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Freeman: Responsibility of States for Unlawful Acts of Their Armed Forces

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RESPONSIBILITY OF STATES FOR UNLAWFUL ACTS OF THEIR ARMED FORCES. By *Alwyn V. Freeman*. [Text of lectures reprinted from the *Recueil de Cours de l'Académie de Droit International de La Haye* (1955 II, Pp. 267-415, Vol. 88 of the Series) for private circulation only.]

Dr. Freeman has had reprinted in book form for private publication his Hague Lectures in 1955 on the significant and specialized topic of the responsibility of states for unlawful acts of their armed forces. Appendices containing diplomatic notes, United States Government memoranda, Allied control laws and regulations, international agreements, and congressional documents increase the value of the separate volume. Since there are relatively few law libraries in this country that contain the bound volumes of the Hague Academy, it is regrettable that these and some of the other lectures in the series cannot be made more accessible to scholars and practitioners through the device of reprinting individual lectures in separate volumes for public distribution. Separate publication might lead to more comprehensive reviews in a wider variety of journals and consequent greater awareness in the profession of the value and availability of the Hague Lectures. The magnitude of the task of reviewing the Hague Academy volumes may well explain the paucity of systematic and thorough analyses of these Lectures. This is a salient example of the bibliographical difficulties which impede the development of a wider knowledge and interest in international law at a time when such knowledge and interest is of vital importance.

Dr. Freeman has assembled a wide range of materials of value to practicing lawyers, government officials, and scholars. The developing practice of stationing armed forces in friendly countries for lengthy periods in peace time enhances the importance of greater understanding of the governing principles, practices, and procedures. The author's previous publications in the field of state responsibility and his extensive experience provide an excellent basis for this specialized study.

A summary of the volume's contents and of Dr. Freeman's views on significant topics should illustrate the value of his intensive analysis

of the subject. Following a brief introduction and outline of the scope of the lectures, the first chapter surveys the general principles of state responsibility as they have developed in the practice of states and the views of publicists. In discussing responsibility for official acts, it is urged that there is no distinction in principle between major and minor officials of a state. What acts of minor officials, and, particularly, of soldiers should impose responsibility can be usefully determined by an adaptation of Professor Dunn's theory of risk allocation. Responsibility for acts of soldiers is not limited to authorized acts but includes all acts apparently authorized if reasonably related to duty. In time of peace, purely personal acts do not give rise to responsibility whereas, ironically, the reverse is true in time of war.

The second chapter develops the basis of responsibility for military activities both in time of war and peace. For the war situation, responsibility is intimately linked to the laws of war which provide an exemption for legitimate military operations. It follows, in principle, that states are responsible for violations of the laws of war. So far as liability between belligerents is concerned, precedents and procedures vindicating the principle in practice are scarce, due largely to waiver by the losers in peace treaties following hostilities. Although claims of neutrals remain, these have been frequently settled by payment as an "act of grace" and thus impede the development of authoritative precedents. The principles of the laws of war have been "whittled away to some degree" by the practice in the last two great wars. Discussing a few of the rules in Hague Convention IV on Land Warfare, for example, continuing vitality is attributed to the prohibition of confiscation of enemy private property despite the evidence to the contrary in the World War II peace treaties. Support for this position is found in the Dirksen and Johnson bills which were introduced in Congress, although no final action upon them has been taken, and many of our war-time allies are strongly opposed to their enactment. With respect to liability in time of peace, the author challenges the view that responsibility exists only if the acts were authorized or if there was failure of supervision. He argues that the precedents justify the imposition of greater responsibility for acts of soldiers than other state agents because of the greater likelihood of harm, and that responsibility exists for negligent acts of soldiers in course of duty whether or not authorized or supervised.

Chapter Three divides the discussion of responsibility for the acts of individual soldiers in time of war into two periods. The first relates to responsibility as developed prior to Hague Convention IV of 1907. In the earlier period, pillage, for example, was not illegal, and to this fact is assigned the reluctance of international tribunals to impose responsibility in such cases even after pillage was formally proscribed in Hague Convention IV and other international conventions. Although

acknowledging that pillage in practice unfortunately continues, these conventions, and particularly Hague Convention IV, are viewed as working a great change in the law in force. The discussion of the post-Hague period is devoted to an intensive analysis of the language of Article 3 of Hague Convention IV. This Article confirmed the existing liability of belligerents for violations of the laws of war and created a civil responsibility of the state for all acts committed by its armed forces. This state civil responsibility includes "war crimes." Article 3 imposes responsibility for all acts in violation of the Regulations of the Hague Convention, but is not exclusive with respect to responsibility under international law outside the Convention. The author disputes the contention of some other writers that Article 3 creates absolute responsibility, citing in support of his position the similar official view adopted by the U.S. War Department during World War II.

Chapter Four considers responsibility for acts of soldiers in foreign territory. The first part discusses illegalities committed in friendly countries and is primarily devoted to the practice of the United States. As a matter of analysis, these matters are governed by the same principles that have been applied in "shore leave" cases. The settlement of many of these controversies by payments as "acts of grace" is, however, acknowledged to be a widespread practice. The same tendency to settle on a broader basis is reflected in United States legislation. In the Foreign Claims Act of 1942, the United States has assumed approximately the position of an insurer without reference to responsibility under international law, although the limitations in that act are duly noted. Similarly, the special Agreements entered into by the United States in World War II attempted to provide for relief beyond international law, and to adjust to local administration. In the discussion of responsibility for acts of U.N. forces in the Korean conflict, the author asserts that the individual nations remained responsible; that the U.N. was not; and raises the question as to whether the United States was responsible for acts of other armed forces under United States command. He concludes this section with a discussion of the refusal of the United States to accept responsibility in paternity cases, particularly in Iceland, and suggests that some relief should be provided by agreement even though no legal liability exists. The second part of Chapter Four deals briefly with the precedents concerning responsibility of the occupant for acts of soldiers in territory under military occupation in the period prior to World War II. The author believes that responsibility in this area is governed by essentially the same principles that are applicable to acts of soldiers within the territorial jurisdiction.

The final chapter provides a valuable discussion of the claims settlement procedures in the period after hostilities have ended. The author asserts that the responsibility of the occupying power should be the same

as that of a territorial sovereign in time of peace because of the similar "control of the area." United States practice after World War I is first briefly reported. There follows a thorough recital of allied practice and procedures after World War II. The similarity between our practice in the United States zone in Germany and our practice in liberated France is noted, as well as the limitations on liability in Germany. The developments in other occupied areas are also described and compared with our experience in Germany. The next section of the final chapter analyzes the impact of peace treaty provisions on responsibility. It recounts the new arrangements in World War II by the victors for restitution of identifiable property in lieu of damages as well as the provisions for the retention of enemy assets seized by the victors within their own borders. The standard provisions for inclusive waiver by the losers of all their claims both for violation of war rules and occupation acts are contrasted with the responsibility of victorious belligerents for alleged violations of the laws of war under Article 3 of Hague Convention IV.

The final section of the chapter outlines the novel and extensive provisions for civil liability for tortious acts contained in the Status of Forces Agreements between the N.A.T.O. powers. In these special arrangements, which are characterized as both necessary and as the most radical and interesting development, there is provision for intergovernmental waiver in "duty" cases and an effective procedure for compensation with respect to private claims. In "line of duty" cases, payment by the local government in accordance with local law is followed by seventy-five percent reimbursement by the government of the visiting force. For so-called "private acts," either the visiting force settles the claim as a matter of grace, or the soldier can be sued in the local courts.

In conclusion, the author asserts that there has been a "striking progression" in liability for wrongful acts of a state's armed forces, especially in war and hostile occupation. He sees, also, a similar but less pronounced evolution in the standards for responsibility in time of peace, which is particularly marked in friendly countries. But the development of this trend, in his opinion, continues to depend on the viability of international law itself.

Without detracting from the acclaim which this careful monograph deserves, this reviewer must confess some dissatisfaction with the traditional approach which it exemplifies. The author's detailed treatment of arbitral decisions on the basis of their importance as legal rules that regulate effectively the conduct of states is not persuasive. His apparent acceptance of the continued vitality of many of the Hague Articles, despite widespread violation in two World Wars and their frequent negation by peace treaty provisions, is not convincing. The alleged inviolability of enemy property may be cited as an example. In my opinion, the provisions of the peace treaties, concluded after widespread hostilities by numerous

participants, are a better indication of the practice of states. The inclusive waiver in those treaties by the losers of all claims for violation of the laws of war is a far more significant development. The same may be said of the common provision for waiver of liability for occupation acts and the frequent payment of claims as "acts of grace." The principles and procedures created by United States legislation and by the Status of Forces Agreements are a more trustworthy guide to the responsibilities actually assumed by many of the principal states concerned with the problem in peace time. A broader view of "law" would consider that this national legislation and these treaty provisions constitute the core of the "law" in force. Intensive analysis of their administration would be the most promising avenue of exploration. Further study and development of the "law" in these documents and arising out of their administration will furnish the basis for further progress in this important area.

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