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You can change your cookie settings at any time. We'll send you a link to a feedback form. It will take only 2 minutes to fill in. Don't worry we won't send you spam or share your email address with anyone. The noble and gallant Earl said My Lords, it may be remembered that on July 19, 1950, a Division took place in your Lordships House upon a Motion which asked the House to agree that an Amendment which had been issued in April, 1944, to Paragraph 443 of Chapter 14 of the Manual of Military Law, which deals with the laws and usages of war on land, wasI do not in the least apologise for reviving this subject, and I do so for two reasons first, because it has become apparent that there is a large body of opinion, including several distinguished legal lights, who do not agree with the verdict given on that occasion. In this connection I was interested to read a wellknown legal publication, Volume 7 of which came out at the end of 1944, after that Amendment was published. After discussing this question, and having given certain pros and cons, it ended up by sayingWe were told, for instance, that the right course was not to alter the law, but to administer it wisely. There was no question of altering the law, and no question of administering it wisely. It is not we who interpret the law in such cases, but our enemies. The great objection to the Amendment is that in certain cases it hands over justice, or the administration of justice, to our enemies. Again, we were told that in this country one could hardly conceive an officer on active service giving unlawful orders. Well, my Lords, if we think that, we live in a fools paradise. When you consider the vast body of men from this country, and men from other parts of the world who, come over here—as especially they came during the later stages of the war—do you not think that there may be some black sheep among themIn fact, they are doing that at this very moment in Korea.<http://www.shipagents.nl/uploadfiles/cub-cadet-1720-service-manual.xml>

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They are charging United Nations officers with crimes that we know perfectly well they have never committed.They may be shot on sight, and we shall be able to do nothing. Then it has been said that the judges of this country are not divorced from common sense. Whoever suggested that they were. Nobody ever suggested it. But they are not immediately concerned. Can we say the same for Communist judges. If Communist judges possess common sense, are they allowed to use it. It is they who matter, for it may be before them that our men will have to appear. The whole object of the Motion was to try to keep the trials of our men ii our own hands, and not to legalise their trials before the set of scoundrels with whom we are now engaged in war and against whom, it seems, we shall be fighting for many years to come, perhaps on a far greater scale than at present. It is against a background of what an enemy may do that I ask your Lordships to consider this Motion.I will try to deal with the case of the ordinary man fighting for his country in time of war in the Army, the Navy or the Air Fore of this Empire. Indeed, I think that airmen are, perhaps, the ones who more greatly need to be protected than any one else, because the vast distances over which they fly increase the chances of the officers and men of the Air Force falling into the hand; of the enemy, perhaps in small bodies and perhaps as single individuals.By universal consent, soldiers fighting were exempted. It not only cancelled it, but it actually declared that the reverse was the law, allowing only that acting under orders might be considered in extenuation. The Amendment not only removed what protection there was, but went further and forced upon all those serving under orders the obligation of using their independent judgment concerning those orders, and brought them as individuals under two laws international law and the military law of their own country.<http://colegiosantarosa.com/uploads/imagen/cub-cadet-1782-service-manual.xml>

The circumstances under which the Amendment appeared are, to put it mildly, somewhat peculiar—they can be followed by a study of the History of the United Nations War Crimes Commission. We are told it was based upon a Memorandum written by Professor Lauterpacht and is given in these words: English writers, such as Professor Lauterpacht, observed that the British Military Manual had no statutory force and could therefore be amended in the face of new developments. They are very different now from the rosy prospects of 1944, when we were going to be one of the Big Four under whom, when victory was gained, the world was to bask in peace. Indeed, the fact that he held those views may possibly account for his being there. But be that as it may, his views happened to fit in with the needs of the moment, and at that time his colleagues and fellow internationalists would have been predisposed to accept his views. Suggestion is a powerful force, more particularly when it discloses an easy way out of a difficulty, and perhaps that subtle influence may also to some extent have been responsible for Article 8 of the Nuremberg Charter. The fact that no endeavour was made at that time to impress on the men at the front their added duties and responsibilities would seem to show that it was then considered a temporary expedient. Now it has remained so long the change has got to be justified. Evidently, little thought was given as to how possible reactions might affect our own men, and perhaps, in the circumstances which existed at that time, that is understandable. For the object at that time was to get rid of any obstacle that might impede the proper bringing to justice and punishment for crime of enemy criminals. By 1943 it was obvious what the result of the war would be, and it was once again believed that our victory would end war, or at least ensure peace for a very long time.

There should be no risk of any one being troubled, subconsciously or otherwise, by doubts as to whether, by so doing, he is laying himself open to future charges of being a war criminal if he should fall into the hands of the enemy. Let that sort of doubt once creep in, and it starts to undermine morale. It is that sort of doubt which tends to drive a wedge between officers and men. Officers may be doubtful of what the men will do, and men may be doubtful of what their officers may order them to do, when this possibility of punishment hangs over them; and that doubt must increase as the situation becomes more desperate. As the time came when they were near to falling into the enemy's hands, the doubt would necessarily grow stronger. It is monstrous to place officers and men in such an equivocal position. In the autumn of 1950 it was stated that a new edition of the Manual of Military Law would appear in the summer of 1951. As nothing happened, hopes were raised that perhaps, after all, there was going to be an overhaul and a revision of Chapter 14. These were dashed to the ground when we were told that the distinguished international lawyer who was rewriting the chapter was Professor Hersch Lauterpacht. I suppose that in a short time a new edition will appear and we shall be told: Surely it should have been done by a properly qualified tribunal or commission, composed not only of lawyers but also of up-to-date soldiers, sailors and airmen. Nearly all the paragraphs dealing with technical matters are hopelessly out of date; and after all it is the soldiers, sailors and airmen, and no one else, who can look after the views and interests of the men under their command. It has often been said that a law should not only be just, but should appear to be just. I have not the honour of knowing Professor Lauterpacht and I mean to show no discourtesy towards him, but I do not think that rules as revised by him will be warmly received.

<http://schlammAtlas.de/en/node/17558>

I very much doubt if he is the right man to employ for this work. No doubt the Professor has performed, and will perform, valuable service for his adopted country, but we have to face things as they are, and I am sure that as a rewriter of the rules governing the actions of the British Forces under active service conditions, he is out of place. If we want the Services to accept the new version of their duties and responsibilities, I think these ought to be presented to them over names that they know and trust. I should have thought that it was perfectly possible to get a British or Dominion

international lawyer to look after the interests of the British people. This, in itself, would go a long way towards getting the British view accepted. It would enable us to bring out our up-to-date Manual for the instruction of officers and men, who cannot now get a Manual of the rules under which to fight if they go abroad. It would also make known to the world the lines which we mean to adopt. It asks no more than that these questions shall be reviewed by a competent tribunal before being finally accepted. In the present state of world affairs, any international conference on these matters must be something in the distant future. Much may happen before any such meeting can take place. The question is much too important to be left in the air. It is a matter of interest to everybody, not only to those fortunate to be young enough and physically fit to rally to the Colours, but also to any who have an interest in any young men who may be called upon to serve in defence of the country. If such a tribunal as is suggested decide to maintain the present rules and regulations, well and good. We shall at least have the satisfaction of knowing that the matter has been carefully considered at a time well removed from that period when, after five years of war, everybody was inevitably slightly unbalanced, when considering these questions.

<http://enbatielektrik.com/images/commander-telephone-manual.pdf>

I beg your Lordships support, and I beg to move my Motion. Since the discussion in your Lordships House it is also accepted that the responsibility extends down to junior officers, even if they are carrying out the orders of a superior. This is, in itself, contradictory, because, if it were found necessary to clear or flood an area, the civilians would have to be transferred elsewhere. A case in point occurred at Suez a short time ago. The Amendment to Paragraph 443 of the Manual of Military Law mentions acts forbidden by international law and crimes against humanity, but makes no mention of military necessity. This strikes one as ominous. The scope thereby given to any charges that might be preferred is extremely wide, especially as participation in a war is considered by many to be a crime against humanity. Therein lies the possibility of bias or prejudice from the start. It may well be that he may have to act contrary to the Articles of the 1949 Convention. As things stand, a junior officer ordered to carry out certain acts may refuse to do so, and thereby lay himself open to disciplinary action. Can he plead that the act ordered had no military justification. He cannot know all the considerations which caused the issue of the order in question. It is evident that a controversial element exists in the interpretation of the laws of war and it would appear from recent publications that eminent jurists are by no means unanimous on how to define and deal with war crimes. Such conditions Psychological warfare is sure to play an important part. The morale of our Forces will be one of the enemies main objectives, both by means of propaganda and the tactics of infiltration through fifth columnists into all ranks opportunities will be taken on mobilisation and expansion to achieve this.

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The creation of the opportunity to dispute certain matters plays straight into the hands of any disloyal or traitorous element, presents an opening for agitators to undermine discipline and provides a stepping stone to mutiny. I can assure your Lordships that mutiny is the most difficult and worrying situation with which a commander can be faced. I myself have had experience of more than one, but I am thankful to say that they did not occur with English-speaking troops. So much so, that our enemies have at times taken advantage of those qualities—I have only to mention cases of abuse of the white flag, and the driving of women and children in front of advancing troops when attacking our positions. Surely, it is only fair to those who may have to fight for their country that they should be allowed to go into action with their morale high, and also with leaders unhampered by having to consider all the time whether they are running the risk of committing crimes against humanity. The field is so wide that it may be impossible to foretell what accusations may be brought forward from legal, political, emotional or prejudiced points of view. It has been said today that certain legal pundits are busy drawing up rules for our Forces for the conduct of war. Has any of

these pundits ever had experience of command in war, either of units or higher formations. A rule which may well be considered correct legally may, under certain conditions, prove impractical in the field. There is also the need to define what a commander can do to secure the safety of his Forces on theCan a legal expert, however distinguished, be competent to have the last word on this matter. The interpretation would have to cover both the zone of operations and occupation of enemy or nonbelligerent countries. I apologise if I appear to disparage the legal profession, but they must always remember that the Inns of Court Regiment is always known as the Devils Own.

I hope, therefore, that Her Majestys Government will see their way to ensure that when the new Chapter emerges from the legal experts it will be scrutinised by those who have had experience of the practical side of war. I also suggest that those who have held independent commands should be asked for their views—I stress independent commands, as it is those commanders who have had experience of the issues involved. I feel that if such an assurance could be given, it would allay the anxiety felt in the minds of serving officers on this important subject. I agree with all that he said and, therefore, I can curtail considerably my remarks. So far as I am concerned and think this applies to most sailors in my position, I should be quite happy if the Board of Admiralty accepted the rules that were drawn up, or criticised or analysed them in the interests of the officers and men of the Service; or, similarly, as regards any other Service, if the distinguished officers who formThis is a much simpler Motion, and we leave the other on one side. After all, I understand that the professor has been rewriting his own words, and we do not know what he is going to say. It may be that he has so met the feelings of some of us in the previous debate that his new proposals may prove quite suitable and innocuous. This is a precautionary Motion, to say that, whatever the professor produces, it ought to be examined by a body of Service officers of sufficient rank, authority and experience before it is imposed on the men whom they command. One of the strongest arguments used in the last debate was that it has always been the case that a man need obey only a lawful command. Every officer, midshipman or ordinary seaman knows what the laws of his own country are. He is brought up on them as a child the Ten Commandments—not to commit murder, not to steal, and so on. He is educated in school on the laws of his country, and he knows them.

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It is very different when you impose on him an order which says also, that he is not to obey certain rules which conflict with humanity or with the unchallenged laws of civilised warfare. Yet those two basic principles are at the bottom of all that we have been told stands behind this new law. I feel that it is highly dangerous to meddle with suchThis matter of military law is neither a national nor an international thing. It is a kind of hybrid. There is nothing agreed in international law today about the laws of humanity or the unchallenged rules of warfare; indeed, so far as international law is concerned there is no international agreement about that either. A law made merely by one country and called international law is not international law at all. It is the law of one country, who makes a rule which it regards as a good thing. But the other nations who are going to fight they may be our allies with whom we may be fighting in line of battle at sea or in military contact on land may not agree on these international laws. It is the Governments who are the culprits, and to leave the Governments in a clean white sheet and to put the onus on subordinates is to my way of thinking a highly unfair and unreasonable proposition. Do our Government intend to carry on war in the spirit of humanity and in accordance with the unchallenged rules of warfare, or are Governments exempt from those rules. Is there agreed understanding today as to what is contrary to the laws of humanity. We have been told that if there is a Third World War it will be disastrous to the human race. Only this morning I received a pamphlet—as I dare say did some of your Lordships—from a body who call themselves The Authors World Peace Appeal, signed by some five hundred distinguished literary men. The first sentence of that pamphlet readsSurely that cannot imply that we are going to conduct

war according to the rules of humanity and the unchallenged principles of warfare.

There must be something which implies that the war is going to be inhuman. You cannot destroy humanity unless you have inhuman methods of doing it. I know very few. As the noble and gallant Earl, Lord Cork, has said, in Korea what is called the napalm bomb—the petrol jelly bomb—is being used. Its use is certainly not unchallenged; it has been challenged a great deal on the grounds that this bomb is an inhuman weapon. Therefore, I feel that it is very dangerous at the present time to impose on your men something which imposes upon them responsibility to do nothing which infringes the rules of humanity and civilised warfare. It is a very difficult position. What is the position of an airman ordered by his Government to drop an atom bomb on a highly populated country in Europe. What is the position of the young officer in command of a submarine if he is ordered by his Government to sink unarmed merchant ships without warning. In the old days, when we were more human, we would not have sunk an armed transport full of soldiers. We should have captured her, saved the men's lives and brought them in as prisoners. That is what I am most anxious about. I am not more naval than the Lord High Admiral, and I feel that if the service Department chiefs and the soldiers, airmen and sailors who serve with them are satisfied, I am satisfied. But I do not feel that they can be satisfied. I believe that the whole matter is in a state of muddle and confusion and that it ought not to be left as it is. There is undoubtedly a feeling in the Services that the position is unsatisfactory and that a decision is going to be imposed on them. With great respect, I feel that there is danger of confusion of thought. There is confusion of thought between what the law is and what the function of a text writer is. That point was well illustrated, if I may say so, in the last speech. It is not for Professor Lauterpacht to lay down laws.

He does not have tables of stone on which he enunciates what the laws are. The task of a text writer is merely to say what he thinks the laws are; and the laws of this country are laid down by Statute and by the interpretation of the judges. It is not for a text writer to alter his text to make it correspond to what he thinks the law ought to be, or to make it correspond to what he thinks is a reasonable law. He has merely to consider what the law is as expounded in that way. I venture to think that there has been some little confusion there. But do not blame it on to the text writers; they have nothing to do with it at all. The Manual of Military Law is a textbook. It is not an authoritative work at all; it has no authority. It is a convenient assistance to people who want to read the law; but that is all. Do realise that whoever compiles the Manual of Military Law has to state merely what he believes the law to be, and not to state what he thinks the law ought to be. Although I have the most profound regard for the distinguished officers of the three Services. I venture to think that they would be out of place in editing the Manual of Military Law, stating what the law is, though no doubt their opinions would be of the greatest value in stating what the law ought to be. I think there has been an element of confusion. So far as the Manual of Military Law is concerned, I personally believe that if, as was the fact, the Manual of Military Law did state that obedience to superior orders was a defence to a charge, the Manual was completely wrong. Without, of course, our courts, our courtmartial and our juries have always determined the law in a sensible way. They have realised that you must have regard to the position of a man in a moment of excitement and tension. You must not regard these things as though the man had had the opinion of learned professors sitting round a table and working the thing out.

I rejoice to think that it is not, and never has been, the law of this country—and I devoutly hope it never will be—that obedience to such an order as that prevents a man from being guilty of the crime of murder. I myself should have thought that at this moment of tension through which we are now going it would be exceedingly inopportune to meddle with the matter. But that is entirely a matter of timing, and one for those who know about the situation and who are in a position to judge. But, as I say, I should have thought it would be difficult to imagine a more inopportune time, internationally, than the present to take up this matter. No doubt the noble and learned Lord, the Lord Chancellor,

will be able to state the view of Her Majesty's Government. I really rose for one purpose. I ask the text writer has merely to record the law as he believes it to be; it is not for him to make the law in any way. I think, from the terms of this Motion, that the fallacy is there for all to see. The function of the Manual of Military Law is to expound the law as it is. If you want to alter the law, then by all means get some Committee or Commission, or what you will—What is the book, then, to which the Services should refer if they want to know what the law is. Who are those who are to teach us what the law is? I agree that the Manual of Military Law should be as simple and clear as possible, but its function is to declare what the law is and not to state what the law ought to be. One thing which may, perhaps, be of concern to some of us who are connected with the Services is that, although it is quite true that whatever is written in the Manual of Military Law, by Lauterpacht or anybody else, is only his attempt to interpret the law as it is, nevertheless, those who interpret the law should have proper regard to the conditions of the men in the air, naval and military service, because that is what the whole thing is about.

This came out very clearly in the Courts-Martial Committee, on which I served. It was clear there that it becomes harder and harder, as conditions in the field become more difficult, to devise a form of law which fits into the condition of battle at sea, on land, or in the air. Those of us who have had Service experience feel very anxious that the law as it stands should be interpreted by people who have had experience of active service and battle, and, therefore, that what is written should be related to what is likely to happen under those conditions. I feel exactly as the noble Lord that was all there was to do, I should feel exactly as he does and I should wish, like other noble Lords, to support this Motion. But I put it to your Lordships that, to achieve the object which obviously is desired by noble Lords such as Lord Wilson and Lord Chatfield, it is not necessary to set up a tribunal such as that for which this Motion calls. And, after all, if this Manual is being brought out by the Army Council and the Air Council I am not sure how much right the Admiralty have in the book it is the plain duty of the Minister concerned, without any instructions from Parliament, to see to it that the text is examined by experts—I do not mean only legal experts, but people such as commanders and ex-commanders, staff officers, regimental officers, and so forth, who have had experience of battle conditions. These experts, when they have read the draft, will be able to apply their minds to things they know will happen in the field. We all desire that it should be done, but that does not necessarily mean that we should agree to this Motion. I do not think that that is necessary. I feel certain, however, that the Service chiefs will be fortified, in handling this thorny problem, if they know that the text has been revised by commanders and regimental officers, and their counterparts in the other Services, with proper experience of battle.

The topic that we are considering today is one which has exercised my mind for a very long time, in particular in connection with international law, but I am not going to deliver a lecture now. I want to say one word about what my noble and learned friend on the other side said with reference to the Manual of Military Law and one or two other points. I have no doubt that what he meant to say, and perhaps what he said, about the Manual of Military Law not possessing authority, is right; but that needs a little explanation to the layman. The Manual of Military Law has the same authority, as we say among lawyers, as have such books as Pollock on Torts, or Jarman on Wills, or some of those books which have been regarded for a long time as being so correctly phrased and so able in their views that what they say has, in one sense of the word, very great authority. I do not think my noble and learned friend on the other side of the House differs from that opinion. I think that that is inaccurate, but it is the view which commonly obtains abroad. From the experience I have gained by reading the reports of various courts-martial or trials under Royal Warrant, I believe those those trials, when concerned with a question falling within Chapter 14 of the Manual of Military Law, have invariably paid great attention to what is therein stated. And they must do, I consider, because there is really no competitive statement of the military law; there is, speaking generally, nothing else in writing to which they can refer. Nevertheless, in regard to what textbook writers are entitled to do

and what prima facie an ordinary or a distinguished writer on these subjects is able to say, I entirely agree that they are not entitled to lay down the law. With that I entirely agree.

I do not think my noble and gallant friend Prima facie, I took his words as meaning persons selected predominantly from people who have spent their lives in one of the three Services, with, I am not hesitating to add, perhaps one person or maybe more people who have been accustomed to deal with legal matters of this nature; that this body, which may be popularly described as a tribunal possibly that is not the correct word should decide what is the best way of laying down by proper means the principles which should be followed by judges who have to deal with cases of this kind, and to indicate to people, such as members of the Services, who are called upon to act in a moment without the possibility of consideration even for a few minutes, what their duty is in the circumstances of the case. I have listened to several of these debates, and in particular to one which your Lordships had in this House the year before last. Listening to the matter from more or less a judicial point of view, I must say that I came to the conclusion that there might be a great difference in the way the rule would be applied in the Army, the Navy and the Air Force. The conditions in which serving Persons have to exercise a discretion with regard to a particular act vary a great deal. I am particularly impressed with the fact that, though I have discussed this matter with many people who have spent their lives in the Navy, I have not found one who conceived that there should be any doubt about the necessity of a person in a ship in active warfare having to follow commands that come down to him from the captain. In those cases there is no time for the consideration which the clause in the Manual of Military Law supposes there would be. Therefore, I suggest, not what the rule should be, but that the people who are to consider what the rule should be should take into consideration the question whether it should be alike in all the three Services.

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