and above all, the ability to choose the obligation that the military man should undertake. This requires a criterion of choice.

The second point of view to define historical insight is that of morality. There should be room for moral assessment in the military command even in wartime. As Gabriel has argued, and as Wakin and Wheeler, I believe, would admit, only ethical military professionals can guarantee that the military itself will not abandon its high ethical responsibilities of service.⁵⁷ Since war is a social creation, it cannot be independent of moral appraisal. Conduct during wartime should be assessed from the moral point of view. No conduct in time of war can be

56. Gabriel, Op. Cit., p.154.

57. Ibid., p.181.

justified beyond moral evaluation. This is why I suggest that historical insight can be defined as a virtue for moral appraisal. As we have already discussed, however, there could be various moral points of view. In Chapter II, we have examined two moral positions as the basis of the rules or laws of war: Nagelian absolutist deontology and Brandtian utilitarianism. Which moral position would be more appropriate for solving the problems facing the military man in wartime? This question leads us to the third point of view for defining the conception of historical insight.

The third and the most important point to consider for the definition of historical insight is the viewpoint of history. Suppose that an officer was ordered to burn Paris. Suppose that a pilot was ordered to drop nuclear bombs on Hiroshima. In a difficult and even dangerous situation facing the military officer in time of war, his decision would be ultimately evaluated by history. For the results of his decision may have a great influence upon the development of history. The more difficult and dangerous the situation in which he is involved, the more the results of his choice may influence history. If the officer who was ordered to destroy Paris had carried out the order in spite of its immorality, how much would his decision have influenced the history of France? If the pilot ordered to

drop nuclear bombs on Hiroshima had not complied with the order because of its immorality, how much would his decision have influenced the history of the world? The officer who was ordered to burn Paris did not obey that order; the pilot did. What made them decide so? Their moral positions? I would answer, yes. But I would rather say that their decision was based upon their historical understanding, or their historical knowledge. Again, I would say that their decision was a moral choice based upon their historical knowledge. For their choice has influenced the development of the history of the world, and whether or not their choice was right has been evaluated by history (I shall discuss this more later). In short, the conception of historical insight can be explained by considerations of these three elements, namely judgment or reflection, a moral view, and historical knowledge. From these considerations, historical insight can be defined as 'moral reflection based upon historical knowledge,' or 'historical knowledge through moral reflection.' A military soldier having the virtue of historical insight, therefore, would be a soldier who has judgment ability, moral point of views, and historical understanding.

A question may be raised: What kind of moral view can historical insight imply? It is not easy to answer this question, for the development of history does not seem to

be explained by just one moral view. It may be true that the utilitarian point of view has largely explained moral phenomena in history, but there could be many parts that it cannot explain. Therefore, I suppose, which moral view historical insight implies depends upon situations with which the military man is confronted. This is why I emphasized historical knowledge for the military professional. I shall return to this again.

To make clear the conception of historical insight, and to elucidate why this can be regarded as the supreme virtue for the military professional, I shall discuss the three following cases in which a military officer was ordered to do terrible things:

(1) On August 23, 1944, the following order was transmitted from Adolf Hitler's Supreme Headquarters in East Prussia to the Commanding General of Greater Paris:⁵⁸

The defense of the Paris bridgehead is of capital importance from both a military and political standpoint. The loss of the city would lead to the loss of the entire coastal plain... In all history, the loss of Paris has inevitably brought with it the loss of all France... Paris must at all costs be defended by locking the city inside a strong position... Paris must not fall into the hands of the enemy, or, if it does, he must find there nothing but a field of ruins.

58. Larry Collins and Dominique Lapierre, Is Paris Burning?, New York (1966), p.211.

(2) On August 6, 1945, Paul Tibbets, the twenty-nine-year-old American pilot, was ordered to drop a nuclear bomb on Hiroshima. Hiroshima was chosen as the most desirable target "to make a profound psychological impression on as many of the inhabitants as possible."⁵⁹

(3) On March 15, 1968, during the Vietnam war, Lieutenant Calley, the platoon leader, received specific orders from Captain Medina to burn the houses, destroy the crops and foodstuffs, and kill everything, even noncombatants in the hamlet of My Lai, which it was needed to pass through for the next operation.⁶⁰

All these orders were awful ones. The military officers who received these brutal orders would have been in a terrible situation.⁶¹ There would have been in their

59. Gar Alperovitz, "Why the United States Dropped the Bomb," Technology Review, August/September (1990), p.28.

60. See Lt. Gen. W.R. Peers, The My Lai Inquiry, W.W. Norton & Company (1979), pp.169-170. According to Peers, there is less unanimity about what Captain Medina told Calley and other platoon leaders concerning noncombatants. Thus there can be doubts for holding that Calley received orders to kill noncombatants at My Lai. But as Peers supports, Medina may have created the impression in the minds of many men in the company that they were to kill or destroy everything in the area "by telling them that no civilians would be in the hamlet...and by not issuing any instructions as to how to deal with civilians." According to Peers, Medina also reminded them that "they had lost several men to enemy mines and booby traps and this operation was their chance to get even: it was to be a revenge or grudge battle." For this reason, and for convenience, I shall suppose that Calley received orders from Medina to kill everything including noncombatants at My Lai.

61. It may be argued that the officers who received those terrible orders might have not suffered as much as

minds conflicts between the duty to follow orders as soldiers and the duty to follow conscience as human beings. There would have been conflicts between loyalty to the state as a soldier and loyalty to morality as a human being. Although all the orders were immoral, the decisions of the military men involved in those terrible orders were different from each other. In the first case, Hitler's demand for the total destruction of one of the most

expected from those orders. In the book, Is Paris Burning?, General Dietrich von Choltitz is described as an anguished soldier on account of the terrible order: "What shall I do? What shall I do?" (p.278.) In contrast, however, Paul Tibbets who dropped the nuclear bomb on Hiroshima replies, when he was asked whether he had no second thought about the original bombing mission, that "People get mad when I say this, but the bombing was as impersonal as can be. I felt no responsibility for the weapon. I didn't invent it or order its use. I just dropped the damned thing." Furthermore, Tibbets says that if war were to break out today he would probably do the same thing he had done on August 6, 1945. According to him, "This is the logic of war." Tibbets may be right. Indeed, he may have been a successful soldier. But his saying that he feels no responsibility for dropping bombs makes us doubt whether he has a noble moral character. Wakin would say that as a military professional, Tibbets should have accepted a portion of the responsibility of the uses of the military instrument. If Tibbets's simple answer, "I dropped the damned thing" means that 'I just followed the order because it was given to me by the superior,' then he might well be blamed for irresponsibility as a military professional. Nevertheless, I still believe that his execution of the order can be justified by the virtue of historical insight. What made him follow the terrible order, and made him still believe that his decision was right is, I suppose, based upon the evaluation, by history, of the result from his execution of the order: It hastened to surrender of Japan. See Greg Mitchell, "The Victim and the Pilot," The Progressive, August (1989), p.28. See also, about the hastened surrender of Japan, "President Rejects Apology To Japan," New York Times, December 2 (1991), p.A12.

beautiful cities in the world was never carried out. General Dietrich von Choltitz who received this savage order could not fulfill it: he disobeyed it. In the second case, in contrast, Paul Tibbets, the pilot of the Enola Gay, completed that order. His decision resulted in the end of the Second World War with the loss of a great number of innocent people's lives. In the third case, Calley's decision to follow orders brought about the death of a number of noncombatants.

I suppose that the decisions of Choltitz and Tibbets, though different, have been considered as justifiable, while Calley's has not been. What has made us consider that their decision was just, I believe, is not their loyalty, obedience, or moral integrity, but their historical insight. In other words, if their decision was just, its justification cannot be explained by the virtue of loyalty, obedience, or integrity, but can be explained by historical insight. Loyalty to the state can explain Tibbets' decision, but it cannot explain Choltitz's; while obedience to the superior's order can explain Tibbets' decision, but not Choltitz's. Choltitz's disobedience may be explained by his moral integrity, but Tibbets' obedience to the terrible order cannot be elucidated by his moral integrity. Nevertheless, I believe, their decisions were just, and only by historical insight, namely by moral reflection

based upon historical knowledge, can the justifications be explained. For when they were issued those orders, I suppose, both Choltitz and Tibbets had a moral point of view founded upon their historical knowledge, namely, in these cases, Brandtian utilitarianism - the principle of long-run utility.⁶² Although Choltitz chose, if I may borrow Huntington's expression, the way of a human being rather than that of a soldier, and Tibbets, in contrast, chose the way of a soldier rather than a human being, I suppose, their choices could be explained by a moral view, in these cases a long-term utilitarian point of view, based upon historical knowledge: Choltitz's disobedience to the brutal order saved the beauty of Paris, and Tibbets' obedience resulted in the quick end of the war.

But on the other hand, Calley's case seems to fail in its justification, not only from a special moral view, but also by historical insight. Calley may be of course considered a soldier who believed that the most important

62. Choltitz's choice of disobedience to the brutal order may be explained by the Nagelian absolutist deontology. Indeed, Choltitz might have been loyal to the duty to follow his conscience as a human being: He could not choose, as a moral being, the destruction of the beautiful city in spite of losing the military and political interests that would have resulted from his alternative choice. But Choltitz's choice, on the other hand, may be also explained by the utilitarian point of view. In the long-term calculation, it may follow that the destruction of the most beautiful city in the world might bring greater loss than the political and military gains which, otherwise, might have brought in to his own country.

virtue for a soldier is unquestioning obedience.⁶³ But as Wheeler and Wakin have pointed out,⁶⁴ Calley, as a military professional, should have reflected on the order given to him. In other words, since Calley's case "involved the interwound questions of obedience to orders versus both the legality and the morality of these orders concerning the treatment of prisoners,"⁶⁵ he should have at least sought after the legitimacy of those orders. In this respect, the case of Lieutenant Calley could be explained by lack of legal and moral reflection required for the military professional. But Calley's case can also be explained by his lack of historical insight. He did not consider how the result of his conducts would be evaluated in the future: He had no reflection on history. In other words, if he had had the virtue of historical insight, namely, if he had morally reflected on the result which would be brought in the future by his conduct, then he might have at least asked

63. When the army's judicial system singled him out for blame and punishment, Calley claimed that he was only doing what Medina, the superior, had ordered him to do. See Walzer, *Op. Cit.*, pp.310-311.

64. Wheeler indicates the problems of the military officer's unquestioning obedience. According to Wheeler, even in combat environments, there is usually some reasonable delay between the giving and the carrying out of an order. This interval allows soldiers to have time for reflection upon the order: "Why was the order given? What purpose does the order seek to obtain." Thus, as Wakin supports, the professional officer should reflect orders given to him, and seek after their justification. See Wheeler, *Op. Cit.*, p.181. See also Wakin, p.207.

65. Wakin, *Ibid.*

his superior the legitimacy of the orders, and also have never issued such brutal orders to his subordinate soldiers. The same can be said of Captain Medina from whom Calley directly received those orders. It seems to me, in short, that they lacked reflection not only on morality but also on history: They did not have the virtue of historical insight.

It may be argued that if Calley's lack of historical insight means his lack of reflection on the result which would be brought in the future by his conduct, then the meaning of historical insight, in Calley's case, would be the same as that of the consideration of long-term utility. What is then the difference between historical insight and a long-range utilitarian point of view? As I have already held, historical insight is based upon a moral point of view, and in this case, it is founded upon the principle of long-run utility. I believe, however, that historical insight is not always based upon the utilitarian principle. It can be, I suppose, explained by other moral principles. For example, in the case of Choltitz, his choice (I supposed that it was made by the virtue of historical insight) can be explained by absolutist deontology. In other words, Choltitz's disobedience to the terrible order can be explained by his faith that he, as a human being before a soldier, should not destroy such a beautiful city

as Paris, regardless of the results of his disobedience. Hence, I suppose, historical insight does not have to imply just utilitarianism as its moral basis.

I have so far supported the choices of Choltitz and Tibbets, though the former's choice was to disobey and the latter's was to obey orders; both could be justified in terms of their influence on the development of world history that resulted from their choices. In contrast, Calley's obedience to the brutal order could not be considered just; He failed to reflect, as a military professional, not only on the legitimacy of the orders but also on the result of following orders in the future. In this context, however, it would be worth noting questions suggested by E. M. Adams:⁶⁶

What is the moral difference between the bombers in these cases [Dresden, Hiroshima, Nagasaki etc.] and the foot-soldiers in the My Lai massacre in the Vietnam? Can anyone seriously believe that the bombers and the missile launchers have moral immunity for their acts but the soldiers at My Lai did not? If so, do they base the difference on the grounds of military necessity - that the actions of the bombers and missile launchers may be necessary for the prosecution of the war but the killings at My Lai were useless? Even if the massacre at My Lai were useless, an army of foot-soldiers could terrorize the civilian population in a way that might be useful in coercing the political will of the society. If so, would soldiers have moral immunity for such violence against noncombatants?

66. E. M. Adams, "The Moral Dilemmas of the Military Profession," Public Affairs Quarterly, Vol. 3, No. 2, April (1989), p.9.

According to Adams, if dropping bombs in the vicinity of noncombatants could have moral immunity on the ground of military necessity, then attacks like the My Lai massacre should be justified for the same reason. But Adams says, "there can be no moral immunity for those who participate in this kind of violence."⁶⁷ He seems to suggest two reasons: One is based on the fact that "many may support the war effort in countering the military forces of the enemy but reject any responsibility to support military attacks on the enemy population," and the other is based on widespread agreement that "there is a difference in moral vulnerability to attack on the part of the agents of violence and of those who support."⁶⁸ In other words, many feel that there is a difference between targeting the workers in a munitions factory, and targeting soldiers, even if the former supports directly or indirectly the latter. Therefore, for Adams, the bombing of Hiroshima, as well as the My Lai massacre, cannot be immune from moral responsibility.

If Adams' argument is right, it may seem to make powerless my argument that Tibbets' obedience to orders could be justified, while Calley's could not. But I do not suppose that my view is basically different from Adams's view. In the cases of Tibbets and Choltitz, my suggestion

67. Ibid., p.11.

68. Ibid., p.10.

that their choices could be justified in light of their influence on the development of history does not imply that they were immune to all responsibility for the result of their choices. In other words, as military professionals, they, I suppose, should be morally or militarily responsible for the result of their decision. What does it mean, then, that their choices could be justified? Does it mean that the decision based upon its influence on history can be justified without regard to morality of the agent? My answer is 'no.' As I have defined the conception of historical insight, it is never neutral concerning morality. The point is that the justification of the military man's choice is possible without regard to his personal responsibility for the result of his choice. In other words, for example, though the choices of Tibbets and Choltitz could be justified in light of their great influence on the development of world history, it does not imply that they were immune from either moral or military responsibility for the results of their choices: Choltitz, as a soldier, should be militarily responsible for the loss of military interests that his state, otherwise, might have had, and Tibbets, as a human being, should be morally responsible for the death of a number of innocent people.⁶⁹

69. I would like to assume that Tibbets' decision to obey the order of dropping a nuclear bomb on Hiroshima was made by his deep moral reflection on the development of world history resulted from his execution of the order. In

In other words, Choltitz himself should be ready to bear responsibility for the loss of military gains for his country (for example, for him, resigning his military office or submitting himself for trial by a court martial); Tibbets himself should take responsibility for the death of a number of innocent people (for him, at least, an apology for the noncombatants' death or a spontaneous resignation of his military office). Since they were both military professionals, and since they themselves chose either to obey or to disobey orders given to them, they should bear, I suppose, either moral or military responsibility for the results of their choices, regardless of the justification of their choices in light of their influence on history. This implies that the military officer who is in a difficult situation, like Tibbets or Choltitz, cannot avoid bearing personal responsibility, whether it is moral or legal one. If he chose to obey the terrible order, he

this respect, his decision could be considered as moral, in this case, from the utilitarian point of view. I would also assume that he should have taken moral responsibility for the death of large numbers of noncombatants in the sense that he would have at least suffered from the fact that his execution of the order brought on the death of many innocent people. But actually I wonder if he really did. As I have already pointed out, he might have obeyed, in reality, the order without reflection. According to his words, he seems to have thought that the bombings on Hiroshima was a kind of reprisal against Japanese who had attacked Pearl Harbor. Tibbets says: "I'm sorry for...others who got burned up down there at Hiroshima, but I feel sorry for those who died at Pearl Harbor, too." See Michell, "The Victim and the Pilot," p.28.

should bear, as a human being, moral responsibility for the result of his choice (for example, for killing noncombatants); if he chose to disobey the brutal order, he should take, as a soldier, military responsibility for the result of his choice (for example, for the loss of military interest which might have been gained if he had obeyed the order). For this reason, I suppose that my argument would be basically the same as Adams's argument that no one has moral immunity to attack noncombatants. Nevertheless, I suppose that the choice of the military officer who is in a dilemma, like Tibbets or Choltitz, could be justified in light of the influence on the development of world history. This assumes that the military officer's choice in a dilemma can be justified irrespective of the problem of personal responsibility for the result of his choice, whether it is moral or military one.

We need to note here the meaning of 'moral' when Adams says that "there can be no moral immunity for those who participate in violence." When he argues that the act of dropping bombs on Hiroshima, as well as that of killing noncombatants at My Lai, cannot be morally immune, what does "moral" mean? Does it mean that the decision to bomb Hiroshima was an immoral one like the killings at My Lai? Or does it mean that those who took part in that violence should bear personally moral responsibility for the death

of large numbers of noncombatants resulted from the violence? I have argued that the bombing on Hiroshima could be justified in light of its influence on the development of world history. I have supposed that the pilot's choice would have come from the virtue of historical insight, namely moral reflection (in this case, utilitarianism) based upon historical knowledge. Could I not, then, suppose that the pilot's choice was a moral one? If the pilot's choice was made through moral reflection, and if it was right, then we could say that his choice was morally correct. I have also asserted that the pilot cannot avoid bearing the moral responsibility for the death of innocent people, and this implied, in this case, his personal moral responsibility. And in this sense, my argument is not basically different from Adams's. But if the word of "moral" means, for Adams, that the decision to bomb Hiroshima was an immoral one, and thus it could not be morally justified, then his view would be opposite to mine. If Adams's view is the latter, it would be on the same line as Nagelian absolutist deontology, which I have already rejected on the ground that it ignores the realities of war.⁷⁰

70. I have rejected Nagelian absolutist deontology on account of its ignorance of the realities of war. But I have also held that historical insight could be combined with not only the long-run utilitarian, but also with the deontological, point of view in the example of Choltitz's disobedience. It may be argued here that these two

I have argued that the choices of Choltitz and Tibbets, though different from each other, could be justified in light of their great influence on the development of history. I have also asserted, however, that they, as military professionals, could not avoid being morally or militarily responsible for the result of their choices: Choltitz, as a soldier, should be responsible for the loss of military interests that might have been gained, and Tibbets, as a human being, should be morally responsible for the death of innocent people. It may be argued, however, that it is ridiculous to hold them to be responsible for the results of their choices in spite of their choices being right. But if we consider that they

arguments seem to be contradictory. But I do not suppose so. I have held that historical insight is based upon a moral point of view, whether it is a deontological or a utilitarian viewpoint. Considering that historical evaluation of a person's conduct is possible long time after his acting, it may be natural to hold that historical insight would be more readily combined with the principle of long-term utility than deontology. But it does not follow from this that historical insight is always based upon the principle of long-run utility. There could be acts that can never be justified by the long-run results of the acts. For example, some Cabinet members' decision in 1910, namely the endorsement of the Japanese annexation of Korea, could never be justified, whatever results their decision may have brought in the modernization of Korea in its history. In this case, they lacked the virtue of historical insight: they should have acted in accordance with deontological point of view based upon historical knowledge. For this reason, historical insight does not have to be based upon utilitarianism. The same can be said of deontology. This is why I have claimed that historical insight is based upon a moral point of view, whether it is utilitarianism or deontology.

were in difficult situations, and their choices were made by themselves, it would be natural that they should be responsible for the results of their choices. Whichever way they may choose, they cannot avoid bearing the responsibility for the result. For military professionals, it may be a sort of tragedy to be faced in those situations. But it would be almost impossible for soldiers not to be faced with those situations. As I have argued, however, their choices could be justified in light of their influence on the development of history regardless of their personal responsibility for the result, whether it is a moral, military, or even legal responsibility.

Now I shall return to some questions which have already been raised but not answered. The first was whether or not the military officer who received immoral orders from his superior should follow them. If we consider historical insight, as I have suggested, to be the supreme virtue for the military professional, then this question may not be difficult to answer. Whether or not he obeys those orders, if his decision was made in light of its influence on the development of history, I suppose, it could be justified. But even if his decision can be justified, in a case where he obeyed those terrible orders, he may not be personally immune from moral responsibility for the result of his choice (for example, I supposed

earlier an apology or the resignation of his military office). In a case where he disobeyed orders because of their brutality, on the other hand, his choice could be also justified if it was made by moral reflection based upon historical knowledge; but he may not avoid bearing the responsibility for the loss of the military interest which might have been achieved if he had obeyed orders (I supposed resigning his military office or submitting himself for trial by the court martial). This may be a tragic burden for the military officer. As a military professional, however, he could not be free from those responsibilities.

The second question was about the choice between the two governments claiming to be duly constituted and to be deserving of military obedience. If the choice of the military officer was made by moral reflection based upon history, then his choice could be justified, without regard to his personal responsibility for the result of the choice. As a military professional facing the difficult situation, he should make the decision himself by deep moral reflection founded on history; if he made decision, and was convinced of its rightness, then he should not shrink taking the responsibility for the result of his choice. Rather he should prepare himself for bearing the responsibility, even if it requires his sacrifice.

In connection with the virtue of historical insight, there seems to remain another important question. The question is this: How can the military officer facing difficult situations make a desirable or correct decision founded on historical insight? Is it possible, in other words, for an officer to have historical insight in advance of acting? This question is ultimately related to the cultivation of the virtue of historical insight. I believe that it is possible for military officers to cultivate this virtue which is expected to help them make a desirable decision in difficult situations. The cultivation of the virtue of historical insight, as well as that of other virtues, will depend upon the education of military officers as professionals - especially their education in history and ethics. Admiral Stockdale's actual example shows how important an education in classics and historical understanding is for military officers faced with trouble situations. According to Stockdale, who was shot down over North Vietnam in 1965 and was held prisoner for seven-and-a-half years, it was a good classical education and an understanding of history that made him survive and keep his honor in that terrible situation. He says⁷¹

School days can be thought of as a time when one is filling the important stacks of one's memory library.

71. James Bond Stockdale, "The World of Epictetus: Reflections on Survival and Leadership," WMMP, p.17.

For me, the golden doors were labeled history and classics. The historical perspective which enabled a man to take himself away from all the agitation, not necessarily to see a rosy lining, but to see the real nature of the situation he faced, was truly a thing of value.

As Stockdale's example shows, if historical perspective built up through the education of history, classics, and moral philosophy can make military officers see the real nature of the situation they faced, then it would be possible to hold that the officers can cultivate the virtue of historical insight through education, and that it will help them to come to a right decision in difficult situations. The suggestions of the way and process of education for the cultivation of historical insight are important, but they, I suppose, would be beyond the limit of this dissertation.

CHAPTER V

CONCLUSIONS

1. Moral Conflicts and Military Virtues

"The world of necessity is generated by a conflict between collective survival and human rights."¹ This conflict is often described in terms of a conflict between utilitarian and absolutist deontologian modes of thought.² Many philosophers have made an effort to overcome this conflict. But as Thomas Nagel pointed out,³ there may be no single room for these two moral point of views. We cannot

1. Walzer, Just and Unjust Wars, Basic Books (1977), p.325.

2. Ibid. Thomas Nagel, as we have discussed in Chapter II, is one of the philosophers who have viewed this conflict as a conflict between utilitarianism and absolutist deontology.

3. According to Nagel, there is no room that "these two forms of moral intuition are capable of being brought together into a single, coherent moral system." Furthermore, since there is no moral or honorable course free of guilt and responsibility for evil, we have to choose one of these two moral views. Nagel tried to defend absolutist deontology. See Thomas Nagel, "War and Massacre," War and Moral Responsibility, Princeton University Press (1974), p.23.

help but choose one of them when they conflict with each other. As we have so far reviewed, Nagel, Hartle, and Adams attempted to avoid the stark gap of these two views by supporting absolutist deontological moral view, while Brandt, Huntington, and Walzer⁴ tried to overcome conflicts between the views by choosing the utilitarian viewpoint.

I have so far attempted to answer the following questions. The answers to these questions were actually one of the central themes of this dissertation: "When the soldier receives immoral and/or illegal orders from his superior, whether the superior is a civilian or a high-ranking military officer, what should he do?" "Who should be responsible for the result from the soldier's execution of such orders?" The situation facing the soldier is the dilemma that the two forms of moral intuition conflict with each other: collective survival is based upon utilitarian point of view, and human rights are founded on absolutist deontology. This has been one of the most difficult questions plaguing not only military men but also civilian leaders in the military command. This problem has often

4. Although Walzer has emphasized that the soldier should choose the way of a human being even if he would meet with his sacrifice, he finally says that "political leaders can hardly help but choose the utilitarian side of the dilemma" when they are involved with the problem of choice between collective survival and human rights. But he says also that this does not mean that political leaders are free of guilt when they do that. See Walzer, Op. Cit., p.326.

been called 'the problem of obedience (or disobedience) to superior orders.' The difficulty of this problem lies in that it requires the soldier to choose either the way of the soldier or the way of the human being. "As a soldier, he owes obedience; as a man, he owes disobedience."⁵

As a part of the answer to these questions, I have reviewed the conception of war, war crimes, and the laws or rules of war, and then considered two types of moral thought as the basic principles for the laws or rules of war: Nagelian absolutist deontology and Brandtian utilitarianism. But none of them were considered as appropriate for the moral foundation of the rules of war: The former was supposed to fail to notice realities of war, and the latter was regarded as impractical as an instruction for army manuals. Nevertheless, Hartle elucidated that the current laws of war are based upon these two humanitarian principles, and attempted to find a link between them. But when these two principles conflict with each other, even Hartle could not but choose one of them: He chose Nagelian absolutism.

As another part of the answer to the problem of obedience to superior orders, I have discussed the problem of the responsibility of the individual for crimes committed by subordinates under orders of superiors. Three

5. Samuel Huntington, The Soldier and the State, p.78.

doctrines were examined as answers to this problem: The doctrine of respondeat superior, the doctrine of absolute liability, and the mens rea principle. But none of them were considered as proper for the solution of the problem. One of the major rationales debated against the doctrine of respondeat superior was the conception of the soldier according to which he can never be transformed into a mere instrument of war. The argument against the doctrine of absolute liability was that it totally denies the factors of mistake of law and compulsion under which the soldier in substance commits crimes. Against the mens rea principle, the difficulty of the proof of the lack of mens rea was suggested. Nevertheless, Wasserstrom attempted to defend the soldier's plea of superior orders by pointing out the real situations of the soldier and the problems of the existing laws of war. But Wasserstrom's suggestion for the doctrine of respondeat superior was also rejected on the grounds that military leaders, as well as ordinary soldiers, could meet with the problems of the current laws of war. Nonetheless, Wasserstrom's demand that superiors, especially civilian leaders should be responsible for crimes committed by their subordinates led us to discuss military leaders rather than ordinary combat soldiers.

I have proposed that we need to shift our concern from the objective moral point of view to the subjective moral

attitude of the soldier. Insofar as there is no objective way of solving for the problem, I supposed that the key to the solution of the problem would be the subjective moral attitude or virtue of the soldier who is in the dilemma. I have also suggested that we can restrict our concern to the military officer, not to the ordinary soldier. Unlike the ordinary soldier, the officer, as a military professional, could (or should) have time to reflect or to seek after the justice of orders given to him.⁶ On these suggestions, I have examined four kinds of virtues which, I suppose, the military officer should cultivate: loyalty, obedience, moral integrity, and historical insight.

2. Virtues for Military Officers

"Persons of good moral character make the right moral choices even when doing right can carry severe personal consequences."⁷ Some philosophers have supposed that this statement can be applied to the soldier, as well as the person who is in the dilemma of choosing between obedience to savage orders and disobedience to them. What kind of moral character, then, is desirable for the military

6. I have obtained this idea from Wakin and Wheeler - the idea that the military officer as a military professional should ask or seek after the justice of orders issued by his superior.

7. Malham M. Wakin, "Wanted: Moral Virtues in the Military," Hastings Center Report, October (1985), p.25.

officer? In other words, what kind of virtues can be required for the military officer? Various moral virtues have been claimed to be desirable for the military professional: Corporate spirit, honor, courage, loyalty, obedience, integrity and so forth. For the purpose of obtaining the key to the solution of the problem of superior orders, however, we need to know what virtue is considered as the supreme virtue for the military professional. For when the virtues conflict with each other, what makes him choose between them would be the supreme virtue. For this reason, I have considered the four following virtues as the alternative supreme virtues for the military officer: Loyalty, obedience, integrity, and historical insight.

The military profession exists to serve the state. For this reason, loyalty to the state or unquestioning obedience to orders given by the state were considered by many scholars as the supreme value for the military professional. Considering the fact that the state is the ground for the existence of the military, it may follow that the emphasis on loyalty and obedience to the state by the military professional cannot be too great. But loyalty could not be regarded as the supreme military virtue on the grounds that there could be conflict between loyalty to the state and loyalty to the statesman as the superior of the

military man. Loyalty also does not say which government to be loyal to when two governments claim to be legitimate. The virtue of obedience could not be considered as the supreme one for the same reason.

The virtue of integrity was suggested as the supreme virtue more powerfully than loyalty and obedience. It was powerful in that it can explain not only the soldier's keeping his personal morality as a human being but also attaining military efficiency as a soldier in the military command. In other words, when military officers consider moral integrity as the most crucial value in the military, their reports on military operations would be regarded as truthful, and this would improve military efficiency. Furthermore, the military commander who has moral integrity can encourage his subordinates to be loyal to him, and their inspired loyalty can make them achieve readily military goals. But the following arguments were suggested against the view that integrity is the most important value in the military command: Integrity cannot answer appropriately the questions suggested above, namely the questions concerning the soldier's choice between obedience and disobedience to immoral orders; if it tries to answer them, it would be again in the conflict of the choice between the soldier's morality and military efficiency. Moreover, we cannot suppose that the subordinate's loyalty

is powerfully encouraged only by the superior's moral integrity: It can also be inspired by his honor, corporate spirit, and the great cause.

Comparing the virtues suggested above as the supreme value with each other, I have argued that historical insight, defined as moral reflection based upon historical knowledge can be considered the supreme virtue for the military officer, especially for the military leader. The reason that I have supported historical insight as the supreme military virtue is that the choice of the military officer in the problem situation, namely the problem of obedience to superior orders, could be more clearly explained by the virtue of historical insight than by any other virtues. For the firm establishment of my argument, I have examined three cases of morally problematic orders given to a military officer shown in military history, and tried to affirm that these cases can be explained by the virtue of historical insight.

3. Further Problems

There seem to be some questions which are connected with the theme of this dissertation, but have been untouched. The first is the problem of the distinction or connection between ethics and virtue. The problem of the military man's choice between obedience and disobedience to immoral and/or illegal orders is the problem of ethical choice of actions. On the other hand, the question, what is the supreme virtue for the military professional, is not the question of ethical choice of actions. Nevertheless, I have attempted to answer the question of superior orders in terms of the supreme virtue for the military officer. It will be true, however, as Gabriel points out, that although virtues involve a disposition toward certain actions, they are not the equivalent of the actions themselves. According to Gabriel, "Virtues are ways of being rather than ways of doing, although they are inevitably connected when ethical action must be undertaken or ethical choices made."⁸ This argument may be right. But although there is clear distinction between virtue and ethics, I suppose that there could be an unbreakable connection between them. I still believe that persons of good moral character, as Wakin

8. Richard A. Gabriel, To Serve With Honor, Greenwood Press (1982), p.151.

emphasized, make the right moral choices. It would be ridiculous to argue that the person who has certain desirable moral virtues can habitually act immorally, even if moral virtues should be distinguished from ethical choices. I can agree with Gabriel when he says that "Without some virtue ethical action is impossible, but...the inculcation of character traits in and of itself will not produce ethical soldiers." But I cannot agree with his argument that "men of great character are quite capable of committing grievously immoral acts"⁹ The simple inculcation of virtues in themselves may not produce ethical soldier. But I still believe that the man of moral character would not act immorally. For the reason that we call a person a man of moral character is based not only upon his moral character but also upon his moral acts. Once he acts immorally, we would not call him any more a man of moral character. For in this case, what made him act immorally would be more crucial for him than his moral character, and thus he does not deserve any more to be called a man of moral character when he acted immorally. As Lao Tzu, an ancient Oriental sage, says, "The way to do is to be."¹⁰ In other words, we acquires virtue, as Aristotle

9. Ibid., p.152.

10. Quoted from Wakin, WMMP, p.216. See also Lao Tzu and Chuang Tzu, Samsung Press (1979), p.92.

says, by doing virtuous actions.¹¹ Therefore, I suppose that I could still explain the problems of superior orders in terms of the supreme virtue for the military officer.

The second question concerns the relation between moral virtues and military virtues. This question would go like this: "Is moral virtue valued as an end not simply as an instrument for the person?" "If so, can we suppose that military virtues, as well as moral virtues, are valued as ends not simply means for the soldier?" Whether moral virtues are valued as ends or as means for the person is not easy to answer. I shall not discuss this in detail here. I simply suppose, as Dewey did,¹² that moral virtues should be pursued not only ends but also means for the person. They are valued as ends in the sense that they are intrinsically valued regardless of their consequences.¹³ They are also valued as means in the sense that they are

11. Aristotle says that "...we become just by performing just acts, temperate by performing temperate ones, brave by performing brave ones." See Aristotle, The Nicomachean Ethics, Trans. by J. A. K. Thomson, Penguin Books (1976), pp.91-92.

12. Dewey attempted to break down the distinction between what is good as an end and what is good as a means on the ground that most of things we do or lives through are both good or bad in themselves and good or bad in their results.

13. Immanuel Kant employs this sense of intrinsic value. According to Kant, a good will is good not because of what it effects or accomplishes but because it is good through its willing alone, namely, "good in itself," and "its usefulness or fruitlessness can neither add to nor subtract from, this value." See Immanuel Kant, Groundwork of the Metaphysics of Morals, H.J.Paton (trans.), New York (1948), pp.61-62.

useful for achieving desirable consequences. For example, for William Frankena, the virtues of benevolence and justice were considered to be valued for the person not only in themselves but also in their consequences.¹⁴ I suppose that the same can be said of military virtues. For the soldier, namely for the military professional, military virtues should be pursued not only as ends but also as means. This is why the soldier feels uneasy when he is in a conflict of the choice between moral virtues and military virtues.¹⁵

Lastly, there remains another important question. This question concerns personal responsibility for the results of the soldier's choice. I have argued that the soldier as a military professional should be responsible for the

14. See William Frankena, Ethics, Prentice Hall (1973), pp.63-65.

15. It may be argued that some of moral virtues, as well as military virtues, are pursued as simply means for desirable consequences. In other words, they are valued instrumentally rather than intrinsically. For example, Mark S. Halfon elaborates why we cannot consider the virtue of integrity to be intrinsically valued. According to him, there is an important difference between believe and is. Thus, we can suppose that "a Nazi could come to have integrity." He could believe that he had integrity. Therefore, for Halfon, the virtue of integrity cannot be said to be intrinsically valued without considerations of its consequences: Integrity can be simply regarded to be instrumentally valued. But if we admit the difference between believe and is, I wonder if we can suppose that there are any moral virtues considered to be intrinsically valued. For without reflections of their results, we could never regard them to be valued. See Mark S. Halfon, Integrity: A Philosophical Inquiry, Temple University Press (1989), pp.126-137.

result of his choice, whether it is moral, military or even legal responsibility, since he himself chose it. But it may still be objected that his choice was made under difficult situations that it might have been made, even if he had not chosen, by some other soldier instead of him, and thus it was inevitable, whether it was made by him or by the other soldier. It may not be difficult to imagine that the order of bombing Hiroshima would have been carried out by some other pilot, even if the pilot (Tibbets) had refused to do it. If so, it may be considered as improper to hold the pilot to be responsible for the result of the execution of the order, even if the responsibility is moral one. But the point is, as I have consistently maintained, that he himself, as a military professional, made the choice, and thereby, took part in the use of the terrible instruments of war. He can never avoid being responsible for the consequences of his choice, whether he chooses obedience or disobedience. But the fact that he can never escape from the responsibility for the results of his choice should not lead him to an arbitrary choice, or to unquestioning obedience without reflections on the consequences. It is true that unquestioning obedience to the orders of superiors is considered an essential military virtue. Furthermore, it may make the soldier feel easy because his unquestioning obedience will not lead him to a trouble for

the choice between obedience and disobedience. But the soldier as the military professional, I suppose, should have time to reflect or seek after the justice of orders before he chooses unquestioning obedience, and should be ready to take responsibility for the results of his choice whether he chooses obedience or disobedience. Only by this resolution, can he submit himself, I believe, to obedience (or disobedience) to even immoral orders, and also maintain his personhood.

BIBLIOGRAPHY

BIBLIOGRAPHY

ARTICLES

- Adams, E. M., "The Moral Dilemmas of the Military Profession," Public Affairs Quarterly, Vol.3, No.2, April, 1989.
- Alexander, Lawrence A, "Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider," Philosophy and Public Affairs, Vol.5, No.4, Summer, 1976.
- Alperovitz, Gar, "Why the United States Dropped the Bomb," Technology Review, August/September, 1990.
- Bedau, Hugo Adam, "Military Service and Moral Obligation," Inquiry, Vol.14, 1970.
- Berger, Jacob, "The Legal Nature of War Crimes and the Problem of Superior Command," The American Political Science Review, Vol.38, 1944.
- Brandt, Richard B., "Utilitarianism and the Rules of War," Philosophy and Public Affairs, Vol.1, No.1, Fall, 1971.
- Bunting, Josiah, "The Conscience of a Soldier," World View, Vol.16, No.2, 1973.
- Chomsky, Noam, "The Rule of Force in International Affairs," The Yale Law Journal, Vol.80, No.7, 1971.
- Cohen, Marshall, "Taylor's Conception of the Laws of War," The Yale Law Journal, Vol.80, No.7, 1971.
- Dunbar, N.C.H., "Some Aspects of the Problem of Superior Orders in the Law of War," Juridical Review, Vol. 63, 1951.
- Drucker, Merrit P., "The Military Commander's Responsibility for the Environment," Clio, Vol.18, Fall, 1988.

- , "How the Moral Education Theory of Punishment Can Be Used by Military Commanders," The International Journal of Applied Philosophy, Vol.3, Fall, 1986.
- Dubik, James M., "Social Expectations, Moral Obligations, and Command Responsibility," The International Journal of Applied Philosophy, Vol.2, Spring, 1984.
- Dyck, Arthur J., "Ethical Bases of the Military Profession," Parameters, Vol.10, No.1, 1980.
- Falk, Richard A., "Nuremberg: Past, Present, and Future," The Yale Law Journal, Vol.80, No.7, 1971.
- Finch, George A., "Superior Orders and War Crimes," The American Journal of International Law, Vol.15, 1921.
- Flammer, Philip M., "Conflicting Loyalties and the American Military Ethic," War, Morality, and the Military Profession, Malham Wakin (ed.), 1979.
- Frank, Willard C. Jr., "The Agony of Our Choosing: Military Power and Human Values."
- Fullinwider, Robert K, "War and Innocence," Philosophy and Public Affairs, Vol.5, No.1, Fall, 1975.
- Gregory, Tappan, "Murder Is Murder and the Guilty Can Be Punished," American Bar Association Journal, Vol.32, 1946.
- Hare, R. M., "Rules of War and Moral Reasoning," Philosophy and Public Affairs, Vol.1, No.1, Fall, 1971.
- , "Can I Be Blamed for Obeying Orders?" War, Morality, and the Military Profession, Malham Wakin (ed.), 1979.
- Hartigan, Richard S., "Saint Augustine on War and Killing: The Problem of the Innocent," Journal of the History of Ideas, Vol.27, No.2, 1966.
- Huntington, Samuel P., "Officership as a Profession," War, Morality and the Military Profession, Malham Wakin (ed.), 1979.
- , "The Military Mind: Conservative Realism of the Professional Military Ethic," War, Morality, and the Military Profession, Malham Wakin

- (ed.), 1979.
- Hurst III, G. Cameron, "Death, Honor, and Loyalty: The bushido ideal," Philosophy East & West, Vol.4, No.4, 1990.
- Lango, John W., "Is It Wrong to Intend to Do That Which It Is Wrong to Do?" The Monist, Vol.70, No.3, July, 1987.
- Levinson, Sanford, "Responsibility for Crimes of War," Philosophy and Public Affairs, Vol.2, No.3, Spring, 1973.
- Lewy, Guenter, "Superior Orders, Nuclear Warfare, and the Dictates of Conscience," War and Morality, Wasserstrom, Richard (ed.), Wadsworth Publishing Company, Inc., 1970.
- Luban, David, "Just War and Human Rights," Philosophy and Public Affairs, Vol.9, No.2, Winter, 1980.
- Mahan, A. T., "The Military Rule of Obedience," Retrospect and Prospect, Kennikat Press, Inc., 1902.
- Mavrodes, George I, "Conventions and the Morality of War," Philosophy and Public Affairs, Vol.4, No.2, Winter, 1975.
- Mitchell, Greg, "The Victim and the Pilot," The Progressive, August, 1989.
- Nagel, Thomas, "War and Massacre," War and Moral Responsibility, Princeton University Press, 1972.
- Peppers, Donald, "War Crimes and Induction: A Case for Selective Nonconscientious Objection," Philosophy and Public Affairs, Vol.3, No.2, Winter, 1974.
- Sabini, J. and Silver, M., "Loyalty as Good and Duty: A Critique Stocker," International Journal of Moral Society Studies, Vol.4, Summer, 1989.
- Sack, Alexander N., "Punishment of War Criminals and the Defence of Superior Order," The Law Quarterly Review, Vol.60, 1944.
- Serebriannikov, V. V., "The Role of the Army in the Life of Society," Soviet Studies in Philosophy, Summer, 1983.
- Shue, Henry, "Morality of Offense Determines Morality of

- Defense," The Philosophical Forum, Vol.18, No.1 Fall, 1986.
- Smith, C. I., "Hegel On War," Journal of the History of Ideas, Vol.26, 1965.
- Smith, T. V., "Ethics for Soldiers of Freedom," Ethics, Vol.60, No.3, 1950.
- Somerville, John, "Democracy and the Problem of War," Moral Problems in Contemporary Society, Paul Kurtz (ed.), Prentice Hall, Inc., 1969.
- Toner, James H., "Sisyphus as a Soldier: Ethics, Exigencies, and the American Military," Parameters, Vol.7, NO.4, 1977.
- Wakin, Malham M., "Wanted: Moral Virtues in the Military," Hastings Center Report, October, 1985.
- , "The Ethics of Leadership," War, Morality, and the Military Profession, Westview Press, 1979.
- , "The Ethics of Leadership II," War, Morality, and the Military Profession, Westview Press, 1986.
- Walzer, Michael, "The Moral Standing of States: A Response to Four Critics," Philosophy and Public Affairs, Vol.9, No.3, Spring, 1980.
- , "Moral Judgment in Time of War," War and Morality, Wasserstrom, Richard (ed.), Wadsworth Publishing Company, Inc., 1970.
- , "Political Action: The Problem of Dirty Hands," Philosophy and Public Affairs, Vol.2, No.2, 1973.
- Waltz, Kenneth N., "Kant, Liberalism, and War," American Political Science Review, Vol.56, 1962.
- Wasserstrom, Richard, "On the Morality of War: A Preliminary Inquiry," Stanford Law Review, Vol.21, 1969.
- , "The Responsibility of the Individual for War Crimes," Philosophy, Morality, and International Affairs, Oxford University Press, 1974.

-----, "The Laws of War," War, Morality, and the Military Profession, Malham Wakin (ed.), 1979.

Wasserman, David, "Justifying Self-Defense," Philosophy and Public Affairs, Vol.16, No.4, Fall, 1987.

Wells, Donald A., "How Much Can 'The Just War' Justify?" The Journal of Philosophy, Vol.66, No.23, December, 1969.

Wheeler, Michael O., "Loyalty, Honor, and the Modern Military," War, Morality, and the Military Profession, Malham Wakin (ed.), 1979.

BOOKS

Axinn, Sidney, A Moral Military, Temple University Press, 1989.

Bennett, John C. (ed.), Nuclear Weapons and the Conflict of Conscience, Charles Scribner's Sons, 1962.

Childress, James F., Moral Responsibility in Conflicts, Louisiana State University Press, 1982.

Clark, Ian, Waging War, clarendon Press, 1988.

Clausewitz, Carl Von, On War, Penguin Books, 1832.

Cohen, Marshall (ed.), War and Moral Responsibility, Princeton University Press, 1974.

Cohen, Sheldon M., Arms and Judgment, Westview Press, 1989.

Collins, Larry, Is Paris Burning?, Pocket Books Inc., 1966.

Department of the Army, The Law of Land Warfare, U.S. Government Printing Office, Washington, D.C., 1956.

Dinstein, Yoram, The Defence of "Obedience to Superior Orders" in International Law, A.W. Sijthoff-Leyden, 1965.

Falk, Richard A., Law, Morality, and War in the Contemporary World, Frederick A. Praeger, 1963.

Finn, James (ed.), A Conflict of Loyalties, Pegasus, 1968.

- Fotion, N. & Elfstrom, G., Military Ethics, Routledge & Kegan Paul, 1986.
- Fotion, Nicholas, Military Ethics, Hoover Institution Press, 1990.
- Gabriel, Richard A., To Serve With Honor, Greenwood Press, 1982.
- Glover, Jonathan, Causing Death and Saving Lives, Penguin Books, 1977.
- Glueck, Sheldon, War Criminals, New York, 1944.
- Goldstein, Joseph, Marshall, Burke & Schwartz, Jack, The My Lai Massacre and Its Cover-up, The Free Press, 1976.
- Green, L. C., Superior Orders in National and International Law, A.W.Sijthoff-Leyden, 1976.
- Hartle, Anthony E., Moral Issues in Military Decision Making, University Press of Kansas, 1989.
- Hauerwas, Stanley, Should War Be Eliminated?, Marquette University Press, 1984.
- Held, Virginia, Morgenbesser, Sidney & Nagel, Thomas, Philosophy, Morality, and International Affairs, Oxford University Press, 1974.
- Holmes, Robert L., On War and Morality, Princeton University Press, 1989.
- Huntington, Samuel P., The Soldier and the State, The Belknap Press of Harvard University Press, 1957.
- Lachs, Manfred, War Crimes, London, 1945.
- Melzer, Yehuda, Concepts of Just War, A.W. Sijthoff International Publishing Company, 1975.
- Murray, John Courtney, Morality and Modern War, The Council On Religion and International Affairs, 1968.
- Newton, Lisa H. (ed.), Ethics in America, Prentice Hall, 1989.
- Paskins, Barrie and Dockrill, Michael, The Ethics of War, University of Minnesota Press, 1979.

- Peers, W. R., The My Lai Inquiry, W. W. Norton & Company, 1979.
- Potter, Ralph B., War and Moral Discourse, John Knox Press, 1969.
- Royce, Josiah, The Philosophy of Loyalty, The MacMillan Company, 1920.
- Sterba, James P., The Ethics of War and Nuclear Deterrence, Wadsworth Publishing Company, 1985.
- Taylor, Telford, Nuremberg and Vietnam: An American Tragedy, A National General Company, 1970.
- The United Nations War Crimes Commission, History of the United Nations War Crimes Commission and The Development of the Laws of War, London, 1948.
- Tucker, Robert W., The Just War, The Johns Hopkins Press, 1960.
- Wakin, Malham M. (ed.), War, Morality, and the Military Profession, Westview Press, Inc., 1979.
- , War, Morality, and the Military Profession, Westview Press, Inc., 1986.
- Walzer, Kenneth N., Man, the State, and War, Columbia University Press, 1965.
- Walzer, Michael, Just and Unjust Wars, Basic Books, Inc., 1977.
- , Obligations, Harvard University Press, 1970.
- Wasserstrom, Richard, War and Morality, Wadsworth Publishing Company, 1970.
- Wells, Donald A., War Crimes and Laws of War, University Press of America, Inc., 1984.
- Zahn, Gordon C., War, Conscience and Dissent, Hawthorn Books, Inc., 1967.

VITA

Min-Soo Lee was born on February 21, 1953, in Seoul, Korea. When he was nine years old, his family left Seoul, and moved to a farm in the provinces, and thus his childhood was spent on the farm. While living there, he attended Yoo-Chon Elementary School, and graduated from East Kun-San Middle and High School in 1972.

In the Spring of 1972, Lee attended the Korea Military Academy and majored in the Studies of International Relations. After the four-year academic & military education and training required for a military officer, he graduated from the Korea Military Academy. Then he served two years for the military as a platoon leader at Yang-Gu, Kang-Won province.

The years from 1978 to 1985 were a transition period for Lee's study. He majored in philosophy at the Seoul National University as a scholarship student. He earned B.A. & M.A. degrees with a concentration on Ethics at the University in 1980 & 1985. During that time, he wrote an article, "A Critique of G. E. Moore's Utilitarianism," for his second B.A. degree. His thesis for M.A. degree was

titled "The Good and the Justice in J. Rawls's Theory of Justice."

From 1980 to 1988, he taught Philosophy, Logic, and Military Ethics at the Korea Military Academy. He was appointed as an assistant professor in 1985, and promoted to Lieutenant Colonel in 1988.

In August, 1988, Lee came for his further studies to the Department of Philosophy at the University of Tennessee, Knoxville. During 1991-1992, he was honored to receive the Herman Spivey Scholarship, which is one of the most competitive awards given to students of the humanities and social sciences.

Lee successfully defended his dissertation on May 15, 1992. He is returning to the Korea Military Academy, where he will teach Philosophy and Military Ethics.