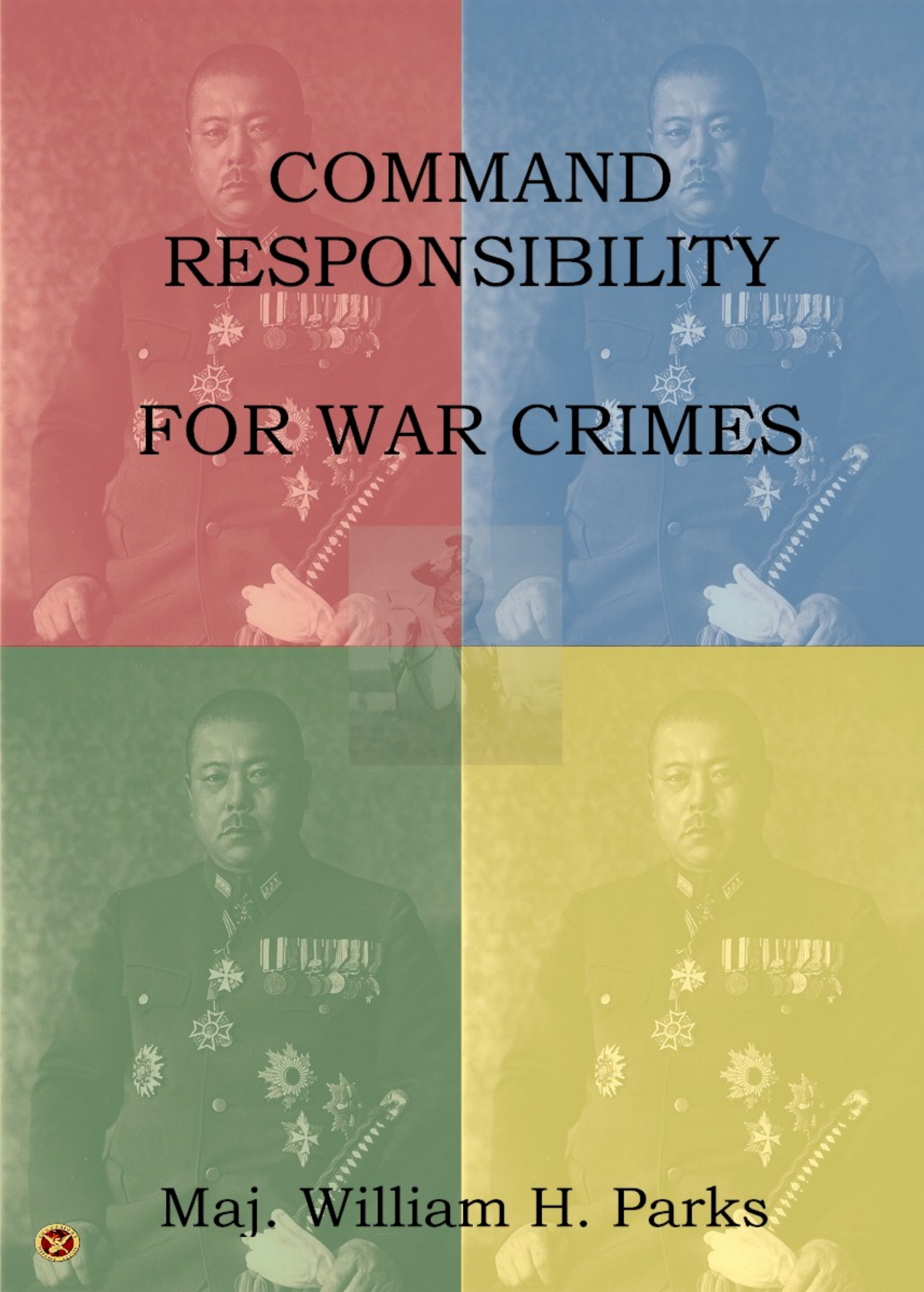
COMMAND RESPONSIBILITY FOR WAR CRIMES



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By Major William H. Parks

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An historical and comparative analysis of war crimes trials involving command responsibility in order to determine the standards of conduct required of a military commander in combat with regard to the prevention, investigation, reporting, and prosecution of war crimes. The author includes as part of his examination a view of the criminal responsibility of the combat commander, possible offenses, and the degree of intent required under both domestic and international law.

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I. INTRODUCTION

The Vietnam conflict and the aberration which occurred in the subhamlet of My Lai (4) in Song My Village, Quang Nai Province, in the Republic of South Vietnam on March 16, 1968, reawakened questions concerning the responsibility of a military commander for the unlawful acts of his subordinates.[1] For some, it constituted an opportunity to re-assert theories of responsibility previously argued and rejected by courts of law;'[2] others saw it as yet another way to indict the nation's leaders, and particularly the military, for the United States' involvement in Vietnam.[3] It is not the intent of this article to rebut these arguments, as this has already been done by others.[4] Rather it is intended to examine the standards of responsibility previously applied in order to ascertain the existing standards, municipal and international, and to determine if an identical municipal-international standard is feasible.

A . DEVELOPMENT OF THE CONCEPT-PRE-1945

1 See, *e.g., The Clamor Over Calley: Who Shares the Guilt?* TIME, April 12, 1971, at 14; *Who Else is Guilty?* NEWSWEEK, April 12, 1971, at 30; Sheehan, *Should We Have War Crimes Trials?*, Seattle Post-Intelligencer, April 11, 1971, at 17, col. 5. *See generally* T. TAYLOR, NUREMBURG AND VIETNAM: AN AMERICAN TRAGEDY (1970); s. HERSH, MY LAI 4 (1970) and R. HAMMER, ONE MORNING IN THE WAR (1970).

2 Telford Taylor, chief prosecutor in the *High Command Case*, discussed *infra* p. 38 *et seq.*, argued (unsuccessfully) for a theory of strict liability of a commander (XI TRIAL OF WAR CRIMINALS BEFORE THE NUERMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [hereinafter "TWC"] 544 [1948]; the argument is renewed in *Nuremburg and Vietnam*, *supra* note 1, at 180-181, and in an interview on the Dick Cavett Show on January 8, 1971, as reported by Neil Sheehan in the New York Times, January 9, 1971, at 3, col. 1. In that interview Professor Taylor opined that if one were to apply to Secretary of State Dean Rusk, Secretary of Defense Robert s. McNamara, Presidential advisors McGeorge Bundy and W. W. Rostow, President Lyndon B. Johnson, and General William C. Westmoreland the same standards of command responsibility as were applied in the trial of General Tomoyuki Yamashita in 1945, discussed infra, "there would be a strong possibility that they would come to the same end as he did." General Yamashita was found responsible for war crimes committed by his subordinates and hanged on February 23, 1946. A. Frank Reel, one of General Yamashita's defense counsel and author of a book relating the defense view of the case (THE CASE OF GENERAL YASASHITA, 1949) , has been similarly quoted, as noted in D. BERGAMINI, JAPAN'S IMPERIAL CONSPIRACY at 1112. n.5 (1972).

3 See, e.g., CRIMES OF WAR (R. Faik, G. Rolko, and R. Lifton, eus., 1971); and WAR CRIMES AND THE AMERICAN CONSCIENCE (E. Knoll and J. McFadden, eds., 1970).

4 See Solf, A Response to Telford Taylor's Nuremburg and Vietnam: An American Tragedy, 5 AKRON L. REV. 43 (1972); DEPARTMENT OF THE ARMY, Final Report of the Research Project: Conduct of the War in Vietnam (1971); Pauet, . My Lai and Vietnam: - Norms, Myths, and Leader Responsibility, 57 MIL. L. REV. 99 (1972); Hart, Yamashita , Nuremburg and Vietnam: Command Responsibility Reappraised, XXV NAVAL WAR COLLEGE REVIEW 19 (1972); and Paust, XXV SAVAL IVAR COLLEGE REVIEW 103 (1973).

The concept of command responsibility-and the commensurate duty of a commander to control his troops-was developed along two paths, not reaching fruition per se until delineated by the post-World War I1 tribunals. The first path dealt with the question of the general responsibility of command; the second, with the specific criminal responsibility of the commander. It is alternatively submitted that (a) the natural development of the former would lead to inevitable inclusion of the latter, and (b) there was in fact an intertwining of the development of the two from the outset. It is further submitted that the development of an international standard was incidental in nature, occurring only where states manifested such conduct as to make it apparent that no satisfactory municipal standard was to be applied, and the other parties to the conflict were in a position to impose what was considered to be an appropriate international standard on culpable commanders of the off ending state.[5] When such an international tribunal was conducted, it generally followed the municipal standard of responsibility of the convening state.[6]

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5 In a report issued October 28, 1953, the U.S. Army disclosed that in June, 1953, thirty-four war crimes cases arising out of the Korean conflict were ready for trial, but that the alleged perpetrators had to be released in the prisoner exchange following the armistice (July 27, 1953) in that conflict, GREENSPAN, THE MODERN LAW OF LAND WARFARE 30, n. 82 (1959). Thus even where a state may legally detain and try prisoners of war for war crimes (as is recognized by Articles 85, 115, and 119 of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949), this right may be forfeited by the terms of armistice between the conflicting states. Only where there is a clear "winner" and "loser" is there likelihood of international war crimes trials. In the Korean and Vietnam wars, it was apparent that the Communist states had no intention of punishing those commanders responsible for the commission of war crimes; and by the terms of the respective peace agreements between the parties and the circumstances of execution of those agreements, their adversaries were incapable of imposing sanctions upon those commanders, even where they were within the control of the Free World states. In the India-Pakistan-Bangladesh conflict, where military success was more readily defined, Bangladesh was ultimately persuaded by India to postpone its plans to try 195 Pakistanis accused of war crimes in the interest of "fulfilling a larger vision of harmony and peace in the (Indo-Pakistani) subcontinent." The Bangladesh insistence of trial of the 195 accused was considered the "most crucial point" in negotiations during the twenty months between cessation of hostilities and conclusion of the peace accord. Simons, *Bangladesh Divided Over Issue of War Crimes Trials,* Wash. Post, August 17, 1973, at p. A22, col. 1. Ratzin, *Pakistan, India Set Accord,* Wash, Post, August 29, 1973, at p. 1, col. 8; and *India to Release* 90,000 *Pakistans in Peace Accord,* N. Y. Times, August 29, 1973, at p. 1, cols. 7,8. This dilemma has been the rule more than the exception, and has been offered as explanation in part for the dearth of international war crimes trials prior to the unconditional surrender of World War 11. Gross, *The Punishment of War Criminals, ZZ* NETHERLANDI.S L. REV. 356 (1955) as cited in Paust, *My Lai and Vietnam: Norms, Myths, and Leader Responsibility,*57 MIL. L. REV. 99 at 111, fn. 38 (1972).

6 This was advocated by Polish legal scholar Manfred Lachs in 1945 in *War Crimes: An Attempt to Define the Issues,* and generally followed by all Tribunals, *e.g.,* the Soviet Union utilized exclusively the Soviet concept of criminal negligence in defining command responsibility. U.S. DEPARTMENT OF THE ARMY, *Prisoner of War Study* (Step Two:

Sun Tzu, in what is considered to be the oldest military treatise in the world, wrote in 500 B.C.:

> When troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general. None of these disorders can be attributed to natural causes.[7]

Recognizing the responsibility of the commander, he also recognized the correlative duty of the commander to control his subordinates. Upon publication of his principles of war, Sun Tzu was summoned before a leading warrior king and asked to submit his theories to a test; Sun Tzu consented. Two companies of women, untrained in military matters, were formed up and each placed under the command of one of the king's favorite concubines. They were armed and given cursory instruction in the then-current manual of arms and close order drill. Then, to the sound of drums, Sun Tzu gave the order, "Right turn !" The only response of the "companies" was one of laughter. Sun Tzu remarked: "If the words of command are not clear and distinct, if orders are not thoroughly understood, then the general is to blame."

Again uttering the same command and receiving the same response, Sun Tzu then declared:

> If the words of command are not clear and distinct, if orders are not thoroughly understood, the general is to blame. But if his orders are clear, and the soldiers nevertheless disobey, then it is the fault of their officers.[8]

So saying and much to the consternation of the warrior king, Sun Tzu ordered the two company commanders beheaded and replaced by a member of each company. The execution was viewed by all, the drum was again sounded for drill, and the companies thereafter executed all maneuvers with perfect accuracy and precision, never venturing to utter a sound.'

The concept of national-and criminal-responsibility was recorded at an early date, Grotius declaring ". . . a community, or its rulers, may be held responsible for the crime of a subject if they knew it and do not prevent it when they could and should prevent it."[9]

While Grotius' statement on its face limits itself to national responsibility rather than addressing the liability of the individual military commander,

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The Functioning of the Law [VIII National Attitudes and Legal Standards 22]), 1969 (hereinafter cited as the "Harbridge House Study").

7 S. Tzu, THE ART OF WAR 125 (S. Griffith transl. 1963).

8 *S.* TZU, THE ART OF WAR 9 (L. Giles Transl. 1944).

9 II GROTIUS, DE JURE BELLI AC PACIS5 23 (C.E.I.P. ed., Kelsy trans 1925).

international recognition of the latter occurred as early as 1474 with the trial of Peter von Hagenbach. Brought to trial by the Archduke of Austria on charges of murder, rape, perjury and other crimes against "the laws of God and man," Hagenbach was tried by an international tribunal of twenty-eight judges from allied states of the Holy Roman Empire.

Despite a plea of superior orders, Hagenbach was convicted, deprived of his knighthood for crimes which he as a knight was deemed to have a *duty* to prevent, and executed. While an "international" trial, his trial in theory was not a "war crimes" trial as no state of war existed at the time of the commission of the offenses, the Swiss-Burgundian war not occurring until 1476.[10]

In 1621 King Gustavus Adolphus of Sweden promulgated his "Articles of Military Lawwes to be Observed in the Warres," Article 46 of which in part provided: "No Colonel or Captaine shall command his souldiers to do any unlawful thing; which who so does, shall be punished according to the discretion of the Judges . . ."

In 1689, after unsuccessful seige of Calvanist Londonderry, Count Rosen was sternly reprobated and relieved from all further military duties by the exiled James II-not for failure to accomplish his mission, but for his outrageous seige methods, which included the murder of innocent noncombatants.[11]

On April *5,* 1775, the Provisional Congress of Massachusetts Bay adopted the Massachusetts Articles of War. The eleventh article provided:

> Every Officer commanding, in quarters, or on a march, shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers bezting or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he, the said commander, who shall refuse or omit to see Justice done to this offender or offenders, and reparation made to the party or parties injured, as soon as the offender's wages shall enable him or them, upon due proof thereof, be punished, as ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of .[12]

Article XI1 of the American Articles of War, enacted June 30, 1775, contained the same language. The provision was re-enacted as section IX of the

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10 Solf, *supra* note 4 at 65, and Paust, *supra* note 4 at 57 MIL. L. REV.

11 Hargreaves, *The Rule Book* of *Warfare,* MARINE CORPS GAZETTE August 1970, at 44.

12 Emphasis supplied. Articles of War, Provisional Congress of Massachusetts Bay, April 5, 1775.

American Articles of War of 1776 on September 20, 1776. Thus from the very outset of this nation, there was imposed upon the military commander the duty and responsibility for control of the members of his command.

In promulgating the Articles of War of 1806, the provision was re-enacted) this time however authorizing specific punishment of the offending commander by cashiering, if deemed appropriate. [13] In addition) Article 33 provided:

> When any commissioned officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the person or property of any citizen of any of the United States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or company to which the person or persons so accused shall belong, are hereby required, upon application duly made by, or in behalf of, the party or parties injured) to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial. If any commanding officer or officers shall willfully neglect, or shall refuse upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.[14]

At approximately the same time, Napoleon I re-emphasized the responsibility of the commander in the briefest maxims: "There are no bad regiments; there are only bad colonels."[15]

During the War of 1812, American soldiers needlessly burned some buildings near their encampment in Upper Canada. Their commanding officer was summarily dismissed from the service. Another commander was brought before a United States military tribunal for a similar occurrence at Long Point.[16]

During the Black Hawk War of 1832, militia captain Abraham Lincoln was convicted by a court-martial for failure to control his men, some of whom had opened the officers' supply of whiskey and partaken freely thereof, while others were inclined to straggle on the march. Captain Lincoln was sentenced to carry a wooden sword for two days.[17]

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13 Articles *of* War, Article 32 (1306).
14 Articles *of* War, Article 33 (1806).
15 R. HEIKL, DICTIONARY OF MILITARY AND NAVAL QUOTATIONS 56 (1966).
16 Colby, *War Crimes,* 23 MICH. L. REV. 432, 501-02 (1925), as cited in Paust, *supra* n. 10 at 113.
17 C. SANDBURG, ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS 30 (1961)

In 1851 the United States Supreme Court affirmed a lower court's decision finding Colonel David D. Mitchell responsible for illegal acts which occurred during the Kearney campaign into Mexico in 1846. Colonel Mitchell had received illegal orders from his immediate superior which he had passed on to his subordinates and in some cases personally carried into execution. Although the case concerned civil rather than criminal penalties, the conclusions reached with regard to certain principles of responsibility-viz. the execution or passing on of a patently illegal order, and the defense of superior orders-were exactly those prescribed almost a century later in the *Hostage* and *High Command* cases.[18]

In 1863, the United States promulgated General Order No. 100, better known as the Lieber Code. Article 71 thereof provided for punishment of any commander ordering or encouraging the intentional wounding or killing of an already "wholly disabled enemy," whether that commander belonged to the "Army of United States, or is an enemy captured after having committed his misdeed." Two years later, Captain Henry Wirz, Swiss doctor and Commandant of the Confederate prisoner of war camp at Andersonville, Georgia, was convicted by military commission and hanged for violation of the Lieber Code, having ordered and permitted the torture, maltreatment, and death of Union prisoners of war in his custody.'[19] Winthrop in his *Military Law and Precedents* makes reference to other post-Civil War investigations, concluding that the burning of Columbia, South Carolina, on February 17, 1865, ". . ., cannot fairly be fixed upon any *responsible* commander. . . ."[20] for lack of evidence and interceding factors.

In 1873 in the course of hostilities in Northern California six Modoc indians, including Captain Jack, the chief, were tried by military tribunal for the murder of Brigadier General Canby and Reverend E. Thomas, who as peace commissioners had entered the Modoc village under a flag of truce. All were convicted and sentenced to hang. The sentences of the principal perpetrators and Captain Jack were affirmed, the latter for ordering the murders. In affirming those sentences, the Attorney General of the United States observed:

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18 *Mitchell w. Harmony,* 54 US. (13 How.) 420 (1851). The plaintiff received a judgment against Colonel Mitchell personally of $90,806.44 for seizure of plaintiff's goods not justified by military necessity. *See Infra,* text at footnotes 120 and 195.

19 THE TRIAL OF CAPTAIN HENRY WIRZ, 8 AMERICAN STATE TRIALS 666 (1865), as cited in THE LAW OF WAR: A DOCUMENTARY HISTORY 783 (L. Friedman ed. 1972).

20 Emphasis supplied. WINTHROP, MILITARY LAW AND PRECEDENTS 782 n. 46 (2nd ed. 1895).

All the laws and customs of civilized warfare may not be applicable to an armed conflict with the Indian tribes upon our Western frontiers, but the circumstances attending the assassination of Canby and Thomas are such as to make their murder as much a violation of the laws of savage as of civilized warfare, and the Indians concerned in it fully understood the baneness and treachery of their act.[21]

On June 22, 1874, the American Articles of War were repromulgated, Article 54 repeating the previous provisions concerning command responsibility. Winthrop in 1886 further defined the duty of the commander in armed conflict, providing some overlap between the responsibility of the military commander as stated in the Articles of War and the obligations of the laws of war:

> The observance of the rule protecting from violence the unarmed population is especially to be enforced by commanders in occupying or passing through towns or villages of the enemy's country. All officers *or* soldiers offending against the rule of immunity of non-combatants or private persons in war forfeit their right to be treated as belligerents, and together with civilians similarly offending, become liable to the severest penalties as violators of the laws of war.[22]

Elsewhere, he re-emphasized this point:

> It is indeed the chief duty of the commander of the army of occupation to maintain order and the public safety, as far as practicable without oppression of the population, and as if the district were a part of the domain of his own nation.[23]

With the deployment of United States forces to the Philippine Islands in 1901, United States forces met the question of the trial of foreign combatants for war crimes head on. By General Order No. 221, Headquarters, Division of the Philippines, August 17, 1901, insurrection First Lieutenant Natalio Valencia was tried, convicted, and sentenced to death for illegally ordering the execution of a non-combatant. By General Order No. 264 of that headquarters, September 9, 1901, Pedro A. Cruz, identified as a "leader" of guerrillas, was condemned to death for *permitting* the murder of two American Army prisoners of war in his custody.[24]

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21 14 OPINS. ATT'Y GEN. 249 (1873), as cited in WINTHROP, *Id.* at 786, n.78

22 WINTHROP, *supra* n. *20* at 779 (footnote omitted).

23 *Id.* at 800, (footnote omitted.) citing Johnson v. McIntosh, 8 Wheaton 581 (1821) which provides at 589: "A conquered people are not to be '*wanton*ly oppressed: . . ." [Emphasis supplied].

24 Brief for the Respondents in Opposition. In the Matter of General Tomoyuki Yamashita for Writs of Habeas Corpus and Prohibition, pp. 33-34. United States Supreme Court, October Term 1945 No. 61, Misc; NO. 672. *Also In re* General Tomoyuki Yamashita, 327 US. 1 *at* 16, n. *3 (1946).* These two orders were cited by the majority in recognizing the

In April, 1902, Brigadier General Jacob H. Smith, United States Army, was tried and convicted by general court-martial for inciting, ordering and permitting subordinates to commit war crimes during counterinsurgency operations on the island of Samar. In approving the conviction and sentence of dismissal, President Theodore Roosevelt stated:

> The findings and sentence of the court are approved. I am well aware of the danger and great difficulty of the task our Army has had in the Philippine Islands and of the well-nigh intolerable provocations it has received from the cruelty, treachery, and total disregard of the rules and customs of civilized warfare on the part of its foes. I also heartily approve the employment of the sternest measures necessary to put a stop to such atrocities, and to bring this war to a close. It would be culpable to show weakness in dealing with such foes or to fail to use all legitimate and honorable methods to overcome them. But the very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible position peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates. Almost universally the higher officers have so borne themselves as to supply this necessary check; and with but few exceptions the officers and soldiers of the Army have shown wonderful kindness and forbearance in dealing with their foes. But there have been exceptions; there have been instances of the use of torture and of improper heartlessness in warfare on the part of individuals or small detachments. In the recent campaign ordered by General Smith, the shooting of the native bearers by the orders of Major Waller was an act which sullied the American name and can be but partly excused because of Major Waller's mental condition at the time; this mental condition being due to the fearful hardship and suffering which he had undergone in his campaign. It is impossible to tell exactly how much influence language like that used by General Smith may have had in preparing the minds of thoses under him for the commission of the deeds which we regret. Loose and violent talk by an officer of high rank is always likely to excite to wrongdoing those among his subordinates whose wills are weak or whose passions are strong.[25]

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existence of "an affirmative duty" on the part of a commander who is additionally the commander of an occupied territory "to take such measures as [are] within his power and appropriate in the circumstances to protect prisoners of war and the civilian population" of that occupied territory.

25 *S.* Doc. 213, 57th Cong. 2nd Session, p.5. After learning of the widespread commission of war crimes by the insurrectionists – including torture and murder of all prisoners of war, mutilation of their bodies, murder of noncombatants, use of poison, and refusal to respect flags of truce- General Smith issued the following order to Major of Marines Littleton Waller Tazewell Waller, whose battalion had been deployed as part of General
Smith's command :
I want no prisoners. I wish you to burn and kill; the more you burn and kill, the better it will please me, The interior of Samar must be made into a howling wilderness.
General Smith further instructed Major Waller to kill all persons capable of bearing arms, designating the lower age limit as ten years of age. In the next sixty days, Major Waller and his Marine expeditionary force through constant contact virtually destroyed a numerically superior enemy force without resorting to the illegal methods urged by General Smith. In January1902, however, the Marine force was beset by a number of problems, many of which were caused by the repeated treachery of that force's Filipino guides and bearers, who Major Waller discovered were plotting to massacre the entire Marine party. Feeling that his drastic

Major Edwin F. Glenn, United States Army, was tried and convicted for violation of paragraph 16 of the Lieber Code, torture of a prisoner, for ordering use of the "water cure" and other means of torture as interrogation methods of prisoners taken during the Samar campaign.";[26] Another Army officer, Captain Cornelius M. Brownell, was accused of ordering and directing the "water cure" interrogation of one Father Augustine de la Pena, who died while being so interrogated; Brownell escaped prosecution, however, as he had been released from the Army prior to discovery of the offense by higher authorities-a jurisdictional refrain which, through lack of Congressional action, returned to haunt the nation at the time of discovery of the My Lai offenses.[27]

On October 18, 1907, the Fourth Hague Convention of 1907, respecting the laws and customs of war on land, was executed by forty-one nations. Article 1 of the Annex thereto laid down as a condition which an armed force must fulfil in order to be accorded the rights of a lawful belligerent, that it must be "commanded by a person responsible for his subordinates."[28] Similarly Article 19 of the Tenth Hague Convention of 1907, relating to bombardment by naval vessels, provided that commanders of belligerent fleets must "see to the execution of the details of the preceding articles" in conformance with the general principles

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situation called for drastic measures: Major Waller convened a drumhead court-martial of eleven Filipino bearers on January 20, 1902, of which he noted: "When I learned of the plot and heard everything, I sent [the bearers] out and had them shot." Major Waller maintained subsequently that the bearers were executed not only for their gross betrayal of the Marines, but in reprisal for the slaughter of Company C of the 9th Infantry at Balangiga, where Moro bolo-men had ripped open the entrails of butchered Army officers and poured in jam looted from the messhall.

General Chafee ordered Major Waller tried by general court-martial. Despite extreme command pressure, the court acquitted Major Waller. When General Chafee disapproved the acquittal, the Judge Advocate General of the Army disapproved the entire court-martial proceeding inasmuch as the Marine force had never been detached for service with the Army by Presidential order, as required by Sec. 1621, R.S. (1895) of the Articles of War. *See also* R. HEINL, SOLDIERS OF THE SEA 123-6 (1962); and J. SCHOTT, THE ORDEAL OF SAMAR (1964).

26 S. Doc. 213, 57th Cong., 2nd Sess., pp. 20-28. The "water cure" method of interrogation consisted of the forcing of large quantities of water into the mouth and nose of the victim, which not only caused the victim to suffocate but served to severely distend the stomach; whereupon the interrogator(s) would strike the victim in the stomach or even jump on his abdomen.

27 *Id.* at pp. 80-92. The offenses of Major Glenn and Captain Brownell were uncovered as the result of statements by former members of their respective commands-again a striking resemblance to My Lai. By letter of May 10, 1902, George B. Davis, Judge Advocate General of the Army, suggested to Senator H. Cabot Lodge that these jurisdictional defects be cured, a plea which has to this day gone unheeded. For a discussion of this point, *see* Paust, *After My Lai-The Case for War Crime Jurisdiction Over Civilians in Federal District Courts, 50* TEX. L. REV. 6 (1971).

28 36 Stat. 2277; Treaty Series No. 539; MALLOY TREATIES, VOL. 11, 2269 (1910).

of that Convention.29[29] Article 43 of the Annex to the Fourth Hague Convention of 1907 further requires that the commander of a force occupying enemy territory "shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[30] The latter principle was not unlike that advocated by Winthrop two decades previous; Hague Convention Four, it is submitted, is a manifestation and codification of that which was custom among the signatory nations, giving early recognition to the duties and responsibilities of the commander.

Article 54 of the 1916 Articles of War provided that a commander has a duty of insuring "to the utmost of his power, redress of all abuses and disorders which may be committed by an officer or soldier under his command." General John A. Lejeune, thirteenth Commandant of the Marine Corps, reiterated the general responsibility of a commander in the 1920 *Marine Corps Manual:*

> . . . officers, especially commanding officers, are responsible for the physical, mental, and moral welfare, as well as the discipline and military training of the young men under their command.[31]

At the conclusion of World War I, an international "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" met at Versailles. As part of their final report, delivered in March, 1919, the Commission recommended the establishment of an international tribunal "appropriate for the trial of these offenses (crimes relating to the war) ." 32[32] Part 111 thereof concluded that:

> All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including and customs of war or the laws of humanity, are liable to criminal prosecution.[33]

It is submitted that this resolution was predicated by two events unusual for the most part in the annals of warfare; (1) acts of war beyond normal public apprehension which shocked the conscience of the world, for example, the commencement of large scale unrestricted submarine warfare, and (2) the virtually total defeat of Germany and her allies. This created a demand for

29 36 Stat. 2351 (1910).
30 36 Stat. 2277.
31 Marine Corps Manual, U. S. Marine Corps, 1920.
32 Committee on the Responsibility of the Authors of the War and on Enforcement of Penalties-Report Presented to the Preliminary Peace Conference, Versailles, March, 1919, Part IV.

33 *Id.* as reported in 14 AM. J. INT. L. *95* (1920).

retribution- perhaps to insure that this was indeed "the war to end all wars"-as well as the potential means for satisfying that demand in the form of the League of Nations.

Such was not to be, however, as some nations for individual reasons voiced reluctance for proceeding. The United States, through its representatives, Secretary of State Robert Lansing and international law scholar James Brown Scott, dissented from the proposed procedure of trial by international tribunal as it was without precedent; rather, any accused should be tried by military tribunals of the conquering nations which had "admitted competence" in the matter.[34] The Japanese delegation dissented from prosecuting

> . . . highly-placed enemies on the sole ground that they abstained from preventing, putting an end to, or repressing acts in violation of the laws and customs of war [feeling] some hesitation [in admitting] a criminal liability where the accused, with knowledge and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to, or repressing acts in violation of the laws and customs of war.[35]

Sweeping these objections aside, Articles CCXXVII and CCXXVIII of the Versailles Treaty demanded the trial of the Kaiser by international tribunal and persons accused of violating the laws of war by international military tribunals.[36]

On February 3, 1920, the Allies submitted to the German government a list of 896 alleged war criminals they desired to try in accordance with Article CCXXVIII of the Versailles Treaty. The list including such high-ranking officers as the son of the Kaiser, Count Bismark (grandson of the Iron Chancellor), and Marshalls Von Hindenburg and Ludendorff. The German Cabinet strenuously objected, warning the Allies that Army leaders would resume hostilities if the demand was pressed. The German government advised the Allies that the Supreme Court of the Reich at Leipzig would conduct the trials and apply international rather than municipal law in trying the cases. The Allies consented on February 13, 1920, tendering to the Germans a list of forty-five names. The Germans eventually tried twelve of the forty-five, acquitting six. Of those convicted, only one was convicted on the basis of command responsibility. Major Benno Crusius was found guilty of ordering the execution of wounded French

34 *Id.* at Annex 11.
35 Greenspan, *supra* n.5 at 478, n.286.
36 The accused was to be tried by a military tribunal of the nation which had jurisdiction over the offense(s) alleged; if more than one nation could claim jurisdiction, a multinational military tribunal was to be appointed.

prisoners of war and sentenced to two years confinement.[37] In the *"Llandovery Castle"* Case, the German Supreme Court of Leipzig noted in their opinion that under their own Military Penal Code,

> [I]f the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such order is alone responsible.[38]

The demands for international standards of responsibility by and large went unanswered and unheeded, as the world was to discover two decades later. The Red Cross Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, promulgated in 1929, recognized in Article 26 that the commander had "the duty .,. to provide for the details of execution of the foregoing articles [of the Convention] as well as for the unforseen cases." 39[39] Thus the belligerent states entered World War I1 with a custom of command responsibility, codified in large part by the Hague Conventions of 1907 and the 1929 Red Cross Convention, and with somewhat of a warning based on the essentially unfilled demands of the Versailles Treaty that concepts of command responsibility would be implemented at the conclusion of any future conflict.[40]

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37 The name of each accused ultimately tried, the charge, and the finding and sentence are as follows:

ACCUSED	CHARGE	FINDING	SENTENCE
Sgt. Karl Heymen	Mistreatment of POWs	Guilty	10 months
Capt. Emil Muller	Mistreatment of POWs	Guilty	6 months
Pvt. Robert Neumann	Mistreatment of POWs	Guilty	6 months
Lt. Capt. Karl Neumann	Torpedoing the hospital ship *Dover Castle*	Not Guilty	
1st Lt. Ludwig Dithmar	Firing on survivors in lifeboats of hospital ship *Llandovery Castle*	Guilty	4 years
1st Lt. John Boldt	Firing on survivors in lifeboats of hospital ship *Llandovery Castle*	Guilty	4 years
Max Ramdahr	Mistreatment of Belgian children	Not Guilty	
Major Benno Crusius	Ordering the Execution of POWs	Guilty	2 years
1st Lt. Adolph Laule	Murder of a POWs	Not Guilty	
Lt. Gen. Hans von Schock	Mistreatment of POWs	Not Guilty	
Maj. Gen. Benno Kruska	Mistreatment of POWs	Not Guilty	
Lt. Gen. Karl Stenger	Ordering the Execution of POWs	Not Guilty	

U. S. DEP'T OF ARMY, PAMPHLET No. 27-161-2, INTERNATIONAL LAW 221-222 (1962).

38 Friedman, *supra* n. 19, 881.

39 47 Stat. 2074 (1932).

40 The concept of command responsibility was well recognized prior to World War 11, even by the so-called ['Oriental mind," as Marine General A. A. Vandegrift indicates in his autobiography, ONCE A MARINE (at p. 75). ln 1928, then-Major Vandegrift was stationed with the Marine expeditionary force in China. He relates the following:

Objections by the Allies to the leniency of the German trials at Leipzig, as well as the actions of Japan, such as their rape of Nanking in 1937, and German genocidal practices from the very outset and even prior to commencement of World War 11, again shocked the conscience of the world, the two serving as catalyctic impetus virtually from the outset of hostilities for thoughts of the establishment of international tribunals for the conduct of war crimes trials once that conflict was concluded.

Stories of the many atrocities committed by the German armies led representatives of many of the victimized states to issue the St. James Declaration in January, 1942, which promised to punish, "through the channels of organized justice," those responsible for war crimes.[41] On March 9, 1943, the United States issued "solemn warnings" to the Axis powers that all those responsible for war crimes, either directly or indirectly, would be held accountable.[42] In July, 1943, the United Nations War Crimes Commission was established to collect and collate evidence of war crimes. The Commission concerned itself primarily with such crimes as mistreatment of prisoners of war, atrocities against civilians, inhumane treatment of concentration camp inmates, execution of hostages, and other killing of non-combatants. On November 1, 1943, Great Britain, the United States, and the Soviet Union issued the Moscow Declaration on German Atrocities, which provided that those accused of war crimes would either be (a) "brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged," or (b) where offenses had no particular geographic localization, "punished by the joint decision of the Government of the Allies."

For a Christian general, Feng Yu-hsiang (the famous "Christian general" who baptized his troops en masse [with fire hoses] and had them sing hymns each night before retiring) proved an anomaly. As was the custom with Chinese forces, plainclothes agents preceded the main forces into the city. These men, generally cruel, plundered at will and treated the Chinese folk very harshly.

Soon after Feng's advance [to Tientsin], I learned that some of his agents were persecuting the natives in a small village close to one of our defense areas. After confirming the report I hastened to Feng's headquarters . . . he received me most courteously, explained that such acts were contrary to his orders, and promised to deal with the offenders if General [Smedley D.] Butler would let troops transit our area. Butler gave permission by telephone and I accompanied a platoon to the trouble spot. We caught the looters redhanded. Before I could say anything the Chinese platoon leader lined six of them up and beheaded them, an example to anyone else so tempted. The rest of them he marched back to the Chinese city, lined them against a wall and had them shot.

Japanese General Tomoyuki Yamashita testified at his trial (discussed *infra* n. 64) that he recognized and acknowledged the concept as a vaIid one, and one to which he maintained he adhered. United States v. Gen. Tomoyuki Yamashita, Tr. 3650, 3652, 3653, 3674.

41 Friedman, *supra* n. 19, 778.

42 89 Cong. Rec. 1773 (daily ed. March 9, 1943).

Formal protests to the Axis powers went unanswered; radio broadcast warnings went unheeded. On January 29, 1944, statements by United States Secretary of State Cordell Hull and British Foreign Secretary Anthony Eden were broadcast-and received by the Japanese-giving the details of the Bataan Death March. The United States also disclosed that the Japanese would not permit the United States Government to send food and supplies to United States and Filipino prisoners. Secretary Hull, in speaking of the treatment of prisoners of war in Japanese hands, stated:

> According to the reports of cruelty and inhumanity, it would be necessary to summon the representatives of all the demons available anywhere and combine their fiendishness with all that is bloody in order to describe the conduct of those unthinkable atrocities on the Americans and Filipinos.[43]

Secretary Eden in turn declared that the Japanese were violating not only international law but all human, decent civilized conduct. He warned the Japanese Government that in time to come the record of their military atrocities would not be forgotten. Secretary Hull closed his statement with the remark that the United States was assembling all possible facts concerning Japanese treatment of prisoners of war and that it intended to seek full punishment of the responsible Japanese authorities. Upon landing in the Philippines in October, 1944, General Douglas MacArthur issued warnings to the Japanese commanders that he would hold them immediately responsible for any failure to accord prisoners of war and civilians proper treatment. Like the Hull-Eden broadcast, General MacArthur's message was recorded in the Japanese Ministries.[44] On August 8, 1945, the Allies signed the London Agreement, establishing an International Military Tribunal for trial of war criminals whose offenses had no particular geographical location.[45] Jurisdiction for the trial of military commanders, as well as national leaders, was established in Article 6 of the Charter of the International Military Tribunal:

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43 Judgment of the International Japanese War Crimes Trial in the International-Military Tribunal for the Far East (hereinafter cited as "IMTFE") (1948), pp. 49, 748-750.

44 *Id.* a t 749.

45 Until execution of the London Agreement, Great Britain was of the mind that the German leaders should be considered wanted outlaws to be shot on sight, even if they voluntarily surrendered. Friedman, *supra,* n.19, p. *777.*

Despite these preliminary moves, some international legal sholars throughout the war doubted the practicality of international war crimes trials. A. Berriedale Keith, in his seventh edition of WHEATON'S INTERNATIONAL LAW (1944) declared "[the idea of war crimes trials by neutral tribunals . . . fantastic, rather than practicable" (p. 242); and that ". . . the probability of anything effective being devised . . . is negligible" (p. *587).* He also questioned whether individuals committing war crimes under order of their governments could be held liable for their actions (p. 586).

> Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.[46]

Individual states, in establishing military tribunals for trial of lesser officials accused of committing war crimes, promulgated comparable rules relating to the criminal responsibility of lesser commanders.

The initial United States definition, although never incorporated into any promulgating order, dealt both with direct commission of an offense and

> . . . omission of a superior officer to prevent war crimes when he knows of, or is on notice as to their commission or contemplated commission and is in a position to prevent them.[47]

Subsequently, each American theater of operations promulgated its own regulations for trial of war criminals. The commanders of the Pacific and China theaters issued orders which defined both subject jurisdiction and jurisdiction of the person:

5. OVER OFFENSES - a. The military commissions established hereunder shall have jurisdiction over the following offenses: murder, torture or ill-treatment of prisoners of war or persons on the seas; killing or ill-treatment of hostages; murder, torture or ill-treatment, or deportation to slave labor or for any other illegal purpose, of civilians of, or in, occupied territory; plunder of public or private property; wanton destruction of cities, towns or villages; devastation,

46 Friedman, *supra* n. 19, 885.

47 JCS Directive 1023/3, September 25, 1944, as cited in Douglass, *High Command Case: A Study in* Staff *and C m a n d Responsibility,* INT'L LAWYER, *686,* 687 (October 1972).

destruction or damage of public or private property not justified by military necessity; planning, preparation, initiation or waging of a war of aggression, or an invasion or war in violation of international law, treaties, agreements or assurances; murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offense within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offenses against the laws or customs of war; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy.[48]

Article 3 of the Law of August 2, 1947, of the Grand Duchy of Luxemborg, on the Suppression of War Crimes, reads as follows:

> Without prejudice to the provisions of Articles 66 and 67 of the Code Penal, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes and delicts set out in Article 1 of the present law: superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being the superiors in rank of the principal authors, have aided those crimes or delicts.[49]

A special provision was made in the Netherlands relating to the responsibility of a superior for war crimes committed by subordinates. Article 27(a) (3) of the Law of July, 1947, adds, *inter alia,* the following provision to the Extraordinary Penal Law Decree of December 22, 1943: "Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment, . . ," [50]

Article 4 of the French Ordinance of August 28, 1944, "Concerning the Suppression of War Crimes," utilized for the trial of persons accused of war crimes within metropolitan France, Algeria, and the then-existing French colonies, provided:

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48 United States Armed Forces, Pacific, *Regulations Governing the Trial of War Criminals* (24 September 1945); United States Armed Forces, China, Regulations (21 January 1946). The former were used in the trial of Generals Yamashita and Homma and in the *Jaluit Atoll Case, infra,* then superseded by the *Regulations Governing the Trials* of *Accused War Criminals* of December 5, 1945, for all subsequent trials.

49 United Nations War Crimes Commission, IV LAW REPORTS OF TRIALS OF WAR CRIMINALS 87 (hereinafter cited *as* "--L.R.T.W.C.--") (1948).

50 Id., 88

> Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have tolerated the criminal acts of their subordinates.[51]

Trials within Germany were all subject to Law No. 10 of the Allied Control Council ("Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity"). Article II (2) provided:

> Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a [war] crime, . . . if he was (a) a principal, or (b) was an accessory to the commission of any such crime or ordered or abetted the same, or (c) he took a consenting part therein .,.[52]

Article IX of the Chinese Law of October 24, 1946, "Governing the Trial of War Criminals," states that:

> Persons who occupy a . . . commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals.[53]

Article 8 (ii) of the British Royal Warrant relating to the trials of persons accused of the commission of war crimes provided:

> Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime . .[54]

The Canadian rules expanded this point, incorporating British rule 8 (ii), then providing in their Rule 10:

> (4) Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as prima facie evidence of the responsibility of the commander for those crimes.
>
> (5) Where there is evidence that a war crime has been committed by members of a formation, unit, body, or group and that an officer or non-commissioned officer was present at or immediately before the time when such offense was committed,

51 III L.R.T.W.C. 94.
52 I TWC XVI.
53 IV L.R.T.W.C. 88.
54 I L.R.T.W.C. 108-9. Article 139 (b), UCMJ *(10* U.S. Code *5* 939(b)), relating to redress of injuries to property similarly provides that where such injuries are committed by a unit and the individual perpetrators cannot be identified, damages may be assessed against all individual members of the command who are shown to have been present at the time the damages complained of were inflicted.

> the court may receive that evidence as prima facie evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body, or group, for that crime.[55]

B. SUMMARY

Command has always imposed responsibility; yet few instances are recorded prior to the end of World War I1 where that responsibility was either criminal or international in nature. The responsibility existed prior to that time, but there was not sufficient warrant or authorization to interfere in what was essentially an area of "state action." The frustrations with the Leipzig trials after World War I, the genocidal acts of the Axis, and the absolute cessation of any form of government in the defeated Axis states, gave the world both the cause and the means for demanding a day of reckoning.

Based on the foregoing rules, the Allied nations entered the trials believing a commander to be responsible for the unlawful actions of his subordinates where (a) he personally ordered the illegal act charged, or (b) with knowledge that such actions were taking place, he failed in his duty as a commander to prevent such offenses, either intentionally (The Netherlands, France, and Luxemborg) or through neglect (United States, China, Great Britain and Canada).[56] It remained for the tribunals to apply those rules to the cases presented.

II. WORLD WAR II TRIALS

A. "WAR CRIMES" DEFINED

Before proceeding, the term ('war crimes" as used generally and in this thesis warrants definition. The United States Army defines ('war crimes" as "the technical expression for a violation of the law of war by any person or persons, military or civilian."[57] The present British definition is similarly imprecise.[58]

Field Manual 27-10 provides some delineation by including those acts defined by the Geneva Conventions of 1949 as ('grave breaches," if committed

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55 IV L.R.T.W.C. 128.

56 The requirement of knowledge presents itself by implication only in all but the United States JCS definition *(supra,* n. 47), which included knowledge or notice.

57 U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27-10, LAW OF LAND WARFARE, para. 499 (1956) [hereinafter cited as FM 27-10]).

58 British War Office, 111 MANUAL OF MILITARY LAW (LAW OF *WAR* ON LAND, 1958), para. 624, defines ('war crime" as "the technical expression for violations of the laws of warfare, whether committed by members of the armed forces or by civilians."

against persons or property protected by those Conventions;[59] Paragraph 504 includes other acts as "representative" of war crimes, *viz.:*

a. Making use of poisoned or otherwise forbidden arms or ammunition.
b. Treacherous request for quarter.
c. Maltreatment of dead bodies.
d. Firing on localities which are undefended and without military
e. Abuse of or firing on the flag of truce.
f. Misuse of the Red Cross emblem.
g. Use of civilian clothing by troops to conceal their military character during battle.
h. Improper use of privileged buildings for military purposes.
i. Poisoning of wells or streams.
j. Pillage or purposeless destruction.
k. Compelling prisoners of war to perform prohibited labor.
1. Killing without trial spies or other persons who have committed hostile acts.
m. Compelling civilians to perform prohibited labor.
n. Violation of surrender terms.[60]

The United States Navy has defined war crimes

> . . . as those acts which violate the rules established by customary and conventional international law regulating the conduct of warfare. Acts constituting war crimes

59 Paragraph 502 provides:
502. Grave Breaches of the Geneva Conventions of 1949 as War Crimes.
The Geneva Conventions of 1949 define the following acts as "grave breaches," if committed against persons or property protected by the Conventions :
a. GWS and GWS Sea:
Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention : Wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. (GWS, art. 50; GWS Sea, art. 51.)
b. GPW
Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention : Wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great sufferings or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention. (GPW, art. 130.)
c. GC.
Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention : wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. (GC art. 147.)
60 FM 27-10 para. 504 (1956).

> may be committed either by members of the armed forces of a belligerent or by individuals belonging to the civilian population.[61]

The Charter of the International Military Tribunal established by the Allied Powers at the conclusion of World War I1 for prosecution and punishment of the major war criminals of the European axis defined "war crimes" as:

> . . . namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity . .[62]

The definition formulated by the United Nations in the Nuremburg Principles of 1946 is similar in language. France in contrast left the term undefined, feeling that any offenses to be punished were such infractions of French law as were not made justifiable by the laws and customs of war.[63] This is not unlike the Navy definition and the general definition, rather than specific definition, would seem to be preferred: a war crime is any act not justified by military necessity and otherwise prohibited by custom or international convention regulating the conduct of war.

B. THE TRIAL OF GENERAL TOMOYUKI YAMASHITA [64]

Of the trials which address the question of command responsibility, the trial of Japanese General Tomoyuki Yamashita by Military Commission remains the most controversial, primarily (a) because of an ill-worded opinion prepared sua sponte by the lay court; (b) because of a book written by one of General Yamashita's defense counsel; and (e) inasmuch as it was one of the first war crimes trials completed, it gained the benefit of judicial review by the United States Supreme Court.

General Tomoyuki Yamashita served as commanding general of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands

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61 U.S. DEPARTMENT OF THE NAYY, LAW OF NAVAL WARFARE, para. 320 (NWIP 10-2, 1955).

62 CHAPTER II, CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, Article VI (b).

63 III L.R.T.W.C. 105.

64 Unless otherwise noted, all facts recited herein or documents referred to are from the record of trial, *United States of America vs. Tomoyuki Yamashita,* a Military Commission appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces, Western Pacific, dated 1 October 1945. [hereinafter referred to as Tr. ---].

from October 9, 1944, until his surrender on September 3, 1945. [65]As such, the evidence established conclusively that he was the commander of all Japanese forces in the Philippines.[66] He served concurrently as the military governor of the Philippines. [67]

On October 2, 1945, General Yamashita was served with the following Charge:

> Tomoyuki YAMASHITA, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and its allies and dependencies, particularly the Philippines; and he, General Tomoyuki YAMASHITA, thereby violated the law of war.[68]

65 Stipulation, October 29, 1945, between the United States and Tomoyuki Yamashita.

66 By stipulation *(Id.)* General Yamashita agreed that in addition to his regular forces he commanded the Kempei Tai (military police). General Yamashita claimed that the naval troops in Manila were only under his tactical command and therefore not within his disciplinary command and control (Tr. 3622); his chief-of-staff, General Muto, testified that any officer having command of troops of another branch under him did have the authority and duty to restrain those men from committing wrongful acts (Tr. 3049, 4034). The Commission, in their finctings, concluded " . . . [t]hat a series of atrocities and other high crimes have been committed by members of the Japanese armed forces *under your command."* [Emphasis supplied]. If these naval forces were not under Yamashita's command and control, they had to be under the command and control of Admiral Soemu Toyoda, Commander-in-Chief of the Combined Fleet. Admiral Toyoda's case is discussed, *infra* page *69*, charged with criminal responsibility for the war crimes committed by the naval troops in question in Manila, the tribunal before which he was tried, in acquitting Admiral Toyoda, concluded that command, control, and responsibility for these forces lay in General Yamashita, not Admiral Toyoda. (Toyoda transcript, page 5012). The Japanese air Forces in the Philippines came under General Yamashita's command and control on January 1, 1945 (Yamashita transcript, p. 3589). He was also commander of all Prisoner of War Camps in the Philippines (Tr. 2675, 3251, 3252.)

67 *In re* Yamashita, 327 U.S. 1 at 16 (1946).

68 Tr. 23. The government of Japan was bound by a number of conventions to observe the rules and customs of land warfare. It had been a signatory of the Hague Convention No. IV of 1907 (Respecting the Laws and Customs of War on Land) and the Red Cross Convention of 1929 (Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field), and at the outbreak of the war, had agreed to apply the Red Cross Convention of 1929 to civilian internees. Although it had not ratified the Geneva Convention of 1929 (Treatment of Prisoners of War), upon the outbreak of war Japan had agreed to apply the provisions of that Convention *mutatis mutandis* and to take into consideration the national and racial customs of prisoners.

On October 8, 1945, as a result of a motion made by the defense during arraignment of the accused[69] the prosecution submitted a Bill of Particulars containing sixty-four specifications. Prefaced by the statement that

> Between 9 October 1944 and 2 September 1946, at Manila and other places in the Philippine Islands, members of Armed Forces of Japan under the command of the Accused committed the following: . . .[70]

Subsequently, on October 29, 1945, a Supplemental Bill of Particulars was filed containing an additional fifty-nine specifications, prefaced by the allegation that

> . . . members of the armed forces of Japan, under the command of the Accused, were permitted to commit the following during the period from 9 October 1944 to 2 September 1945 at Manila and other places in the Philippine Island: . .,. [71]

Trial on the merits commenced on October 29, 1945, concluding December 7, 1945, after hearing 286 witnesses and receiving 423 documents in evidence.[72] The evidence substantially supported the crimes alleged in most of the 123 particulars; General Yamashita admitted neither the commission of the acts nor that they were violations of the laws of war.[73] Rather, he denied ordering the offenses alleged, and denied having any knowledge of their commission, the latter as a result of the extreme tactical situation in which he found himself from the very outset of assumption of command.'[74].' Had he known of or foreseen these acts, he would have concentrated all of his efforts toward preventing them.[75] In concluding his testimony, General Yamashita specifically denied either receiving from superior authority or giving any order to massacre "all the Filipinos." [76]

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69 Tr. 34.
70 Tr. 37.
71 Tr. 74.
72 Tr. 4058.
73 Tr. 3917 *et seq.;* United States v. Yamashita, 327 U.S. 1 at 14.
74 Tr. 3537, 3654-6.
75 Tr. 3656.
76 Tr. 3656. David Bergamini, in JAPAN'S IMPERIAL CONSPIRACY (1972) indicates Japanese records are to the contrary. General Yamashita's subordinates received such a directive from Tokyo Imperial Headquarters and carried it out despite General Yamashita's efforts to prevent its execution. (pp. xxii, 1111-1112) If this is true, the *Yamashita* case factually resembles the situation presented in the war crimes trial of Generalfeldmarschall Wilhelm von Leeb. On receipt of The Commissar Order, General von Leeb called his subordinate commanders together, advised them that he considered that order to be in violation of international law, and advised them of his opposition to it. As the court stated in acquitting him of charges relating to its subsequent implementation, "If his subordinate commanders . . . permitted . . . enforcement, that is their responsibility and not his." U.S. v. Von Leeb, XI TWC 557-558, discussed *infra* p. 44 *et seq.* The so-called "Yamashita doctrine'' of strict liability, as argued and asserted by chief prosecutor Telford

The evidence presented the Commission directly and circumstantially refuted the testimony of General Yamashita, the latter on five bases: (a) the number of acts of atrocity, (b) the number of victims, (c) the widespread occurrence of atrocities, (d) the striking similarity in the method of execution, and (e) the vast number of atrocities carried out under the supervision of an officer.

Of the 123 atrocities included within the Charge, evidence was adduced on ninety.[77] Forty-four occurred in Manila substantially during the two-week period from 6 to 20 February 1945,during which time over 8,000 men, women, and children, all unarmed non-combatant civilians, were killed and over 7,000 mistreated, maimed or wounded. [78]While General Yamashita had displaced his headquarters from Manila some two months previous, and while communications were generally precarious, his headquarters nevertheless possessed and utilized the capability of communication with Manila until June, 1945.[79] The war crimes which occurred in Manila were carried out pursuant to written orders [80] and under the supervision of officers of the army and navy. [81]Many advised their victims-to-be that they were acting pursuant to orders from higher authority. [82]A pattern of execution and an orderliness and

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Taylor, was specifically rejected by the Tribunal in the *von Leeb* case. XI TWC 534-44. One can only speculate as to what success General Yamashita may have had proffering this argument (assuming *arguendo* Bergamini is correct) rather than asserting the improbable denial of knowledge.

77 Annex to the Review of the Theater Judge Advocate, United States Army Forces, Pacific (December 26, 1945).

78 Tr. 212, 271, 348, 370, 412, 429, 445, 587, 6% 669, 717, 743, 778, *806,* 871, 1147, 1159, 1197, 1200, 1222, 1262, 1270, 1299, 1370, 2211, 2223. Annex, *id.* items 3, 10, 13, 15, 15, 17, 20, 23, 24, 25, 27, 28, 29, 30, 32, 34, 35, 36, 41, 48, 50, 51, 52, 53, 60, 61, 62, 63, 64, 68, 77, 80, 88, 89, 93, 97, 98, 99, 101, 102, 104, 105.

79 Tr. 3524-3527, 3654-3656, 3123, 3387, 2674.

80 An order of the Kobayashi Heidan group dated 13 February 1945 directed that all people in or around Manila except Japanese and Special Construction Units (Filipino collaborators) be executed (Tr. 2905, 2906; Ex. 404). An operations order of the Manila Naval Defense Force and South-western Area Fleet, part of the land based naval forces, directed that in executing Filipinos, consideration was to be given to conserving ammunition and manpower; and that because the disposal of bodies was "troublesome" they should be gathered into houses which were scheduled to be burned or destroyed (Tr. 2909).

81 Tr. 833, 2174.

82 During the Paco massacre in Manila on February 10, 1945, in which twelve unarmed noncombatant civilians were executed (Annex, *supra* n. 64, item 29), a Japanese officer informed his intended victims, "You very good man but you die," and "Order from higher officer, Kill you, all of you." (Tr. 833). At Dy Pac Lumber Yard in Manila on February 2, 1945, (Annex, *supra* n.64, items 16 and 93), before executing 117 noncombatant civilians, the Japanese captain in charge advised his victims that they were to die because of "an order from above" he had to follow. (Tr. 2174). Outside Manila, on April 10, 1945, during the murder of civilians near Sumayao, a Japanese soldier said "It was Yamashita's order to kill all civilians." (Tr. 2317). On Bataan Island, an American aviator was tortured, then buried alive. The commander of the execution party stated that the execution was carried out as a

dispatch emerged: assembly of the victims in a central location, usually a house or large building,'?[83] where the most "economical" means of execution were utilized in order to conserve the expenditure of ammunition.[84] In a number of instances extensive advance preparation of the site, for example, installing strings to set off explosives, cutting holes in the floor for bodies to fall through, digging mass graves, and staging gasoline for the burning of bodies and buildings, was made to facilitate executions.[85] The bodies were then disposed of by throwing in the river, burning with a house or building, or burying in mass graves. [86]Similar war crimes were documented throughout the Philippines, manifesting the same pattern of orderliness, planning, and direction for the most part during the same two-week period in February, 1945.[87] In addition, there was extensive evidence concerning the starvation, torture, lack of medical care for, and murder of American prisoners of war and civilian internees.[88]

General Yamashita never inspected any of the prisoner of war camps, even though his headquarters was located within, adjacent to, or in the vicinity of two different camps where a substantial number of violations occurred.[89] After General Yamashita personally ordered the suppression of guerrilla activities in

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result of a direct order from General Yamashita that "American prisoners of war in the Philippine Islands will be killed." (Tr. 2609-12, 2616, 2621).

83 Tr. 190, 410, 429, 450, 463, *587*, 606, 715, 738, 767, 775, 797, 823, 2167; Ex. 131

84 Tr. 148, 192, 271, 283, 348, 405, 453, 587, 621, 717, 745, 779, 798, 833, 1134, 1197, 2151, 2168; Ex. 126

85 Tr. 445, 467, 477, 589. 669, 768, 778, 823, 2151, and 2268.

86 467, 607, 639, 768, 778, 806, 865, 1188, 1200, 1237, 2152; Ex. 91, 92, 93, 114, 124.

87 Tr. 1491, 1506, 1515, 1524, 1533, 1546, 1556, 1621, 1628, 1647, 1652, 1655, 1661, 1671, 1707, 1710, 1714, 1736, 1737, 1739, 1764, 1775, 1783, 1799, 1813, 1839, 2182. On February 12, 1945, more than 2,500 men, women, and children of the town of Calamba on Luzon were executed by bayoneting or burning. (Tr. 1977. 1979. 1981. 1985. 1992, 1999, 2004, 2008. 2012.) On February 24, 1945, all male residents of San Pablo between the ages of 15 and 50 - some 6,000 to 8,000 in all - were executed (Tr. 2064, 2069, 2070, 2072, 2083, 2084, 2088).

88 Annex, *supra* n. 64, items 2, 4, 6, *7*, 9, 13, 69, 73, 76, 83, 86, 87, 89, 94, 95, 109, 122.

89 Tr. 3537, 3573. General Yamashita's headquarters were at Fort McKinley until December 23, 1944, where four hundred disabled American prisoners of war were held from October 31, 1944 until January 15, 1945. The prisoners were crowded into one building, furnished no beds or covers and kept within the inclosure of a fence extending thirty feet beyond each side of the building. Their two meals a day consisted of one canteen cup of boiled rice, mixed with greens; once a week the four hundred men were given twenty-five to thirty pounds of rotten meat, filled with maggots. Occasionally they would go a day or two without water and at times were reduced to eating grass and sticks they dug in the yard. (Tr. 2756-2758). These conditions existed within walking distance of General Yamashita's headquarters; yet, while recognizing a duty to prevent such occurrences, and despite his testimony that had he forseen or known of these conditions he would have "concentrated all [his] efforts toward preventing it," he never conducted nor directed the conduct of an inspection of the facilities. (Tr. 3654-3656). He transferred his headquarters to Baguio in 1945, where in one incident on April 18, 1945, eighty-three men, women, and children all noncombatants, were executed. (Tr. 2655-2661).

December, 1945, two thousand Filipinos incarcerated in Manila as guerrilla suspects were given cursory trials, none of which lasted more than five minutes and none of which even conformed to Japanese legal requirements, transported to North Cemetery in trucks, and beheaded.[90] General Yamashita's staff judge advocate, Colonel Hideo Nishiharu, testified that he advised General Yamashita that these guerrilla suspects were in custody, that there was insufficient time to give them proper trials, and that the Kempei Tai "would punish those who were to be punished."[91] Knowing that this meant that these guerrillas would be executed without trial, General Yamashita nodded in apparent approval.[92]

90 Tr. 2253-2311.

91 Tr. 3762-3763.

92 Tr. 3762, 3763, 3814, 3815. Aware that Colonel Nishiharu's testimony directly connected General Yamashita to 2,000 deaths and generally weakened the defense argument of lack of knowledge. Defense counsel A. Frank Reel did everything he could to discredit Colonel Nishiharu's testimony. Utilizing a little literary license and a pair of editing scissors, he met with greater success in his book *The Case* of *General Yamashita* (1949) than before the Commission. In his book, Reel asserts that the Commission, impatient with Colonel Nishiharu, conducted its own cross-examination, concluding :

The Commission doubts that further exploration of the point would serve any useful purpose. . . . We have great doubt that lengthy cross-examination will be worth consideration of this court.

To which Reel then added:

And that, I believe, disposed of Nishiharu.

A reading of the transcript lends itself to a different interpretation. A colloquy between the Commission and Reel indicates that any impatience of the Commission was with Reel and his line (and length) of crossexamination. After extensive cross-examination concerning Colonel Nishiharu's role in the decision-making process, particularly as it related to the execution of the 2,000 prisoners, the Commission interrupted :

The answers will probably be quite immaterial, anyway. No commander could possibly be in a position where the recommendations by a staff officer, if accepted, would place the responsibility upon the staff officer. In all armies, it is presumed to be a standard practice that staff officers make recommendations to commanders, which may or may not be accepted, but if they are accepted then it becomes the decision of the commander: the staff officer's responsibility is finished.

(Tr. 3792).

Reel maintained he was merely attacking Colonel Nishiharu's credibility, and resumed his line of examination. His attempts were interrupted for clarification purposes by both government counsel and the Commission. Once the point in question - approval by the Commanding General of death sentences - was clarified by the Commission's questions, the Commission then advised Captain Reel. "You may proceed, and the Commission doubts that further exploration of this point would serve any useful purpose. Do you propose to explore it further?" (Tr. 3799)

While answering initially in the negative, Reel's subsequent explanation indicated that he in fact did intend to renew the same line of question. The Commission then replied :

Well, we have great doubt that lengthy cross examination will be worth consideration of the Court. It is entirely possible you may wish to explore into the details of the alleged execution of the one thousand or thereabouts Filipinos charged with being guerrillas, just before the headquarters was moved from Fort McKinley.

I will ask you to consider very carefully the necessity of much more cross-examination of this witness.

General Yamashita subsequently issued a written order to the Kempei Tai unit responsible for the executions commending them for their "fine work." [93]

Two other witnesses appeared on behalf of the prosecution to directly link General Yamashita to the offenses alleged. While both were in the custody of United States forces as suspected collaborators, and while both previously had offered to exchange information as to Filipino and Japanese collaborators in return for their freedom, both testified that they had received no promise or reward for their testimony in the trial of General Yamashita. [94]

The first, Narciso Lapus, was private secretary from June 1942 to December 1944 to General Artenio Ricarte, a prominent member of the Japanese puppet government of the Philippines. Lapus was advised by Ricarte in October 1944 that Yamashita had informed him that:

> We take the Filipinos 100 percent as our enemies because all of them, directly or indirectly, are guerrillas or helping the guerrillas. In a war with the enemies [sic] we don't need to give quarter. The enemies should go.[95]

According to Lapus, General Yamashita then advised Ricarte that he planned to allow the Americans to enter Manila; he would then counter-attack, destroying Manila, the American forces, and the population of Manila. His plan of defense coincided with orders he had received to destroy Manila, particularly the

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(Tr. 3800)
Thereafter, rather than "disposing" of Colonel Nishiharu, Captain Reel continued his examination for another twenty-one pages.
The author's reading of the transcript is borne out by a conversation with the government counsel in the *Yamashita* trial, Major Robert M. Kerr, on November 23, 1972. Mr. Kerr thought the testimony of Colonel Nishiharu both significant and conclusive, believed the Commission accepted his testimony, and was in complete disagreement with Reel's conclusions concerning that testimony.
Colonel Nishiharu's testimony is supported by the testimony of Richard M. Sakakida (Tr. 2253-2302), a Nisei interpreter who worked in Colonel Nishiharu's office. Sakakida testified that during December 1944, trial of Filipino civilians consisted merely in the accused signing his name and giving his thumb-print, in reading the charge to him and in sentencing him. In the event a sentence of death was passed, the victim was not informed of this until arrival at the cemetery. In one week in December 1944, the cases of 2,000 Filipinos accused of being guerrillas were so handled by General Yamashita's headquarters. If Japanese soldiers were tried, however, they were accorded a full trial in accordance with Japanese procedures. No Japanese soldiers were tried after October 1944, however.
The testimony of Richard M. Sakakida was overlooked by Mr. Reel in *The Case of General Yamashita.*
93 Tr. 905-906, 3763. The captured diary of a Japanese warrant officer assigned to a unit operating in the Manila area contained an entry dated December 1, 1944: "Received orders, on the mopping up of guerrillas last night. Our object is to wound and kill the men, to get the information and to kill the women who run away." (Tr. 2882; Ex. 385).
94 Tr. 913, 1059.
95 Tr. 917.

populated and commercial areas of the city. General Yamashita further advised General Ricarte that he had ordered Japanese forces to wipe out any population area that gave any signs of pro-American movement or action; and that when Ricarte asked General Yamashita to rescind the order, General Yamashita refused.[96]

The second witness, Joaquin S. Galang, testified that he overheard a conversation between Generals Yamashita and Ricarte in December 1944 in which General Ricarte asked General Yamashita to rescind his order to kill all Filipinos. General Yamashita replied: "The order is my order. And because of that it should not be broken or disobeyed. It ought to be consumed, happen what may happen." [97]

The testimony of Galang was rebutted by the defense: Galang had testified that General Ricarte's 12-year-old grandson had served as an interpreter for the conversation overheard by Galang; the defense produced the grandson, Bislumo Romero, who denied interpreting the conversation in question.[98]

The trial concluded on December 7, 1945. In reaching a finding of guilty, the Commission, none of whom were lawyers, saw fit to issue a written opinion, which states in part:

> The Prosecution presented evidence to show that the crimes were so extensive and wide-spread, both as to time and area, that they must have been wilfully permitted by the Accused, or secretly ordered by the Accused . . .
>
> The Accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war in Asia, Malaya, Europe, and the Japanese Home Islands. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nonetheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood. The Rules of Land Warfare, FM 27-10, United States Army. are clear on these points. It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice. The tactical

96 Tr. 917, 923, 939, 940, 947, 1023.
97 Tr. 1063, 1068, 1069.
98 Tr. 2014, 2021.

> situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character, and training of his troops are other important factors in such case's. These matters have been the principle considerations of the Commission during its deliberations. . . .
>
> . . . The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) that during the period in question you failed to provide effective control of your troops as was required by the circumstances.")[99]

Review of the evidence presented, the record of trial, and the Commission's "opinion" indicates four theories of command responsibility upon which the Commission could have depended to reach their decision: (1) that General Yamashita ordered the offenses committed; (2) that, learning about the commission of the offenses, General Yamashita acquiesced in them; (3) that, learning about the commission of the offenses, General Yamashita failed to take appropriate measures to prevent their reoccurrence or to halt them; (4) the offenses committed by the troops under General Yamashita were so widespread that under the circumstances he exhibited a personal neglect or abrogation of his duties and responsibilities as a commander amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence.

The question of knowledge, an element of the first three theories, was the subject of re-examination during the trial of General Yamashita's Chief of Staff, Lieutenant General Akira Muto. Tried by the International Military Tribunal for the Far East, a tribunal composed of lawyer-judges from eleven nations, Muto was charged with the same offenses as Yamashita; much of the evidence received was taken directly from the Yamashita transcript. Muto's defense to these charges was the same: lack of knowledge owing to the extreme tactical situation. In addressing this defense, the Tribunal stated:

> . . . During his tenure of office as such Chief-of-Staff a campaign of massacre, torture and other atrocities was waged by the Japanese troops on the civilian population, and prisoners of war and civilian internees were starved, tortured and murdered. Muto shares responsibility for these gross breaches of the Laws of War. We reject his defense that he knew nothing of these occurrences. It is wholly incredible.[100]

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99 Tr. 4059-4063.

100 II Tokyo Judgment 1, 186 [Emphasis supplied.]; *Also see* Volume *203*, Official Transcript of the International Japanese War Crimes Trial, In The International-Military Tribunal for the Far East, pages 49, 820-49, 821. The specific count of the indictment, Count

General Yamashita's case received daily review during the progress of the trial by the staff judge advocate for the convening authority.[101] A daily summary of evidence was made and as a result the staff judge advocate's review of the case was completed on December 9, 1945. In conclusion, the staff judge advocate stated:

> The evidence affirmatively shows a complete indifference on the part of accused as commanding officer either to restrain those practices or to punish their authors. The evidence is convincing that the overall responsibility lay with the Army Commander, General Yamashita, who was the highest commander in the Philippines; that he was charged with the responsibility of defending the Philippines and that he issued a general order to wipe out the Philippines if possible and to destroy Manila; that subsequently he said he would not revoke the order.
>
> The pattern of rape, murder, mass execution and destruction of property is wide spread both in point of time and of area to the extent a reasonable person must logically conclude the program to have been the result of deliberate planning.
>
> From all the facts and circumstances of record, it is impossible to escape the conclusion that accused knew or had the means to know of the widespread commission of atrocities by members and units of his command; his failure to inform himself through official means available to him of what was common knowledge throughout his command and throughout the civilian population can only be considered as a criminal dereliction of duty on his part.[102]

Defense counsel for General Yamashita had previously filed a petition for writs of habeas corpus and prohibition with the United States Supreme Court on November 25, 1945; [103]a petition for writ of certiorari was subsequently filed on January 7, 1946.[104] In the interim, the military continued its review process. On December 26, 1945, the review of the theater staff judge advocate was completed. After extensive review of the evidence, the theatre staff judge advocate stated:

55, contained language similar to that with which Yamashita was charged: . . . being by virtue of (his) respective (office) responsible for securing the observance of the said Conventions and assurances and the Law and Customs of War . . . in respect of many thousands of prisoners of war and civilians then in the power of Japan belonging to the United States , . . (and) the Commonwealth of the Philippines . . . deliberately and recklessly disregarded (his) legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war.

101 101 United States Army Forces, Western Pacific. (Count 55 of the Indictment, Annex No. A-6, Tokyo Judgment).

102 Review of the Staff Judge Advocate of the Record of Trial by Military Commission of Tomoyuki Yamashita, Headquarters, United States Army Forces, Western Pacific, December 9, 1945.

103 In the Matter of the Application of General Tomoyuki Yamashita. United States Supreme Court, October Term. 1945, No. 61, Miscellaneous.

104 General Tomoyuki Yamashita, Petitioner, v. Lieutenant General Wilhelm D. Styer, Commanding General, United States Army Forces, Western Pacific, United Supreme Court, October Term, 1945, No. 672.

The only real question in the case concerns accused's responsibility for the atrocities shown to have been committed by members of his command. Upon this issue a careful reading of all the evidence impels the conclusion that it demonstrates this responsibility [reciting facts]. All this leads to the inevitable conclusion that the atrocities were not the sporadic acts of soldiers out of control but were carried out pursuant to a deliberate plan of mass extermination which must have emanated from higher authority or a t least had its approval. From the widespread character of the atrocities as above outlined, the orderliness of their execution and the proof that they were done pursuant to orders, the conclusion is inevitable that the accused knew about them and either gave his tacit approval to them or at least failed to do anything either to prevent them or to punish their perpetrators. Accused himself admitted that he ordered the suppression or "mopping up" of guerrillas and that he took no steps to guard against any excesses in the execution of this order. One cannot be unmindful of the fact that accused, an experienced officer, in giving such an order must have been aware of the dangers involved when such instructions were communicated to troops the type of the Japanese. Accused stoutly insists that he knew nothing of any of the atrocities and assigns as the reason for his lack of knowledge the complete breakdown of communications incident to the swift and overpowering advance of the American forces and to his complete preoccupation with plans for the defense of the Philippines. He states that his troops were disorganized and out of control, leaving the inference that he could not have prevented the atrocities even had he known of them. With respect to Manila, he insists that he had only tactical command of naval troops operating in the city and although he had authority to restrain such troops committing disorders, he could not discipline them, the situation being thus complicated by dual control between himself and the Navy. Here in particular the defense witnesses testified to a breakdown of communications with the forces in Manila. While, however, it may be conceded that the accused was operating under some difficulty due to the rapidity of the advance of the Americans, there was substantial evidence in the record that the situation was not so bad as stated by the accused. General Yokoyama admitted that he had communication with troops in Manila until 20 February and with the accused until June and made frequent reports to him. Surely a matter so important as the massacre of 8,000 people by Japanese troops must necessarily have been reported. (Since accused had authority to control the operations of the naval troops he cannot absolve himself of responsibility by showing that others had the duty of punishing them for disorders.) There is no suggestion as to any breakdown in communications with Batangas where late in February some of the most widespread atrocities occurred, nor is there any substantial proof that communications with other points in the islands at which atrocities occurred were at all interrupted. It is also noteworthy that the mistreatment of prisoners of war at Ft. McKinley occurred while accused was present in his headquarters only a few hundred yards distant and some of the other atrocities transpired close to the proximity of Baguio where he had his headquarters after removal from Manila. Taken all together, the court was fully warranted in finding that accused failed to discharge his responsibility to control his troops thereby permitting the atrocities alleged and was thus guilty as charged.[105]

105 Review of the Theater Staff Judge Advocate of the Record of Trial by Military Commission of Tomoyuki Yamashita, General Headquarters, United States Army Forces, Pacific, December 26, 1945.

In re Yamashita was argued before the Supreme Court of the United States on January 7, 1945.

The substance of the Court's opinion [106] addressed three issues: (a) jurisdiction of a military commission over the accused; (b) failure to state an offense against the law of war, that is, jurisdiction over the offenses; and (c) entitlement to and denial of the accused's fundamental right of a fair trial thereby divesting the Commission of jurisdiction to proceed.

This article limits its discussion to (b)-was there such a duty imposed upon a military commander that its disregard constituted a violation of the law of war? In determining that the acts alleged stated an offense against the law of war, the Court first addressed the question of command responsibility:

> . . . it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.
>
> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect the civilian population and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.[107]

Citing the provisions relative to command of Articles 1 and 43 to the Annex of the Fourth Hague Convention of 1907, Article 19 of the Tenth Hague Convention, and Article 26 of the Geneva Red Cross Convention of 1929,[108] the Court stated:

106 *In re* Yamashita, 327 US. 1 (1945).
107 *In re* Yamashita, *327* U.S. 1, 14-15 (1945) [Emphasis supplied.].
108 See text at notes 28, 29, 30, 39 and 40, *supra.*

> These provisions plainly imposed on petitioner . . . an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.[109]

In concluding that the charge stated an offense against the law of war, the majority, in refusing to review the evidence before the Commission, nevertheless noted:

> There is no contention that the present charge, thus read, is without the support of evidence, or that the Commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances . . . It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the Commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.
>
> . . . we conclude that the allegations of the charge, tested by any reasonable standard, adequately allege a violation of the law of war and that the Commission had authority to try and decide the issue which it raised.[110]

The majority thus concluded (a) that a commander has a duty to control the conduct of his subordinates, insuring their compliance with the law of war, and (2) that where such a duty exists, a charge alleging less than personal participation in or ordering of an act in violation of the law of war states a violation of the law of war.

In a dissent laden with emotion, Justice Murphy charged:

> . . . He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge.[111]

However, Justice Murphy conceded that "inaction or negligence may give rise to liability, civil or criminal," [112]subsequently observing that "this is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities."[113] Justice Murphy's objection was not to the standard of responsibility, but to the seeming inconsistency in the facts between the picture

109 *In re* Yamashita, 327 U.S. 1, 16 (1945).
110 *Id.* at 17, 18. *See also,* n. 4 at 327 US. 1, 16.
111 *Id.* at 28. *See also,* 327 U.S. 1, 47 (Justice Rutledge concurrence in this view).
112 *Id.* at 39.
113 *Id.* at 40.

painted, first, of a thoroughly defeated commander, retaining operational command but having lost tactical control, under constant attack by vastly superior forces and, second, a commander who was not exercising proper administrative control over his subordinate units. This is a factual determination balanced by the Commission and eventually determined adversely to the accused based on their professional opinion, as soldiers, that the accused failed to fulfil his duties as a commander as required by the circumstances.

It has been fairly speculated that the emotive dissents of Justices Rutledge and Murphy-manifested by the shaking voice and castigating looks of Justice Murphy in reading his dissent came about as a result of the serious procedural questions raised by the case.[114] Unable to accept the majority's logic on these points, the dissenting justices accepted all arguments of counsel for the accused.[115] The respective petitions were denied, and the case was returned to the military for disposition on February 4, 1946, the date of the Court's decision. [116]

General Yamashita's fate lay in the hands of General Douglas MacArthur, Commanding General, United States Army Forces, Pacific. That decision came on February 7, 1946: General MacArthur approved the findings and sentence of the commission [117] and on February 23, 1946, General Yamashita was hanged.[118]

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114 KERR, *supra* n. 92.

115 Justice Murphy's opinion embraced all defense arguments in *t o t o* and in most cases verbatim; his famous language concerning General Yamashita's purported lack of knowledge (327 U.S. 1 a t 34) comes directly from the brief filed with the Supreme Court by the defense (pages 28-29).

An independent source confirms that the dissenting Justices - indeed, the entire Court - were in disagreement over procedural questions only: no review of the merits was attempted. A. MASON, HARLAN FISKE STONE:PILLAR OF THE LAW (1956), 666-671.

116 Denial of Motion for Leave to File Petition for Writ of Habeas Corpus and Prohibition, Supreme Court of the United States, October Term, 1945, No. 61, Miscellaneous; and Denial of Petition for Writ of Certiorari, No. 672.

117 It is not easy for me to pass penal judgment upon a defeated adversary in a major military campaign. I have reviewed the proceedings in vain search for some mitigating circumstance on his behalf. I can find none. Rarely has so cruel and wanton a record been spread to public gaze.

Revolting as this may be in itself, it pales before the sinister and far reaching implication thereby attached to the profession of arms. The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable They are based upon the noblest of human traits-sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, to mankind; has failed utterly his soldier faith. The transgressions resulting therefrom as revealed by the trial are a blot upon the military profession, a stain upon civilization and constitute a memory of shame

The value of the study of the Yamashita trial lies not in its often misstated facts nor in the legal doctrine of strict liability it purportedly espoused (but did not),but in the legal conclusions it actually reached, *Yamashita* recognized the existence of an affirmative duty on the part of a commander to take such measures as are within his power and appropriate in the circumstances to wage war within the limitations of the laws of war, in particular exercising control over his subordinates; it established that the commander who disregards this duty has committed a violation of the law of war; and it affirmed the *summum jus* of subjecting an offending commander to trial by a properly constituted tribunal of a state other than his own. In the latter it became the foundation for all subsequent trials arising from World War 11. In the former its value lies primarily in the general rather than the specific sense-while recognizing the duty of the commander and the violation of the law of war for failure to exercise that duty, the duty was all the more absolute in *Yamashita* because of General Yamashita's additional responsibilities as military governor of the Philippines. As military governor, all trust, care, and confidence of the population were reposed in him.

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and dishonor that can never be forgotten. Peculiarly callous and purposeless was the sack of the ancient city of Manila, with its Christian population and its countless historic shrines and monuments of culture and civilization, which with campaign conditions reversed had previously been spared.

It is appropriate here to recall that the accused was fully forewarned as to the personal consequences of such atrocities. On October 24 - four days following the landing of our forces on Leyte - it was publicly proclaimed that I would "hold the Japanese Military authorities in the Philippines immediately liable for any harm which may result from failure to accord prisoners of war, civilian internees or civilian non-combatants the proper treatment and the protection to which they of right are entitled.

No new or retroactive principles of law, either national or international, are involved. The case is founded upon basic fundamentals and practice as immutable and as standardized as the most matured and irrefragable of social codes. The proceedings were guided by that primary rational of all judicial purpose – to ascertain the full truth unshackled by any artificialities of narrow method or technical arbitrariness. The results are beyond challenge.

I approve the findings and sentence of the Commission and direct the Commanding General, United States Army Forces, Western Pacific, to execute the judgment upon the defendant, stripped of uniform, decorations and other appurtenances signifying membership in the military profession.

(signed) Douglas MacArthur
(typed) DOUGLAS MacARTHUR,
General of the Army, United States
Army, Commander-in-Chief

Action of the confirming authority, General Headquarters, United States Army Forces, Pacific, in the case of General Tomoyuki Yamashita, Imperial Japanese Army, February *7*, 1946.

118 Notification of Death, Office of the Surgeon, Headquarters, Philippine Detention & Rehabilitation Center, February 23, 1946.

This was in addition to his duties and responsibilities as a military commander, a point refined in the *High Command* and *Hostages* cases which follow. [119]

C. THE "HIGH COMMAND" CASE

Perhaps the most important of the war crimes trials involving the question of command responsibility was the Nuremburg trial of *United States v. Wilhelm von Leeb,*[120] also known as "The High Command Trial." The accused were thirteen of the higher ranking German officers in American custody;[121] all held important staff and/or command positions in the German military. The Tribunal hearing the case was composed of Presiding Judge John C. Young, former Chief Justice of the Supreme Court of Colorado; Associate Judge Justin W. Harding, formerly U.S. District Judge, First Division, District of Alaska; and Associate Judge Winfield R. Hale, a Justice on the Tennessee Court of Appeals on leave of absence.[122]

The indictment alleged four offenses: (1) Crimes Against Peace[123] (2) War Crimes[124] (3) Crimes Against Humanity[125] (4) Conspiracy to Commit the Crimes

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119 The other major objection to the trial of General Yamashita - lack of due process - has generally been mooted by the provisions of the Geneva Conventions of 1949 which provide fundamental legal protections for those charged with violation of the Conventions or other laws and subjected to trial by a state other than their own.

120 Vols. X and XI TWC.

121 Generalfeldmarschall (General of the Army) Wilhelm von Leeb, Generalfeldmarschall (General of the Army) Hugo Sperrle, Generalfeldmarschall (General of the Army) Georg Karl Friedrich-Wilhelm von Kuechler, Generaloberst (General) Johannes Blaskowitz, Generaloberst (General) Hermann Hoth, Generaloberst (General) Hans Reinhardt, Generaloberst (General) Hans von Salmuth, Generaloberst (General) Karl Hollidt,, Generaladmiral (Admiral) Otto Schniewind, General der Infanterie (Lieutenant General, Infantry) Karl von Roques, General der Intanterie (Lieutenant General, Infantry) Hermann Reinecke, General der Artillerie (Lieutenant General, Artillery) Walter Warlimont, General der Infanterie (Lieutenant General, Infantry) Otto Woehler, and Generaloberstabsrichter (Lieutenant General, Judge Advocate) Rudolf Lehmann. General Johannes Blaskowitz committed suicide in prison on 5 February 1948, and thereby the case against him was terminated. XI TWC 482-463.

122 XI TWC 462.

123 None of the accused were found guilty of Count One, as none were considered to have been involved in the policy-making decisions alleged.

124 Count Two - War Crimes - Count two of the indictment, paragraph 45, is as follows:
45. Between September 1939, and May 1945, all of the defendants herein . . . committed war crimes and crimes against humanity . . . in that they participated in the commission of atrocities and offenses against prisoners of war and members of armed forces of nations then at war with the Third Reich or under the belligerent control of or military occupation by

Charged in Counts One, Two, and Three.[126] Before entering judgment as to the guilt or innocence of each of the accused, the Tribunal discussed the offenses at length. As in *Yamashita,* there was no question that the offenses occurred; the only questions to be resolved concerned the standard of responsibility and, based on that standard, the individual responsibility of each accused.

It was to the standard of responsibility that the Tribunal first addressed itself. Initially, the Tribunal stated:

> For a defendant to be held criminally responsible, there must be a breach of some moral obligation fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law.[127]

Germany, including but not limited to murder, ill treatment, denial of status and rights, refusal of quarter, employment under inhumane conditions and at prohibited labor of prisoners of war and members of military forces, and other inhumane acts and violations of the laws and customs of war. The defendants committed war crimes and crimes against humanity in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups connected with, the commission of war crimes and crimes against humanity.

Then follows paragraph 46, which in general terms sets out the unlawful acts.

Paragraph 47 alleged issuance and execution of the "Commissar" Order, which provided for summary execution of Soviet political commissars; Counts 48 and 49, the issuance and execution, respectively, of the "Commando" Order, which directed that all allied troops on commando missions, even if in uniform, whether armed or disarmed, offering resistance or not, were "to be slaughtered to the last man." Counts 50 through 53 dealt with alleged use of prisoners of war for prohibited labor; while Counts 54 through 58 alleged murder and ill-treatment of prisoners of war. As part of these charges the accused allegedly implemented a number of illegal orders. The Barbarossa Jurisdiction Order was intended for application on the eastern front and concerned the military jurisdiction of military commanders over enemy civilians or inhabitants of that area. The Night and Fog Decree directed that non-German civilians be taken to Germany for handling by the Ministry of Justice in Germany. Other orders provided for the taking of hostages and the execution of reprisals.

125 Count Three - Paragraph 59 of the indictment, is as follows:

59. Between September 1939, and May 1945, all of the defendants herein . . . committed war crimes and crimes against humanity.. . in that they participated in atrocities and offenses, including murder, extermination, ill-treatment, torture, conscription to forced labor, deportation to slave labor or for other purposes, imprisonment without cause, killing of hostages, persecutions on political, racial and religious grounds, plunder of public and private property, wanton destruction of cities, towns and villages, devastation not justified by military necessity, and other inhumane and criminal acts against German nationals and members of the civilian populations of countries and territories under the belligerent occupation of, or otherwise controlled by Germany.

The following paragraphs 60 to 82 set forth generally and particularly the unlawful acts, such as enslavement of the population, plunder of public and private property, murder, etc., and participation of the defendants in the formulation, distribution and execution of these unlawful plans.

126 Count Four was subsequently struck by the Tribunal on the basis of duplicity, inasmuch as it tendered no issue not contained in the preceding points (XI TWC 483).

127 XI TWC 510. It is submitted that the use of the word "moral" was a poor choice, as any obligation if "fixed by international law" is legal rather than moral. While a moral

From the outset the prosecution urged a theory of strict liability of the commander, even where orders were not obviously criminal or where an order is routinely passed without review by a commander from a superior headquarters to a subordinate. The Tribunal rejected these arguments, stating that

> . . . to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal.[128]

The Tribunal next addressed the problem of the commander's criminal responsibility for actions committed within his command pursuant to criminal orders passed down independent of his command.[129] The Tribunal stated the commander has four alternatives in such a situation: (1) he can issue an order countermanding the order; (2) he can resign his commission; (3) he can sabotage the enforcement of the order within a somewhat limited sphere; or (4) he can do

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obligation through custom may have become a legal obligation, one does not normally risk criminal liability for violation of a purely moral obligation.

128 The Tribunal continued, careful to distinguish between implementation and transmittal:

Transmittal through the chain of command constitutes an implementation of an order. Such orders carry the authoritative weight of the superior who issues them and of the subordinate commanders who pass them on for compliance. The mere intermediate administrative function of transmitting an order directed by a superior authority to subordinate units, however, is not considered to amount to such implementation by the commander through whose headquarters such orders pass. Such transmittal is a routine function which in many instances would be handled by the staff of the command without being called to his attention. The commander is not in a position to screen orders so transmitted. His headquarters, as an implementing agency, has been bypassed by the superior command. Furthermore, a distinction must be drawn as to the nature of a criminal order itself. Orders are the basis upon which any army operates. It is basic to the discipline of an army that orders are issued to be carried out. Its discipline is built upon this principle. Without it, no army can be effective and it is certainly not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality. Without certain limitations, he has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law.

Many of the defendants here were field commanders and were charged with heavy responsibilities in active combat. Their legal facilities were limited. They were soldiers-not lawyers. Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.

XI TWC 51C-11.

129 This situation while more likely to occur under the pluralistic system of command could occur under our bureaucratic system of command. See discussion *infra* at text to ns. 270-277.

nothing. In discussing these alternatives under the pluralistic or dual command system which existed in Nazi Germany, the Tribunal found none of the alternatives viable, yet nevertheless concluded that the commanders concerned must be responsible.[130] Citing Control Council Law No. 10, Article 11, paragraph 2,[131] the Tribunal concluded that " [a]ny participation in implementing such orders, tacit or otherwise, any silent acquiescence in their enforcement by his subordinates, constitutes a criminal act on his part."[132] The Tribunal found the situation analogous to any other plea of superior orders; while no defense, it was a mitigating circumstance.[133]

In next considering the responsibility of commanders for orders issued by members of their staff, the Tribunal did not see fit, under ordinary circumstances, to vary the traditional military adage that while a commander may delegate authority, he may never delegate responsibi1ity.[134]

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130 XI TWC 511-512.

131 Control Council Law No. 10, Article 11, paragraph 2, provides in pertinent part as follows :

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this article, if he * * * (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) *took a consenting part therein* or (d) *was connected with* plans or enterprises involving its commission * * *. [Emphasis supplied by Tribunal] XI TWC 512.

132 *Supra* n. 130, at 512. It is submitted that the Tribunal found itself treading a very thin line in distinguishing implementation of orders, "tacit or otherwise," and "mere transmittal," discussed *supra* n. 114, the former requiring knowledge and intent, the latter being an uninformed ministerial act. The question of culpability would seem to turn on whether the command had a duty to know the contents of the order transmitted.

133 *Id.* at 512. Both denial of the plea of superior orders as a defense and its consideration in mitigation were prescribed by Article 11, 0 4(b) of Control Council Law No. 10.

134 *Id.* at 514. The accused found their positions in conflict, not only with each other but with themselves. Those on trial as commanders pointed out that there were certain functions which they of necessity left to their chiefs of staff and that at times they did not know of orders which might be issued under authority of their command. Staff officers on trial urged that a commander was solely responsible for what was done in his name. Several accused had served in both capacities, and hence were caught on the horns of the dilemma.

U.S. Army field manuals of that time and at present support the concept of the non-delegable responsibility of the commander. FM 100-5, OPERATIONS OF ARMY FORCES IN THE FIELD, provides at paragraph 3-1:

The authority vested in an individual to direct, coordinate, and control military forces is termed "command." This authority, which derives from law and regulation, is accompanied by commensurate responsibility that cannot be delegated. The commander alone is responsible for the success or failure of his command under all circumstances.

U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF OFFICERS FIELD MANUAL: STAFF ORGANIZATION AND PROCEDURE (1972) , provides :

Paragraph 1-4

b. The commander alone is responsible for all that his unit does or fails to do. He cannot delegate this responsibility.

Paragraph 1-9 is applicable to the situation presently under consideration :

After considering the legality of the various orders which the accused allegedly issued, the Tribunal again addressed the collective question of command responsibility and again rejected any concept of strict liability:

> Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive. Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.[135]

The Tribunal next addressed the duties and responsibilities of a military commander of an occupied territory whose authority has been limited by his own government or is not otherwise absolute:

> Concerning the responsibility of a field commander for crimes committed within the area of his command, particularly as against the civilian population, i t is urged by the prosecution that under the Hague Convention, a military commander of an occupied territory is *per* se responsible within the area of his occupation, regardless of orders, regulations, and the laws of his superiors limiting his authority and regardless of the fact that the crimes committed therein were due to the action of the state or superior military authorities which he did not initiate or in which he did not participate. In this respect, however, it must be borne in mind that a military commander, whether it be of an occupied territory or otherwise, is subject both to the orders of his military superiors and the state itself as to his jurisdiction and functions. He is their agent and instrument for certain purposes in a position from which they can remove him at will. In this connection the *Yamashita* case has been cited. While not a decision binding upon this Tribunal, it is entitled to great respect because of the high court which rendered it. It is not, however, entirely applicable to the facts in this case for the reason that the authority of Yamashita in the field of his operations did not appear to have been restricted by either his military superiors or the state, and the crimes committed

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b. When the commander authorizes staff officers to issue orders in his name, the commander retains responsibility for these orders.
For discussion of staff responsibility *see* Douglass, *High Command Case* : *A Study in Staff and Command Responsibility,* 6 INT. LAWYER 686 (October 1972).

135 *Supra* note 130 at 543-541.

were by troops under his command, whereas in the case of the occupational commanders in these proceedings, the crimes charged were mainly committed at the instance of higher military and Reich authorities.

It is the opinion of this Tribunal that a state can, as to certain matters, under international law limit the exercise of sovereign powers by a military commander in an occupied area, but we are also of the opinion that under international law and accepted usages of civilized nations that he has certain responsibilities which he cannot set aside or ignore by reason of activities of his own state within his area. He is the instrument by which the occupancy exists. It is his army which holds the area in subjection. It is his might which keeps an occupied territory from reoccupancy by the armies of the nation to which it inherently belongs. It cannot be said that he exercises the power by which a civilian population is subject to his invading army while at the same time the state which he represents may come into the area which he holds and subject the population to murder of its citizens and to other inhuman treatment. The situation is somewhat analogous to the accepted principle of international law that the army which captures the soldiers of its adversary has certain fixed responsibilities as to their care and treatment.

We are of the opinion, however, as above pointed out in other aspects of this case, that the occupying commander must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal.[136]

Where such authority has been allegedly removed from a commander, or where a commander has denied knowledge of illegal activities by other units, the Tribunal stated a court should examine both objective and subjective factors in considering the validity of any such defense.[137]

The Tribunal, in concluding, turned to the individual accused and their responsibility for the acts alleged.[138]

1. Wilhelm von *Leeb:* Von Leeb, a former General of the Army, was charged with offenses committed during the period in which he was commanding general of Army Group North.[139] These offenses dealt with: (a) The Commissar Order; (b) crimes against prisoners of war; (c) The Barbarossa Jurisdiction Order; (d) crimes against civilians; (e) pillage of public and private property; and (f) criminal conduct pertaining to the seige of

136 *Id.* at 544-545.

137 *Id.* at 548-549. The accused were again confronted by the inconsistencies of their own arguments: they claimed they had been vested of executive authority for their territory by orders of the SD while denying knowledge of the duties and activities of the SD, which were established and defined by the same orders. For a discussion of the subjective criteria to be utilized in determining a commander's knowledge and responsibility, see *infra* text at notes 288-293.

138 Only the charges of those accused as commanders are discussed. For a discussion of the question of responsibility of the staff officer, see Douglass note 134 *supra.*

139 Von Leeb was Commander in Chief of Army Group North in the campaign against Russia until January 16, 1942, when he resigned primarily because of interference in technical matters by Hitler; he was then placed in reserve.

Leningrad. The Tribunal considered each *seriatum;* in preface the Tribunal stated:

> The evidence establishes the criminal orders were executed by units subordinate to the defendant and criminal acts were carried out by agencies within his command. But it is not considered under the situation outlined that criminal responsibility attaches to him merely on the theory of subordination and over-all command. He must be shown both to have had knowledge and to have been connected to such criminal acts, either by way of participation or criminal acquiescence.[140]

a. The Commissar Order. The evidence showed that von Leeb recognized the Commissar Order to be in violation of international law from the outset, and voiced his opposition to those senior to him on a continuous basis. As a result of the resistance to the order by von Leeb and his fellow Russian front commanders, von Rundstedt and von Bock, the question of its application was resubmitted to Hitler on September 23, 1941, who refused to change the decree. In putting the order into effect, von Leeb's headquarters had no implementing authority; merely the administrative function of passing it to subordinate commanders. Yet the evidence showed that von Leeb not only advised his subordinate commanders of his opposition to the order, but advised them that he would fully implement the German high command's "maintenance of discipline" order, which provided for strict measures to be taken against any soldier committing war crimes. He continued to resist the order until his retirement in January, 1942. The Tribunal concluded:

> . . . we cannot find von Leeb guilty in this particular. He did not disseminate the order. He protested against it and opposed it in every way short of open and defiant refusal to obey it. If his subordinate commanders disseminated it and permitted its enforcement, that is their responsibility and not his.[141]

b. Crimes Against Prisoners of War. The Tribunal entered a finding of not guilty to this charge as the evidence failed to show von Leeb possessed either knowledge or a duty to know of crimes committed against prisoners of war. All responsibility for prisoners at that time was in the hands of the quartermaster general, who was responsible directly to the German High Command and Hitler rather than through the tactical chain of command. Subordinate units within General von Leeb's command responsible for the handling of prisoners of war were similarly responsible directly to the German High Command.')[142] As General von Leeb was heavily engaged

140 *Supra* n. 130 at 555.
141 *Id.* at 557-558.
142 Id. at 558

during this period with the initial phases of the seige of Leningrad, a matter he was desperately attempting to conclude before winter, he had neither the authority nor the means of ascertaining what treatment prisoners of war were receiving.[143] As the Tribunal stated:

> . . . [H]e . . . had the right to assume that the officers in command of those [subordinate] units [charged with responsibility] would properly perform the functions which had been entrusted to them by higher authorities, both as to the proper care of prisoners of war or the uses to which they might be put.[144]

c. *The Barbarossa Jurisdiction Order.* The evidence established that von Leeb, while expressing personal disapproval, implemented this order by passing it into the chain of command. The order was illegal in part; and, as his implementing order made no effort to clarify its instructions or prevent its illegal application, "having set this instrument in motion, he must assume a measure of responsibility for its illegal application." [145]

d. Crimes Against Civilians. This charge derived from the activities of a Nazi Security Police unit, which was assigned to and operated within General von Leeb's Army Group North area. While these activities included acts of mass murder-some by units subordinate to Army Group North but on order of the Security Police-and recruitment of slave labor, with one exception there was no evidence to establish that the orders for these illegal activities or reports thereof passed through or were received by Army Group North. In that one case, although reported to von Leeb as having been carried out by a local self-defense organization of Latvians, he immediately took action to prevent any reoccurrence. The Tribunal concluded that insufficient evidence existed to establish General von Leeb's knowledge of the acts alleged.[146]

e. Pillage of *Public and Private Property.* The evidence presented failed to establish that the acts committed were illegal under the circumstances, based on questions of military necessity.[147] Similar findings were made to

143 *See generally* HART, HISTORY OF THE SECOND WORLD WAR (1971), p. 157 *et seq.* and SALISBURY, THE 900 DAYS (1969), p. 334 *et seq.*

144 XI TWC *558.* The author would qualify this statement with what may be the obvious, as follows: A commander has the right, *within reason,* to assume, etc. What is reasonable under the circumstances would depend on a number of criteria, all of which relate to putting a commander on notice. See discussion, *infra* text at ftnts. 288-293.

145 *Id.* at 560-561.

146 *Id.* at 560-562.

147 *Id.* at 562-563.

charges concerning conduct pertaining to the siege of Leningrad.[148] The Tribunal recognized several subjective matters in conclusion:

> We believe that there is much to be said for the defendant von Leeb by way of mitigation . . . . He was a soldier and engaged in a stupendous campaign with responsibility for hundreds of thousands of soldiers, and a large indigenous population spread over a vast area. It is not without significance that no criminal order has been introduced in evidence which bears his signature or the stamp of his approval.[149]

2. Hugo Sperrle: Former commanding general of the "Condor Legion" during the Spanish Civil War and the representative of the Luftwaffe in the High Command trial, Sperrle was acquitted of all charges, the Tribunal finding that Sperrle, rather than implementing the one order which formed the basis of the charge against him, on principle opposed it and sought to make it ineffective.[150]

3. Georg Karl Friedrich-Wilhelm von Kuechler: General von Kuechler served as a subordinate commander to General von Leeb, succeeding him as Commanding General of Army Group North in January 1942. He continued in this command until January 1944, when he was placed in the Reserves. The Tribunal addressed the list of charges in order.

a. The Commissar Order. Although von Kuechler testified concerning his opposition to the Commissar Order, the Tribunal found his testimony irreconcilable with an earlier affidavit in which he denied any knowledge of the order. There was no question that the order was transmitted to and through his headquarters, nor that it was enforced by subordinate units. Reports were made by these subordinate units to his headquarters that commissars were being executed by them. General von Kuechler denied knowledge of those reports, to which the Tribunal replied: "It was his business to know, and we cannot believe that the members of his staff would not have called these reports to his attention had he announced his opposition to the order." [151]

b. Neglect of Prisoners of War and Their Use in Prohibited Labor. Based on an order to subordinate units that General von Kuechler admitted must have passed through his headquarters, both civilians and prisoners of war were utilized

148 *Id.* at 563.
149 *Id.* at 563.
150 *Id.* at 566.
151 *Id.* at 567.

for improper and dangerous work. The Tribunal concluded that the evidence supported a finding that General von Kuechler had knowledge of and approved such practice.

c. *Illegal Execution of Russian Soldiers and Murder and Ill-treatment of Prisoners of War.* While the evidence was extensive that Russian prisoners of war had been illegally executed and that they were executed pursuant to orders of the German High Command, the Tribunal did not feel that the evidence adequately established General von Kuechler's transmittal of them. The Tribunal did find that subordinate units submitted reports to his headquarters over a wide period of time, and noted: "These reports must be presumed in substance to have been brought to his attention."[152] His own testimony indicated he was aware of the reports, yet took no corrective action. The Tribunal concluded that he not only tolerated but approved the execution of these orders.[153] Nor was there any question, based on numerous reports received by his headquarters, the inordinately high death rate,[154] and by his own admission that he had personally visited every prisoner of war camp in his area, that he had knowledge of the extensive neglect and ill-treatment of prisoners of war in his area. The Tribunal held von Kuechler to be guilty of criminal neglect of prisoners of war within his jurisdiction.[155]

d. Deportation and Enslavement of the Civilian Population. The massive deportation program was carried out pursuant to orders executed by General von Kuechler, which the Tribunal found "establish beyond question the ruthless manner in which he contributed to this program and also the ruthless manner in which he evacuated hundreds of thousands of helpless people, contrary to the dictates of humanity and the laws of war." [156]

e. Murder, Ill-treatment, and Persecution of *Civilian Population; and Enforcement of the Barbarossa Jurisdiction Order.* Citing *Yamashita,* the

152 *Id.* at 568.
153 *Id.* at 568.
154 On November 9, 1941, General von Kuechler's Chief of Staff received a report that "at present 100 men are dying daily." At another conference held at his headquarters on November 28, 1941, it was disclosed that all of the inmates in one camp were expected to die within six months because of ill-treatment and lack of adequate rations. XI TWC 569.
155 General von Kuechler was convicted of ill-treatment offenses occurring while he was commander of 18th Army; he was acquitted of charges of neglect occurring after he relieved General von Leeb. XI TWC 569.
156 XI TWC 576-577. The tribunal also found von Kuechler guilty of the use of the civilian population for work directly connected with the waging of war contrary to the rules of international law without discussion of the evidence in support thereof. XI TWC 577.

prosecution again argued General von Kuechler's absolute liability as commanding general of the occupied territory for offenses committed by the Security Police.[157] While rejecting this argument "for substantially the same

157 The Prosecution's theory as to the responsibility of a commanding general is revealed in the following paragraphs taken from the Memorandum on the responsibility of von Kuechler under Counts I1 and 111:

The annex to the 4th Hague Convention lays down as the first condition which an armed force must fulfil in order to be accorded the right of a lawful beligerent that "it must be commanded by a person responsible for his subordinates" (Annex to the 4th Hague Convention, Article I). Implicit in this rule is the point that in a formally organized army, the commander is at all times required to control his troops. He is responsible for the criminal acts committed by his subordinates as a result of his own inaction. As the Supreme Court of the United States held in *In re Yamashita:*

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized and its breach penalized by our own military tribunals. , . .

Most extensive rights and corresponding responsibilities are conferred by positive provisions of international law upon the commanding general in occupied territory. The heading of Section 111 of the Hague Regulations mentions specifically the "military authority over the territory of the hostile State." Article 42 declares that "territory is considered occupied when it is actually placed under the authority of the hostile army." Article 43 imposes the duty on the occupant to restore and to ensure public order and safety and to respect the laws in force in the country, "the authority of the legitimate power having, in fact, passed into the hands of the occupant." In Article 57, it is expressly stated that no contribution shall be collected except under local order and on the responsibility of a C.-in-C.

It follows that international law acknowledges no other bearer of executive power except the commander of the occupying army, and for this reason a unilateral delegation of this power to some agency other than the military commander is not recognized by international law, and is ineffective to relieve the military commander, *pro tanto,* of his duties and responsibilities.

Counsel for von Kuechler replied:

The Prosecution attempts to explain these Rules of Land Warfare in such a way that it would appear that Field-Marshal von Kuechler, in his capacity of Commander-in-Chief, was territorially responsible for everything that happened at any time in the ,occupied enemy area. However, such a territorial responsibility exists neither in the practice nor in the theory of International Law. Even the Supreme Court in its judgment of Yamashita could not decide to recognize such a responsibility. Such a responsibility--to use the words of the judgment of the jurists--would lead to the result:

that the only thing for a Tribunal in a case would be to pronounce the declaration of guilty. . . .

The Yamashita Judgment, therefore, also takes the factual jurisdiction as a basis. Time and again it speaks of the armed forces under the orders of the Commander-in-Chief, of the soldiers who were bound to carry out his orders, of the units which he commanded.

The judgment against Field-Marshal List (Case 7, Military Tribunal V) cannot be interpreted in the meaning of territorial responsibility either, although there may be some items which point in this direction. The decisive factor is that the judgment always examines the factual jurisdiction. In this connection I want to refer to the expositions as on pages 10377 and 10419 of the German transcript. In the last-named case, the Tribunal investigated the relation of subordination of an SS Police leader and the Tribunal would have no need to undergo this work if it was to affirm unreservedly the maxim of territorial responsibility. It can be inferred herefrom that there will be a personal responsibility of a Commander-in-Chief only if:

(1) An action took place in the territory which he controlled, or

reasons as given in the judgment concerning von Leeb," [158]the Tribunal found that both acts alleged were carried out pursuant to orders promulgated or disseminated by General von Kuechler by units under his command.[159] Initially manifesting knowledge of the illegal activities of the Security Police through a directive to his troops to avoid contact or interference with any such units, he subsequently distributed the anti-Semitic Reichenau Order on October 10, 1941, which the Tribunal set out in full in its opinion "because of its inhumanity." [160]Conviction on these counts, then, was based on his knowledge of, acquiescence in and, in some cases, direct order of the offenses alleged.

4. Hermann Hoth: General Hoth was also charged with offenses relating to commands held on the Russian front.

a. The Commissar Order. General Hoth was found to have passed to subordinate units an order which the Tribunal found was criminal on its face. The Tribunal concluded: "When those units committed the crimes enjoined by it, the superior commander must bear a criminal responsibility for such acts because he ordered their commission." [161]

After unsuccessfully pleading the defense of superior orders, Hoth offered the following in defense or mitigation (in the words of the Tribunal):

> . . . he simply passed it down without emphasizing it or attempting to mitigate it . . . he was certain that his subordinates were sufficiently radar-minded to pick up the rejection impulses that radiated from his well known high character and that he believed that they would have the courage he lacked to disobey the order.[162]

The Tribunal in rejecting his argument stated:

> . . . the mere unexpressed hope that a criminal order given to a subordinate will not be carried out is neither a defense nor a ground for the mitigation of

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(2) If it was committed by somebody who was under his orders.
It is significant that the Hague Convention on Land Warfare only speaks of the "Occupying Power" and by this means the Occupying State. The counterpart of the indigenous civilian population, therefore, is not an individual person, but the occupying State. And that is only logical, because the war against the Soviet Union had been declared by the German Reich and not by some Commander-in-Chief, as, for instance, by Field-Marshal von Kuechler. As cited XI1 L.R.T.W.C. p. 108, n. 1.

158 *Supra* n. 130 at 578.
159 *Id.* at 577 (Barbarossa Jurisdiction Order); 578-583 (civilian population violations).
160 *Id.* at 578-580.
161 *Id.* at 581-582.
162 *Id.* at 582.

> punishment. That the character impulses were too weak or the minds of the subordinates were too insensitive to pick them up is shown by the documents.[163]

b. Prisoner mistreatment. Hoth was also charged with ill-treatment and improper use of prisoners of war, war crimes and crimes against humanity consisting of crimes against civilians, and cooperation with the Security Police in execution of their illegal programs. He was found guilty on all counts on the basis of orders issued by him and carried out by units of his command.[164]

5. Hans Reinhardt: General Reinhardt was charged with offenses that occurred while he was commander of Panzer Group 3, 3rd Panzer Army, and Commander in Chief of Army Group Center, all on the Russian Front.

a. The Commissar Order. General Reinhardt testified that in transmitting this order, he simultaneously issued verbal orders that it was not to be carried out. After an extensive listing of executions of Russian commissars by General Reinhardt's command, the Tribunal in rejecting this argument stated:

> If international law is to have any effectiveness, high commanding officers, when they are directed to violate it by committing murder, must have the courage to act, in definite and unmistakable terms, so as to indicate their repudiation of such an order. The proper report to have been made . . . when a request was made from the top level to report the number of commissars killed would have been that this unit does not murder enemy prisoners of war.[165]

In passing on this criminal order, the Tribunal found General Reinhardt bore the responsibility for its execution in his area.

b. The Commando Order: General Reinhardt was found guilty of passing this order, although the Tribunal noted:

> It may be stated as a matter somewhat in mitigation and as showing the personal attitude of . . . Reinhardt, that in November 1943, he issued an order that parachutists are lawful combatants and are to be treated as prisoners of war. That was at a time when the German Army was not so flushed with success and when it was a little more inclined to soften the treatment meted out to the Russians. The Tribunal has noted it as being a matter proper, at least for consideration, on the matter of mitigation. It should further be noted in this connection that it does not appear that

163 *Id.* at 582.
164 *Id.* at 584-596.
165 Id. at 598.

> Reinhardt, thought he received it, ever passed on literally or in substance the notorious Reichenau Order.[166]

c. *Prohibited Labor* of *Prisoners* of *War, Murder, and Ill-Treatment of Prisoners of War, and Turning Over of Prisoners to the Security Police.* The Tribunal found that Reinhardt had issued orders concerning the use of prisoners of war in prohibited labor and had received reports at his headquarters concerning all three illegal activities, in one instance manifesting his knowledge of these activities by opposing authorizing the Red Cross to make any search for prisoners missing in action for the following reason: "Overwhelmingly large number of POW'S deceased without documentary deposition, and of civilians who disappeared due to brutal actions." [167]

Citing the opinion in *United States v. List,*[168] the Tribunal concluded that any reports made to General Reinhardt's headquarters were made for his benefit; therefore he was responsible for knowledge of their contents.[169]

d. Deportation and Enslavement of Civilians. The Tribunal found the evidence established that in the area of General Reinhardt's army, enforced labor by civilians was carried out as it policy and that it was implemented ruthlessly with General Reinhardt's knowledge and consent, and even pursuant to his orders;[170] forcible conscription for deportation was a fixed policy. In replying to Reinhardt's denial of such a policy, the Tribunal stated:

> . . . the orders and reports cited, and others to which we have not referred, show clearly that the deportation of civilian workers to the Reich was of such long continued and general practice, that even were there no orders signed by the defendant authorizing it, he must be held to have had knowledge of the practice and of its extent.[171]

e. Murder, Ill-Treatment, and Persecution of *Civilian Populations; the Barbarossa Jurisdiction Order.* Not only was it established that General Reinhardt passed on the Barbarossa Jurisdiction Order, but that he issued implementing instructions and received extensive reports concerning its execution. Addressing only the point of slave labor, the Tribunal stated "Slave hunting in his area was so

166 Id. at 600.
167 Id. at 602.
168 XI TWC 759, discussed infra n. 195.
169 Supra n. 130 at 603.
170 Id. at 603-607.
171 *Id.* at 614.

general and long continued that without the direct evidence pointed out, knowledge would be imputed to him." [172]

6. *Hans von Salmuth:* General von Salmuth was charged with offenses which occurred while in command at the Corps and Army level on the Russian front.

a. The Commissar Order. Upon its receipt, General von Salmuth distributed the Order to his subordinate units, advising them that he rejected it and acquainting his division commanders with his objections. The Tribunal felt that the evidence tended to bear this out as the order was never carried out while General von Salmuth was in command, and acquitted him of this charge.[173]

b. ,The Commando Order. The Order was transmitted to subordinate units by General von Salmuth's Chief of Staff with directions that all copies be returned within twelve days. The Tribunal found General von Salmuth guilty of issuance of the Order despite his protestations that the chief of staff should not have signed the letter and was not authorized to do so, as he had done nothing to repudiate his subordinate's action nor did he reprimand him in any way. He subsequently requested clarifying instructions concerning the Order's application from higher headquarters, and through his Quartermaster issued further instructions to a subordinate command, both acts manifesting his knowledge of the order and its implementation within his command.[174]

c. *Prohibited Labor of Prisoners* of *War; Murder and Ill-treatment of Prisoners of War; Deportation and Enslavement and Enslavement of Civilians; Illegal Reprisals.* While the Tribunal could not conclude that General von Salmuth transmitted the Barbarossa Jurisdiction Order, he did issue orders implementing the execution of the provisions of the order and remained actively interested in their implementation.[175] In yet another basis for holding General von Salmuth criminally responsible, the Tribunal stated:

> Concerning the treatment of prisoners of war in the areas under the defendant, numerous reports from these areas show what must be considered an excessive number of deaths by shooting and otherwise among the prisoners of war. They imply a degree of negligence on the part of the defendant . . . . These reports show that prisoners of war were handed over to the SD, a police organization, and that thereafter the army exercised no supervision over them and apparently had no control or record as to what became of them.

172 *Id.* at 616.
173 *Id.* at 616.
174 *Id.* at 616-625.
175 *Id.* at 617.

> Whether or not they were liquidated, as many of them undoubtedly were, is not the question. The illegality consists in handing them over to an organization which certainly by this time [1941] the defendant knew was criminal in nature.
>
> . . , he must accept criminal responsibility for the illegal transfer of these prisoners to the SD. [176]

7. *Karl Hollidt:* General Hollidt was charged with offenses that occurred while he served as a division, corps, and army commander.

a. The Commissar Order. General Hollidt testified that on receipt of the Order he instructed his regimental commanders not to comply with it. The one isolated incident reported was described by the Tribunal as ambiguous. Furthermore, there was some question as to whether General Hollidt had actually assumed command of the unit at the time of the incident. Hence he was found not guilty of the offense.[177]

b. The Commando Order, General Hollidt acknowledged receipt of the Order but denied its transmittal. As there was no evidence that it was ever carried out by units under General Hollidt's command, the Tribunal found General Hollidt not guilty of this charge.[178]

c. *Prohibited Labor of Prisoners of War.* The evidence indicated that over a wide period of time prisoners of war were used by his subordinate units in the combat zone for construction of field fortifications. The Tribunal concluded this could only have been done with his knowledge and approval; thus, criminal responsibility attached.[179]

d. Murder and Ill-treatment of *Prisoners of War.* This charge constituted yet another refusal by the Tribunal to apply the strict liability theory urged by the prosecution. Concluding even if an assumption were made that certain executions were unjustified, the Tribunal concluded no criminal connection to General Hollidt was established.[180]

e. Deportation and Enslavement of Civilians. General Hollidt was found criminally responsible for the deportation and enslavement of civilians as orders were issued in the former case which also tended to show his knowledge and

176 *Id.* at 617.
177 *Id.* at 626.
178 *Id.* at 627.
179 *Id.* at 627.
180 *Id.* at 628.

consent, if not preference, for use of labor forces locally for construction of field fortifications.[181]

8. *Otto Schniewind:* Admiral Schniewind was acquitted of those charges under Counts Two and Three inasmuch as there was no evidence showing implementation or enforcement by any of the units subordinate to him of the orders alleged, the Barbarossa Jurisdiction Order and the Commando Order. In discussing the Barbarossa Jurisdiction Order, the Tribunal refused to adopt the prosecution's argument that would have shifted the burden of proof to the defendant to show what he did to discourage or stop implementation of the order (which did not occur until after Admiral Schniewind's departure from the command) , finding such argument "rather naive." [182]

9. *Karl von Roques:* Lieutenant General von Roques was charged with offenses committed while Commanding General of Rear Area of Army Group South (March 1941 to 15 June 1942) and Rear Area of Army Group A (July 1942 to December 1942). By his own testimony, General von Roques had executive power as the representative of the occupying power in his area. As such, he owed a duty to the civilians, he felt, because he needed their cooperation. The Tribunal noted despite this representation "neither his testimony nor his actions show that he appreciated the fact that he owed a duty as an occupying commander to protect the population and maintain order."[183] The Tribunal deemed it appropriate at this point to define executive power and the responsibility of a commander holding that power:

General Halder in his testimony succinctly defines executive power as follows:

> "The bearer of executive power of a certain area unites all the legal authorities of a territorial nature and legislative nature in his own person."
>
> The responsibility incident to the possession of executive power is well stated in the judgment [in the *List* case] as follows: " . . . This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territories having executive authority as well as military command will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility.

181 *Id.*
182 *Id.* at 629-630.
183 *Id.* at 631.

> It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent, or approval of these defendants. But this cannot be a defense for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defense."[184]

After citing the duties of a commander of occupied territory as recited by the Supreme Court in *Yamashita,* the Tribunal concluded:

> We are of the opinion that command authority and executive power obligate the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area; and that orders issued which indicate a repudiation of such duty and inaction with knowledge that others within his area violating this duty which he owes, constitute criminality.[185]

a. The Commissar Order. General von Roques denied issuing this order, a denial which the Tribunal found contrary to the facts but a factual differentiation unnecessary to resolve. The Tribunal found that whether or not the order was or was not passed on by him was immaterial; its implementation was so extensive in his territory as to require some action on his part to prevent the criminal action that was carried on by the units subordinate to his command and by agencies in his area. Commissars were regularly shot with his knowledge, and he did nothing about it. Furthermore, the Commissar Order which he received provided:

11. *In the rear areas* - Commissars arrested in the rear area . , . are to be handed over to the 'Einsatzgruppe' or the 'Einsatzkommandos' of the SS Security Service (SD) , respectively.[186]

During the periods in question, these security service units were subordinate to Lieutenant General von Roques. The evidence showed that in one instance he received a direct written report of 1,896 executions by an SS Brigade during one two-week operation; and that he continued to receive similar reports as well as issue orders directing the security police to participate in other operations. He also received and implemented an order which the Tribunal described as "So bestial as to be fit to be seen only by those to whom it was addressed" providing for extermination by security police elements of "unbearable elements." [187]The Tribunal concluded that General von Roques knew of the carrying out of the

184 *Id.* at 631-632.
185 *Id.* at 632.
186 *Id.* at 632.
187 *Id.* at 636-637.

Commissar Order and therefore bore criminal responsibility for its implementation in his area.

b. Murder and Ill-treatment of *Prisoners of War.* The evidence was conclusive that General von Roques ordered the execution of paratroopers as guerrillas; that he had knowledge of and acquiesced in the execution of others; and through gross neglect of the sanitary conditions and lack of food in four prisoner of war camps permitted others to die at the rate of 100 per day, in three of those camps at rates in excess of 80 percent per year. The Tribunal concluded responsibility lay in General von Roques.[188]

c. *The Barbarossa Jurisdiction Order.* General von Roques was found criminally responsible for implementation of this order as he passed it down to his subordinates; personally issued other orders in the implementation of it or pursuant to it which the Tribunal found criminal; and that these subordinate units thereafter carried out these orders with his full knowledge, acquiescence and approval.[189]

d. Hostages and Reprisals. While General von Roques passed on an order directing that reprisals be taken against saboteurs, the Tribunal found themselves believing General von Roques' testimony that no such acts were actually carried out.[190]

e. Ill-treatment and Persecution of *the Civilian Population.* The evidence reflected the complete subservience of army units in General von Roques' area to the security police and their full cooperation with the security police program with "knowledge of its debased and criminal character."[191] While General von Roques issued orders directing his troops not to participate in the "arbitrary shooting" of Jews, he directed them to otherwise assist the security police in carrying out their orders.[192]

10. Otto Woehler: General Woehler was charged with offenses committed both as a commander and as a staff officer; concern here is only with the former.

a. Murder and Ill-treatment of *Prisoners of War.* One isolated incident involving the illegal execution of two Russian soldiers was reported by General

188 *Id.* at 639-644.
189 *Id.* at 645-647.
190 *Id.* at 647.
191 *Id.* at 648.
192 *Id.* at 648.

Woehler to his next higher headquarters. While the evidence tended to show that he did nothing about this incident, the Tribunal refused to conclude that this established acquiescence and approva1.[193]

b. Prohibited Labor of *Prisoners* of *War.* The Tribunal found that General Woehler had knowledge of and acquiesced in the use of prisoners of war by regiments of his command as illegal labor in forward combat areas. They rejected the *tu quoque* argument, stating "The fact that similar use was made of German prisoners by the enemy is only a factor in mitigation and not a defense." [194]

D. THE HOSTAGE CASE

The second significant joint trial at Nuremburg involving the question of command responsibility was the trial of *United States v. Wilhelm List,* also known as "The Hostage Case," tried between July 8, 1947 and February 19, 1948.[195] The accused, all high-ranking officers of the military,[196] were charged with being principals and accessories to the murder and deportation of thousands of persons from the civilian populations of Greece, Yugoslavia, Norway and Albania between September 1939 and May 1945 by troops under their command who were acting pursuant to orders issued, distributed and executed by the defendants.[197] Members of the Tribunal were two civilian jurists and an equally-distinguished civilian practitioner.[198]

193 *Id.* at 684-685.
194 *Id.* at 685.
195 Reported at XI TWC 759 to 1332
196 The accused were Generalfeldmarschall (General of the Army) Wilhelm List; Generalfeldmayschall Maximilian von Weichs; Generalaloberst (General) Lothar Rendulic; General der Pionere (Lieutenant General, Engineers) Walter Kuntze; General der Infantrie (Lieutenant General, Infantry) Hermann Foertsch; General der Gebirgstruppen (Lieutenant General, Mountain Troops) Franz Boehme; General der Flieger (Lieutenant General, Air Force) Helmuth Felmy; General der Gebirgotruppen Hubert Lanz; General der Infantrie Ernst Dehner; General der Infantrie Ernst von Leyser; General der Flieger Wilhelm Speidel; and Generalmajor (Brigadier General) Kurt von Geitner. Lieutenant General von Boehme committed suicide after indictment and prior to arraignment; General von Weichs became ill on October 6, 1947, and for medical reasons his case was subsequently severed from that of the remaining defendants.
197 The charges against the defendants were:
COUNT ONE: Alleged the murder of "hundreds of thousands of persons from the civilian populations of Greece, Yugoslavia, and Albania. . ."
COUNT TWO: Alleged the "wanton destruction . . . and other acts of devastation not justified by military necessity, in the occupied territories of Norway, Greece, Yugoslavia, and Albania. . ."

The main precedental value of the *Hostage* Case is its examination of the law of reprisal; this concept will not be examined. Additionally, this review will concern itself only with those defendants charged with offenses allegedly committed while the defendants were holding positions of command.

In initially dealing with the question of command responsibility, the Tribunal found it necessary to address a factual dispute and its legal implications:

> We have been confronted repeatedly with contentions that reports and orders sent to the defendants did not come to their attention. Responsibility for acts charged as crimes have been denied because of absence from headquarters at the time of their commission. These absences generally consisted of visitations to points within the command area, vacation leaves and leaves induced by illness . . .
>
> We desire to point out that the German Wermacht was a well equipped, well trained, and well disciplined army. Its efficiency was demonstrated on repeated occasions throughout the war.
>
> The evidence shows . . . that they were led by competent commanders who had mail, telegraph, telephone, radio, and courier service for the handling of communications. Reports were made daily, sometimes morning and evening. Ten-day and monthly reports recapitulating past operations and stating future intentions were regularly made. They not only received their own information promptly but they appear to have secured that of the enemy as well. We are convinced that military information was received by these high ranking officers promptly, a conclusion prompted by the efficiency of the German armed forces.
>
> An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such occurrences result occasionally because of unexpected contingencies, but they are the unusual. With reference to statements that responsibility is lacking where temporary absence from headquarters for any cause is shown, the general rule to be applied is dual in character. As to events occurring in his absence resulting from orders, directions, or a general prescribed

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COUNT THREE: Alleged offenses committed against enemy troops and prisoners of war in Greece, Yugoslavia, and Italy, including refusal of quarter, denial of status as prisoners of war, and murder and ill-treatment of prisoners of war.
COUNT FOUR : Alleged the "murder, torture, and systematic terrorization, imprisonment in concentration camps, arbitrary forced labor on fortifications and entrenchments to be used by the enemy, and deportation to slave labor, of the civilian populations of Greece, Yugoslavia, and Albania . . ." All offenses were alleged as "war crimes and crimes against humanity" committed "by troops of the German armed forces under the command and jurisdiction of, responsible to, and acting pursuant to orders issued, executed, and distributed by (the defendants) ," listing specific acts.
198 The presiding judge was Charles F. Wennerstrum of the Supreme Court of Iowa; the members were Edward F. Carter of the Supreme Court of the State of Nebraska and George J. Burke, a member of the State Bar of Michigan.

> policy formulated by him, a military commander will be held responsible in the absence of special circumstances. As to events, emergent in nature and presenting matters for original decision, such commander will not ordinarily be held responsible unless he approved of the action taken when it came to his knowledge.[199]

Turning to acts committed by units not subordinated to a commander or by independent units subordinated to agencies other than the German Wermacht, the Tribunal stated:

> The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime, and protecting lives and property, subordination are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been delegated to them.[200]

As in the *High Command* case, the Tribunal began its findings by rejecting the contentions that the accused were party to any overall conspiracy to decimate and exterminate the population. In determining questions of guilt or innocence, the Tribunal declared it would require proof

> . . . of a causative, overt act or omission from which a guilty intent can be inferred . . . . Unless this be true, a crime could not be said to have been committed unlawfully, willfully, and knowingly as charged in the indictment.[201]

The Tribunal, after brief historical review, turned itself to the individual defendants.

1. Wilhelm List: General List, fifth ranking field marshal in the German Army, was charged with offenses committed by units of his command while serving as Armed Forces Commander Southeast and as commander in chief of Army Group A on the Russian front. In the former position he was the supreme representative of the armed forces in the Balkans, exercising executive authority in the territories occupied by German troops. The evidence showed that General List both passed to subordinates illegal orders from the high command as well as issuing orders demanding "ruthless . . . measures" against the local population.[202] Of other orders, General List denied knowledge as he was away from his

199 XI TWC 1259-1260.
200 *Id.* at 1260.
201 *Id.* at 1261
202 *Id.* at 1263-64.

headquarters at the time the reports came in. The Tribunal reiterated its previous position regarding a commander's responsibility in such a case:

> A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area in his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged, to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced. He may not, of course, be charged with acts committed on the order of someone else which is outside the basic orders which he has issued. If time permits he is required to rescind such illegal orders, otherwise he is required to take steps to prevent a recurrence of their issue.
>
> Want of knowledge of the contents of reports made to him is not a defense, Reports to commanding generals are made to their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.
>
> The reports made to . . , List , . . charge him with notice of the unlawful killing of thousands of innocent people. . . . Not once did he condemn such acts as unlawful, Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility.[203]

The Tribunal found General List guilty of counts one and three of the indictment.[204]

2. Walter Kuntze: General Kuntze was charged with offenses committed during his service as Armed Forces Commander Southwest. The Tribunal noted that General "Kuntze assumed command on October 27, 1941, a month which exceeded all previous monthly records in killing innocent members of the population in reprisal for the criminal acts of unknown persons." [205] The Tribunal found it highly improbable that General Kuntz could assume command in the midst of the carrying out and reporting of these reprisal actions without gaining knowledge thereof and acquiescing in their execution. Other evidence indicated Kuntze personally ordered other reprisals and received confirming reports on

203 *Id.* at 1271-1272
204 *Id.* at 1274
205 *Id.* at 1276

their completion. The Tribunal found that he was advised of all such killings, and that he not only failed to take measures to prevent their recurrence but on several occasions urged more severe action to be taken by his subordinate commanders. The Tribunal ruled that his ordering of and acquiescence in these and other offenses made him criminally responsible for charges alleged under counts one, three, and four.[206]

3. Lothar. Rendulic: General Rendulic was charged with offenses committed while he was serving as commander of 2nd Panzer Army, 20th Mountain Army, and Army Group North. All the charges related to offenses resulting from his orders or orders he passed on to subordinate units. He was found not guilty of issuing the Commando Order and was found justified by military necessity in his utilization of scorched earth tactics in a retreat under severe conditions and against overwhelming odds in Norway.[207]

4. Ernst Dehner: As commander of the LXIX Reserve Corps, Lieutenant General Dehner was charged with unlawful killing of hostages and reprisals taken against prisoners, and with wanton destruction of towns and villages, both in an effort to suppress guerrilla activities operating in his area of responsibility. Specifically, General Dehner was charged as one of the subordinate commanders of General Rendulic. The Tribunal noted:

> It appears to us from an examination of the evidence that the practice of killing hostages and reprisal [against] prisoners got completely out of hand, legality was ignored, and arbitrary action became the accepted policy. The defendant is criminally responsible for permitting or tolerating such conduct on the part of his subordinate commanders.[208]

5. The Remaining Commaders: The remaining commanders were found guilty of similar action or inaction. Lieutenant General von Leyser was found guilty of illegally conscripting indigenous persons for military service and compulsory labor service, as well as issuing the Commissar Order.[209] Lieutenant General Helmuth Felmy was found guilty of passing on illegal reprisal orders resulting in extensive unwarranted, excessive and illegal reprisals; in one instance, on receipt of reports concerning reprisals conducted well in excess of existing orders, General Felmy recommended the most lenient punishment of the regimental commander responsible without follow-up to determine what

206 *Id.* at 1281
207 *Id.* at 1295-1297
208 *Id.* at 1299
209 *Id.* at 1300-1305

punishment, if any, was assessed.[210] Lieutenant General Hubert Lanz was convicted of failing to prevent illegal reprisals of which he had knowledge, and with ordering the unlawful execution of Italian officers and soldiers of the surrendered Italian army.[211] Finally, Lieutenant General Wilhelm Speidel was convicted of permitting illegal acts to occur of which he had knowledge.[212]

E. THE HIGH COMMAND AND HOSTAGE CASES-IN SUMMARY

In the *High Command* and *Hostage* cases, commanders at division, corps, and army level-men prominent in their profession were tried by three-judge tribunals, also men of professional prominence. Each tribunal was presented a variety of situations involving the intricacies and complexities of command and control of a military force in combat; the considered responses of the tribunals offer some of the more definitive reasoning and logic in arriving at standards of responsibility for commanders.

As in *Yamashita,* there was seldom any question that the offenses occurred; the question left for resolution concerned the standard of responsibility and, given the determination of that standard, the individual responsibility of each accused. *Yamashita* had confirmed the existence of *duty* and *responsibility;* the *High Command* and *Hostage* tribunals sought to achieve some definitional value for each. *Yamashita* addressed the duty and responsibility of the commander with a broad brush; the *High Command* and *Hostage* cases provided much of the detail necessary to complete the picture. Significantly, both minimum and maximum lines were drawn, the latter in express rejection of any purported Yamashita-strict liability theory. That rejection was not merely of the strict liability theory per se but of the proposition that *Yamashita* represents such a theory.

The *High Command* and *Hostage* cases are of greater value than *Yamashita* in that the respective opinions rendered therein are the product of judicial minds rather than of lay jurors, and prepared under less emotive circumstances; the blaze of war had died sufficiently to permit juristic scholarship providing necessary light for future interpretation rather than mere heat. The results of this careful examination have previously been analyzed.

F. THE TOKYO TRIALS

210 *Id.* at 1305-1309
211 *Id.* at 1309-1313
212 *Id.* at 1313-1317

Of the war crimes trials conducted after World War 11, the "International Japanese War Crimes Trial in the International- Military Tribunal for the Far East," otherwise known as and hereinafter called "The Tokyo Trial" was the longest, most complex, and perhaps least known.

Heard by distinguished jurists from eleven countries,[213] the Tokyo Trial brought before an international tribunal twenty-eight of the former leaders of Japan,[214] charged with crimes against peace, murder and conspiracy to commit murder, and war crimes and crimes against humanity. Counts 54 and *55,* part of the latter group of charges, accused certain of the defendants with having ordered, authorized and permitted conduct in violation of the Laws and Customs of War; and with violating the laws of war by deliberately and recklessly disregarding their legal duty to take adequate steps to secure observance of the Laws and Customs

213 The Tribunal was composed of the following judges:

Australia	Sir William Flood Webb, Chief Justice Supreme Court of' Queensland: later Justice High Court of the Australian Commonwealth
Canada	Stuart F. McDougall, Puisne Judge Quebec Court of King's Bench (Appeal Side)
China :	Mei, Juo-Ao, Acting Chairman, Foreign Affairs Committee, Legislative Yuan
France :	Judge Henri Bernard
Great Britain :	Lord Patrick, Senator, His Majesty's College of Justice in Scotland
India :	R. M. Pal, Judge, High Court of Calcutta
Netherlands :	Bernard V. A. Roling, Judge, Court of Utrecht
New Zealand:	Erima H. Northcraft, Justice, Supreme Court of New Zealand
Philippines :	Delfin Jaranilla, Justice, Supreme Court of the Philippine
Soviet Union :	J. M. Zaryanov, Major General of Justice, Military Colloquium, Supreme Court of the Soviet Union
United States :	Myron H. Cramer, Major General, former Judge Advocate General of the United -States Army.

214 Those selected for indictment were former prime ministers Kaki Hirota, Kiichiro Hiranuma, Hideki Tojo and Kuniaki Koiso; foreign ministers Yosuke Matsuoka, Shigenori Togo, and Manoru Shigemitsu (a position which Hirota also held); war ministers Jiro Minami, Sadao Araki, Seishiro Itagaki, Shunroku Hata, and Tojo; navy ministers Osami Nagano and Shigetaro Shimada; finance minister Okinori Kaya; education ministers Koichi Kido and Araki; home ministers Hiranuma, Kido, and Tojo; overseas ministers Koiso and Togo; Presidents, Planning Board Naoki Hoshino and Teiichi Suzuki; Chiefs of Army General Staff Tojo and Yoshijiro Umezu; Ambassadors Hiroshi Oshima, Tashio Shiratori, Mamoru Shigemitou, and Togo; and military leaders Heitaro Kimura, Koiso, Itagaki, Kuriaki Koiso, Iwane Matsui, Minami, Akira Muto, and Takasmui Oka. Also indicted were Kingoro Hashimoto and Shume Okawa. Matsuoka and Nagano died during the course of the trial and the case against Okawa was not considered because of his mental condition.

of War and to prevent their breach, respectively.[215] It is with these latter counts, *54* and *55,* that this article is concerned.[216]

As in the *High Command* and *Hostage* cases, the Tribunal attempted to define the appropriate rules of law before examining the individual responsibility of each accused. In discussing the question of duties, responsibilities and responsibility under Counts *54* and *55,* the Tribunal stated :

> (b) RESPONSIBILITY FOR WAR CRIMES AGAINST PRISONERS
>
> Prisoners taken in war and civilian internees are in the power of the Government which captures them. For the last two centuries, this position has been recognized and the customary law to this effect was formally embodied in the Hague Convention No.IV in 1907 and repeated in the Geneva Prisoner of War Convention of 1929. Responsibility for the care of prisoners of war and of civilian internees (all of whom we will refer to as "prisoners") rest therefore with the Government having them in possession. This responsibility is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners.
>
> In the discharge of these duties to prisoners, governments must have resort to persons. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties.
>
> In general the responsibility for prisoners held by Japan may be stated to have rested upon:
>
> (1) Members of the government;
>
> (2) Military or naval officers in command of formations having prisoners in their possession;
>
> (3) Officials in those departments which were concerned with the well-being of prisoner;
>
> (4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.
>
> It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill treatment of prisoners if:
>
> (1) They fail to establish such a system.
>
> (2) If having established such a system, they fail to secure its continued and efficient working.

215 Annex A-6, Volume 2, TOKYO JUDGMENT; also Annex A-6, Volume 204, Official Transcript of the International Japanese War Crimes Trials in the International-Military Tribunal for the Far East.

216 For an excellent analysis of the Tokyo Trials, see Horwitz, *The Tokyo Trial,* INTERNATIONAL CONCILIATION, No. 465, November 1950; *Cf.* MINEAR, VICTOR'S JUSTICE (1971).

> Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless :
>
> (1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or
>
> (2) They are at fault in having failed to acquire such knowledge. If such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge. Army or Navy Commanders can, by order, secure proper treatment and prevent ill treatment of prisoners. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.[217]

Two points previously raised in the *Yamashita* trial were again raised by the military leaders in the Tokyo trial. The first was an objection to the theory of vicarious responsibility for acts committed by subordinates; this matter was dealt with in the Tribunal's general judgment previously discussed. Where a commander had the responsibility to act, while he could delegate the authority, he could not delegate the responsibility; in the words of the Tribunal, "He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application." [218]

The second defense went to the subjective standards in individual cases. Like General Yamashita, the defendants argued that their failure of compliance was based upon impossibility of performance; that the allied offensive had forced conditions to deteriorate not only in prisoner of war camps but overall, and that it was impossible for military commanders in the field to maintain communication and control of their troops because of the deteriorating conditions.[219] The Tribunal chose to consider this argument on an individual basis, although noting

217 Volume 200, OFFICIAL TRANSCRIPT, pages 48,442 to 48,447.
218 Volume 200, OFFICIAL TRANSCRIPT, pages 48,444. *Also* see, I TOKYO JUDGMENT 30
219 HORWITZ, *supra* n. 216 at 532

(1) that once Japanese forces had occupied territory and fighting had ceased, massacres were freely committed in subjecting the local population to the domination of the Japanese;[220] (2) that massacres of prisoners of war and civilian internees or conscripted laborers during the occupation were committed because they were no longer of any use or for other reasons had become a burden to the Japanese occupation force;[221] and (3) that other massacres were perpetrated in anticipation of a Japanese withdrawal or of an Allied attack.[222] The fact that these massacres occurred throughout the war tended to militate against this argument; rather, the Tribunal's detailed analysis of acts of murder, torture, mistreatment, vivisection, cannibalism, and neglect, often occurring as a result of direct orders from the Imperial Headquarters, often on a systematic basis throughout an occupied territory, led the Tribunal to conclude that such actions were carried out as a matter of policy by the Japanese Government or individual members thereof and by the leaders of the armed forces.[223]

In submitting specific findings as to each accused, the Tribunal first considered the case of General Konji Dohiharu. As commander of the 7th Area Army-an area which encompassed Malaya, Sumatra, Java, and for a time Borneo from April 1944 until April 1945, he was responsible for the care of prisoners of war within his command. The evidence established prisoner deaths at an "appalling rate" due to starvation, malnutrition, and food deficiency diseases. General Dohiharu submitted such instances occurred due to the deterioration of Japan's war position and the severance of communications. The Tribunal, in noting that these conditions applied only to prisoners and not among their captors, concluded that food and medical supplies were available but withheld upon a policy for which Dohiharu bore responsibility.[224]

General Shunroko Hata was commander of forces in China which committed atrocities on a large scale over an extended period of time. In finding him guilty of a breach of duty under Count *55,* the Tribunal concluded :

> Either Hata knew of these things and took no steps to prevent their occurrence, or he was indifferent and made no provision for learning whether

220 202 OFFICIAL TRANSCRIPT, 49,634.
221 *Id.* at 49,636.
222 *Id.* at 49,636.
223 *Id.* at 49,592.
224 *Id.* at 49.779 to 49.780. The defense of "impossibility due to deteriorating war conditions" was also rejected in the case of General Seishiro Itagaki, at pages 49,789 to 49,800.

orders for the humane treatment of prisoners of war and civilians were obeyed.[225]

Defense counsel for General Heitaro Kimura argued his innocence on the basis that he had issued orders to his troops to conduct themselves in a proper soldierly manner and to refrain from ill-treating prisoners. While doubting that such orders were even issued because of the extent of ill-treatment, the Tribunal found him at a minimum negligent in his duty to enforce the rules of war, stating:

> The duty of an army commander in such circumstances is not discharged by the mere issue of routine orders . . . . His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out. This he did not do. Thus he deliberately disregarded his legal duty to take adequate steps to prevent breaches of the laws of war.[226]

General Iwane Matsui was held criminally responsible for the infamous "Rape of Nanking." The Tribunal stated :

> . . . from his own observations and the reports of his staff he must have been aware of what was happening. . . . The Tribunal is satisfied that Matsui knew what was happening. He did nothing, or nothing effective to abate these horrors. He did issue orders before the capture of the city enjoining propriety of conduct upon his troops and later he issued further orders to the same purport. These orders were of no effect as is now known and as he must have known , . . . He had the power as he had the duty to control his troops and to protect the unfortunate citizens of Nanking. He mustbe held criminally responsible for his failure to discharge this duty.[227]

After finding that General Akira Muto shared criminal responsibility for the starvation, neglect, torture and murder of prisoners of war and civilian internees and the massacre of civilians by virtue of orders which he promulgated as Japanese military commander in Northern Sumatra, the Tribunal turned to a review of his activities as Chief-of-Staff to General Yamashita :

> Muto further demonstrated his disregard for the laws of war upon his transfer to become Chief-of-Staff under General Yamashita. . . , During his tenure , . . a campaign (of) massacre, torture, and other atrocities were waged by the troops

225 *Id.* at 49,784.
226 *Id.* at 49,809.
227 *Id.* at 49,815-816.

> under Yamashita and Muto on the civilian population of the Philippines, including the massacres in Batangau and massacres and other atrocities at Manila. These bore the same features and followed the pattern set eight years earlier at Nanking when Muto was a member of Matsui's staff. During this period prisoners of war and civilian internees were starved, tortured and murdered.[228]

Concluding, the Tribunal stated ". . . Muto shares responsibility for these gross breaches of the Laws of War. We reject his defense that he knew nothing of these occurrences. It is wholly incredible." [229]

G. THE TRIAL OF ADMIRAL TOYODA

Admiral Soemu Toyoda, former Commander-in-Chief of the Japanese Combined Fleet, the Combined Naval Forces, and the Naval Escort Command, occupying all three positions concurrently from May 3, 1944, to May 29, 1945, and Chief of the Naval General Staff from May 30, 1945 to September 2, 1945, was tried by military tribunal in Tokyo in a trial which commenced on October 29, 1948 and concluded in Admiral Toyoda's acquittal on September 6, 1949 -- One of the last, if not the last, of the major war crimes trials concluded. It is a case of some significance to the subject of this article.

Admiral Toyoda was charged with violating "the laws and customs of war," the Charge setting out five specifications :

(Specification 1) wilfully and unlawfully disregarding and failing to discharge his duties by ordering, directing, inciting, causing, permitting, ratifying and failing to prevent Japanese Naval personnel of units and organizations under his command, control and supervision to abuse, mistreat, torture, rape, kill and commit other atrocities; *(Specification 2)* wilfully permitting, etc. unlawful pillage, plunder and destruction; *(Specification 3)* unlawful use of non-military objects and places such as churches and hospitals as fortifications; *(Specification 4)* wilful and unlawful disregard and failure to discharge his duties by ordering and permitting the unlawful interment, mistreatment, abuse, starvation, torture and killing of prisoners of war; *(Specification .5)* conspiracy to commit the above offenses.

228 *Id.* at 49,737.
229 *Id.* at 49,821.

The Bill of Particulars listed eighty-six separate offenses, approximately one-half of which originated in the *Yamashita* Bills of Particulars.

The seven-member military tribunal had as its president a Brigadier of the Australian Army. Three of its members were from the Air Force, three from the Army, including the law member of the Tribunal. It is suggested that in so composing the court-adding a member of a foreign service as the President and a law member-General MacArthur sought to avoid further criticism based on command influence, such as was alleged in the *Yamashita* trial, as well as to gain a more carefully-worded judgment in the event the Tribunal was disposed to writing one.[230]

The Tribunal was so disposed and contributed to the law of command responsibility in three ways :

> (1) It resolved certain factual questions rising from the *Yamashita* judgment. Because many of the charges against Admiral Toyoda were the same or similar charges as those for which General Yamashita was tried, the Tribunal heard the same evidence and reviewed the record of that trial, as well as those of thirty-one other trials which the Tribunal deemed might have some relevance to or bearing on the trial of Admiral Toyoda.

The first point concerned command responsibility for the naval forces which perpetrated the "Rape of Manila." The defense in *Yamashita* maintained that while General Yamashita had operational control of those forces, administrative control flowed through a naval chain of command and it was through this latter chain of command that any responsibility should flow. The Tribunal, in addressing this point, declared :

> This Tribunal is convinced - as were the Commissions in the trials of Yamashita, Muta, and Yokoyama, with the conclusions of which this Tribunal can find no point of major issue – that these naval personnel were both legally and in

230 The correspondence file contained with the *Yamashita* record of trial, as well as the personal correspondence records of General MacArthur and his personal aide and confidant, BGen. Courtney Whitney, reveal an on-going flurry of correspondence over the concern over the *Yamashita* trial, which continued for some five years thereafter, spurred on initially by the dissenting opinions of Justices Murphy and Rutledge, then renewed by publication of Frank Reel's book in 1949 and General MacArthur's refusal to permit its publication in Japan. While these particular matters were not specifically addressed in any of the memoranda contained in these files, it is believed that they were viewed as reasonable improvements in the military tribunal system, particularly since Admiral Toyoda was an officer of even greater prominence, on trial in Tokyo rather than Manila, in a post-war Japan in which General MacArthur was making every effort to win the confidence and respect of the people. In the trial of General Yamashita, in contrast, General MacArthur's concern was for the Filipinos.

> fact commanded by the Japanese Army at the times and under the conditions here under consideration.[231]

After carefully documenting and delineating the joint army-navy agreements [232] which provided for this command arrangement, the Tribunal concluded :

> The Tribunal concludes that the so-called "Rape of Manila" was perpetrated by a force of 22,000 men, some 20,000 of whom were Navy personnel, under Rear Admiral Iwabuchi, the commander of the operation, who was under command of General Yokoyama, Commanding General of the Shimbu Shudan. The naval command channel . . . is not evident and the Tribunal cannot but conclude that it did not, in fact, exist. The much disputed definition of operational and administrative authority is not a point of issue here. The practicabilities of the situation, the obligations and duties of the immediate command, must be viewed with realism. The responsibility for discipline in the situation facing the battle commander cannot, in the view of practical military men, be placed in any hands other than his own. Whatever theoretical division of such responsibility may have been propounded, it is, in fact, impossible of delineation in the heat of "trial by fire."[233]

The second point of factual significance dealt with clarification of the issue of knowledge raised by the wording of the judgment of the commission in *Yumashita.* The Tribunal stated:

> It is not within the province of this Tribunal to comment on the action of the United States Supreme Court taken in the cases of General Yamashita and Lieutenant General Homma . . . . Their lives were not forfeited because their forces had been vanquished on the field of battle but because they did not attempt to prevent, even to the extent of issuing orders, the actions of their sub-ordinates, of which actions the commanders must have had knowledge.[234]

(2) In addressing the question of command responsibility, the Tribunal determined, after review of the trials which had preceded it, what it considered the essential elements of command responsibility to be :

> 1. That offenses, commonly recognized as atrocities, were committed by troops of his command;
>
> 2. The ordering of such atrocities.
>
> In the absence of proof beyond a reasonable doubt of the issuance of orders then the essential elements of command responsibility are :
>
> 1. As before, that atrocities were actually committed;
>
> 2. Notice of the commission thereof. This notice may be either:

231 19 United States v. Soemu Toyoda 5011 [Official transcript of Record of trial].
232 *Id.* at 5011, 5013.
233 *Id.* at 5012.
234 *Id.* at 5005.

a. Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or

b. Constructive. That is, the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and acknowledged routine for their commission.

3. Power of command. That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders.

4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations of the laws of war.

5. Failure to punish offenders.

In the simplest language it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished?[235]

(3) The Tribunal re-emphasized the practical limitations of command responsibility, reviewing those subjective factors which would determine whether a commander knew or had the means to know of the commission of offenses by units subordinate to him. By so doing, it refused to accept the vicarious responsibility or strict liability theory which *Yamashita* purportedly established :

In determining the guilt or innocence of an accused, charged with dereliction of his duty as a commander, consideration must be given to many factors. The theory is simple, its application is not. One must not lose sight of the facts that even during the accused's period as Commander-in-Chief of Yokosuka Naval District, his nation had already begun to lose battles, its navy and, indeed, the war. The climax was being reached. His duty as a commander included his duty to control his troops, to take necessary steps to prevent commission by them of atrocities, and to punish offenders. His guilt cannot be determined by whether he had operational command, administrative command, or both. If he knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties. Only the degree of his guilt would remain.[236]

Admiral Toyoda was acquitted of all charges.

235 *Id.* at 5005-5006.
236 *Id.* at 5006.

H. OTHER TRIALS

The trials of lesser commanders support the general body of law conceived by the preceding tribunals. General Anton Dostler, tried by United States military commission in Rome[237] and Generals Mueller and Braver, tried by Greek court-martial in Athens,[238] were convicted of ordering subordinates to commit war crimes, General Kurt Meyer, tried before a Canadian military tribunal, was convicted of "inciting and counselling" troops under his command to execute prisoners of war.[239] In the *Essen Lynching* case, German Captain Erich Heyer gave instructions to a prisoner escort-before a crowd of angry townspeople-that the three Allied prisoners of war in his custody were to be taken to a Luftwaffe unit for interrogation. He ordered the escort not to interfere if the townspeople attempted to molest the prisoners, adding that the prisoners would or should be shot. The townspeople subsequently murdered the prisoners as the escort stood by.

Heyer was sentenced to death for inciting the offenses.[240] An unidentified commander was reportedly found responsible for the murder of partisans, following his issuance of an order which read in part: "I will protect any commander who exceeds usual restraint in the choice and severity of the means he adopts while fighting partisans." [241]

Lieutenant General Harukei Isayama was convicted by a United States military commission in Shanghai of permitting, authorizing, and directing an "illegal, unfair, unwarranted and false trial" before a Japanese court-martial of American prisoners of war.[242] Yuicki Sakamoto was convicted by a United States military commission in Yokohama for "permitting members of his command to commit cruel and brutal atrocities" against American prisoners of war.[243] Lieutenant General Yoshio Tachibana and Major Sueo Matoba of the Japanese Army and Vice-Admiral Kunizo Mori, Captain Shizuo Yoshii and Lieutenant Jisuro Sujeyoshi of the Japanese Navy were tried and convicted of like charges by

237 I L.R.T.W.C. 22.
238 XV L.R.T.W.C. 62.
239 IV L.R.T.W.C. 97.
240 I L.R.T.W.C. 88.
241 VI11 L.R.T.W.C. 10.
242 V L.R.T.W.C. 60.
243 IV L.R.T.W.C. 86.

a United States military commission at Guam,[244] as were General Hitoshi Imamura and Lieutenant General Masao Baba by Australian military courts sitting at Rabaul.[245] In a trial by British military court at Wuppertal, Germany, Major Karl Rauer was charged with neglect in the treatment of prisoners of war. Subordinates of Major Rauer were charged with and convicted of illegally executing British prisoners of war, then returning to report to Rauer the prisoner's death "while attempting to escape." Major Rauer was acquitted of the first charge, but convicted of the latter two, the court feeling that it was less reasonable for Rauer to believe after the second incident that the prisoners involved were shot while trying to escape, and that measures should have been taken to investigate and prevent repetition of the incident.[246]

The cases dealt with crimes committed in the commanding officer's absence. Major General Shigeru Sawada was tried by United States Military Commission in Shanghai for permitting the illegal trial and execution of three United States airmen. The trial occurred in General Sawada's absence; informed of the trial and its results, Sawada endorsed the record and forwarded it to the chain of command, making only verbal protest of the severity of the death sentences, which were subsequently carried out. The Court held General Sawada had ratified the illegal acts which occurred in his absence and therefore bore the responsibility for them.[247] General Tanaka Hisakasu was tried by similar Commission at Shanghai for the trial and execution of an American aviator, both of which occurred in his absence. Convicted by the Commission and sentenced to death, the findings and sentence were disapproved by the confirming authority on the basis of insufficiency of evidence of wrongful knowledge on his part.[248] Evidence of what action he took to punish his subordinates for this crime was apparently not raised or presented.

One case dealt with the question of responsibility for passing illegal orders. In the *Jaluit Atoll* case, a lieutenant in the Japanese Navy received an order from Rear Admiral Nisuke Masuda to execute three American aviators, an order which the lieutenant, the custodian of the prisoners, passed to three warrant officers who

244 IV L.R.T.W.C. 86.
245 IV L.R.T.W.C. 87.
246 IV L.R.T.W.C. 113.
247 V L.R.T.W.C. 1.
248 V L.R.T.W.C. *66.*

carried out the order. The warrant officers received death sentences; the lieutenant, ten years' imprisonment."[249]

Virtually simultaneous with the trial of General Yamashita occurred the trial of General Masaharu Homma, Japanese commander in the Philippines at the time of the Bataan Death March.[250] The evidence established that of 70,000 American and Filipino prisoners taken in the surrender of Bataan Peninsula on April 8-9, 1942, in excess of 10,000 --2,000 American and 8,000 Filipino-were executed or perished from maltreatment during the 120-kilometer march from Mariveles to San Fernando.[251] Other charges alleged and proved included massacre of 400 Filipino soldiers on April 12, 1945; failure to provide adequate prisoner of war facilities, illegal prisoner of war labor, torture and execution of civilian internees, refusal to accept the surrender of enemy forces, bombing of hospitals, and bombing of an open city (Manila).[252] Tried in the Philippines by a United States military commission convened by General MacArthur, General Homma was found guilty of permitting members of his command to commit "brutal atrocities and other high crimes." [253]An appeal to the Supreme Court of the United States was unsuccessful.[254] In confirming the death sentence of General Homma, Genera1 MacArthur, a commander for forty-four years at that time, commented aptly in conclusion of this chapter :

> Soldiers of an army invariably reflect the attitude of their general. The leader is the essence. Isolated cases of rapine may well be exceptional but widespread and continuing abuse can only be a fixed responsibility of highest field authority. Resultant liability is commensurate with resultant crime. To hold otherwise would prevaricate the fundamental nature of the command function. This imposes no new hazard on a commander, no new limitation on his power. He has always, and properly, been subject to due process of law. Powerful as he may become in time

249 I L.R.T.W.C. 71. Admiral Masuda committed suicide prior to trial.
250 General Homma was arraigned on December 9, 1945; trial commenced on January 3, 1946, concluding February 11, 1946. He was acquitted of an additional charge which alleged that he refused to accept the surrender of United States forces on Corregidor and adjacent fortified islands on May 6, 1942.
251 Review of the Theater Staff Judge Advocate of the Record of Trial by Military Commission of Masaharu Homma, Lieutenant General, Imperial Japaneses Army, General Headquarters, Supreme Commander for the Allied Powers, March 5, 1946, pp. 2-3.
252 *Id.* at 6-13.
253 *Id.* at 1.
254 *In* re Homma, 327 U.S. 759 (1946). The majority filed no opinion in denying General Homma's appeal. Justices Murphy and Rutledge filed dissenting opinions attacking the haste with which the case was brought to trial. Both the Supreme Court and the military commission reached decision on February 11, 1946, one week after the Supreme Court had rendered its decision in *Yamashita.*

> of war, he still is not an autocratic or absolute, he still remains responsible before the bar of universal justice . . . . [255]

I. SUMMARY

The trials upon the conclusion of World War I1 gave international application on a major scale[256] to a custom first given substantial recognition by its codification in Hague Convention IV of 1907. While that custom-an imposition of responsibility upon a commander for the illegal acts of his subordinates-existed prior to World War 11, it was the action of commanders and national leaders during that conflict which so shocked the conscience of the world as to demand a strict accounting for the commencement and conduct of those hostilities. Seldom have judges been appointed to the bench with such a clear mandate of public opinion as were the judges of the World War I1 tribunals. The law of war, and as

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255 D. MACARTHURR, EMINISCENCES 298 (1964). BERGAMINI*supra* n. *76* at p. *956-959* insists that General Homma was a scapegoat for Emperor Hirohito, who either ordered the Death March or permitted it. Says Bergamini (at p. 956) : "knowledgeable former members of the Japanese General Staff place the entire responsibility for the Death March on these unwanted helpers: '[Colonel] Tsuji [Massanobu] and the China gang,' on 'staff officers from Imperial Headquarters,' on 'experts in Yen Hsi-shan operations'." General Homma was merely an automaton.

256 Japanese figures indicate 4,000 suspects were tried by United States, British, Australian, and Chinese military tribunals. Eight hundred were acquitted, 2,400 were sentenced to three years or more imprisonment, and 809 were executed. BERGAMINI*supra* n. 76, at 1109. Bergamini states the last figure includes 802 "minor" and seven "major" war criminals. He apparently considers only the seven defendants condemned by the Tokyo Tribunal (Dohiharu, Hirota. Itagaki, Kimura, Matsui, Muto, and Tojo) and not Generals Masaharu Homma and Tomoyuki Yamashita as "major" war criminals, even though General Akira Muto was General Yamashita's subordinate.

Between 1945 and March 1948 some 1,000 cases involving 3,500 persons were tried on the European continent before Allied courts. United States courts in Nuremburg from July 1945 to July 1949 tried 199 persons, of whom 38 were acquitted, 36 sentenced to death (18 were executed), 23 to sentences of life imprisonment, and 102 to shorter terms. American courts in Dachau sentenced 420 to death. Official German sources had recorded the following statistics through 1963 :

American courts: 1,814 convicted; 450 given death sentence
British courts : 1,085 convicted; 240 given death sentence
French courts : 2,107 convicted; 104 given death sentence

German authorities estimate the Soviet Union convicted some 10,000 persons of war crimes. Germany itself through 1963 had arraigned 12,846 persons of whom 5,426 were convicted. E. DAVIDSON, THE TRIAL OF THE GERMANS 28- 30 (1966).

These trials are continuing. On May 1, 1973, Hermine Braunsteine Ryan, 53, an Austrian-born housewife from Queens, New York, was ordered extradited to West Germany to stand trial for war crimes (murder of more than 1,700 women and children) allegedly committed by her as the head female guard at Ravensbruck prison camp in Germany and Majdanek in Poland. Ross, *Extradition.* Of *Ex-Nazi Is Ordered,* Wash. Post, May 2, 1973, at A-13. *Also* ,9613 *In re* Extradition of Ryan, 360 F. Supp. 270 (E.D.N.Y. 1973).,. aff'd 478 F.2d 1397 (2d Cir. 1973).

a part thereof the law of command responsibility, witnessed great progression through definition and delineation, perhaps reaching a high water mark as international jurists concentrated their efforts on the subject. In this sense the law of war is like all other parts of international law in its progression: "Its principles are expanded and liberalized by the spirit of the age . .' . . Cases, as they arise under it, must be brought to the test of enlightened reason and of liberal principles. . , ." [257]

III. THE STANDARD DEFINED

Acceptance of command clearly imposes upon the commander a duty to supervise and control the conduct of his subordinates in accordance with existing principles of the law of war. Equally clear, a commander who orders or directs the commission of war crimes shares the guilt of the actual perpetrators of the offense. This is true whether the order originates with that commander or is an order patently illegal passed from a higher command through the accused commander to his subordinates. Only the *genre* of culpability may distinguish the commander from those members of his command accused of committing the war crimes for which he is charged.

A. INCITEMENT

No less clear is the responsibility of the commander who incites others to act, although there may be extremes in examples in such a case. In the *Essen Lynching cas*e, by ordering his men before an angry crowd not to interfere if the crowd attempted to mistreat prisoners in their custody, Captain Heyer knowingly incited (a) an abandonment of responsibility by his subordinates and (b) perpetration of the main offense by persons not members of his command, resulting in the deaths of the prisoners. Would his incitement (and responsibility) be as clear had it been shown that (rather than the events occurring as they did) these same soldiers, while never receiving an order from Captain Heyer to neglect their responsibilities, nevertheless had heard him say that "the only good prisoner is a dead one," or refer to the enemy through racial epithets imputing to the enemy a less than human quality or status? *Black's Law Dictionary* defines "incite" as : "to arouse; urge; provoke; encourage; spur on; goad; stir up; instigate;

257 Bergman v. DeSieyes, 71 F. Supp. 334, 337 (S.D.N.Y. 1946).

set in motion."[258] *Webster's* defines "incite" as *"to move to a* course *of action;* stir up; spur on; urge on."[259] Certainly it would depend on the circumstances of the remark, the recipient, and whether the perpetrator of the offense charged to have occurred as a result of the alleged incitement was the intended recipient. The passing remark by the twenty-four year old company commander to his twenty-three year old executive officer over a drink certainly would not have the same effect as if that same company commander were briefing his troop for a combat assault-troops eighteen years old who have been trained to respect and obey every word uttered by their company commander. While the qualification, "unless illegal" should be added to the last sentence, this does not take into account the impressionability of the young soldier. Even where a commander's comments are in jest and intended as casual remarks for the ears of the executive officer or the company first sergeant, such remarks, particularly where repeated with some frequency, could lead to questions of incitement where overheard by the "casual private first class" who then carries them back to the barracks. Here the incitement abandons the normal image of an explosive, motivating harangue for the subtle suggestion of toleration of certain offenses. While it would be most difficult to attach criminal responsibility to such casual remarks overheard by the unintended eavesdropper, the impact on the subconscious of the young eavesdropper who subsequently finds himself in custody of a "mere ------" on a lonely trail cannot be under-estimated. While it is most unlikely that criminal responsibility would attach for such a casual remark or remarks, it is nevertheless asserted - for moral and military mission reasons, if not legal[260] - that the commander's responsibility lies or should lie in affirmatively manifesting an intolerance for illegal acts under any and all circumstances; and that the dividing line between moral and legal responsibility as it relates to incitement of others to act is a fine one. This dividing line could move depending on the tactical situation

258 BLACK'S LAW DICTIONARY 905 (4th ed. 1951) [Emphasis added].

259 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1142 (1966) [Emphasis added].

260 The concept of intolerance of war crimes in order to accomplish the mission is simply one of not making unnecessary enemies (the civilian population) who will thus detract you through partisan warfare from your primary mission, or of giving the natural enemy cause to fight harder (the enemy soldier who believes he will die if taken prisoner will fight harder not to be taken prisoner). While the Vietnam "winning the hearts and minds of the people" program of civic action is the most recent example of this concept, Emperor Meiji of Japan, in his "Rescript to Soldiers and Sailors'' of January 4, 1883, admonished :

Those who appreciate true valor should in their daily intercourse set gentleness first and aim to win the love and esteem of others. If you affect valor and act with violence, the world will in the end detest you and look upon you as wild beasts. Of this you should take heed.

(HEINL, supra n. 15 at 172). Similarly, Sir Philip Sidney (1554-1586) declared: "Cruelty in war buyest conquest at the dearest price." *(Id.* at 20).

of the commander and his command; the casual remarks of the commander of a maintenance unit in a conventional war would seem to have less impact than those of an infantry company commander in a counterinsurgency environment. Even when remarks which incite violate a legal responsibility, the degree of culpability may vary. Captain Heyer was found to be a principal for his remarks and as a result received a death sentence; while his remarks were not tantamount to orders, they were (a) given with the intent of inciting and (b) with full knowledge of the probable consequences. The single or even occasional castoff remark would not normally indicate the same intent nor awareness of the possible circumstances, although it could amount to personal dereliction on the part of a commander if shown that he should have anticipated the probable consequences; [261]and, taken alone, would only under the rarest circumstances be sufficient to find its speaker responsible, assuming a direct correlation between remark and act could be made. Thus, the degree of criminal responsibility may vary from the situation where the remarks of incitement are synonymous with orders as opposed to the situation where such remarks are unintended in the context received and erroneously perceived as a manifestation of acquiescence on the part of the speaker. The degree of responsibility is determinative of the degree of culpability, and is of particular significance where the misconduct charged is alleged to constitute a "grave breach" as that term is defined in the 1949 Geneva Conventions.[262]

B. ACQUIESCENCE

261 In this situation the dereliction may be one of the commander not knowing his troops. U.S. DEP'T OF ARMY, FIELD' MANUAL 101-5, OPERATIONS OF ARMY FORCES IN THE FIELD, provides a t paragraph 3-5:

3-5 THE HUMAN ELEMENT

Despite advances in technology, man remains the most essential element on the battlefield. The commander must be acutely sensitive to the physical and mental condition of his troops, and his plans must take account of their strengths and weaknesses. He must make allowance for the stresses and strains the human mind and body are subjected to in combat. His actions must inspire and motivate his command with the will to succeed under the most adverse conditions. He must assure his troops that hardship and sacrifice will not be needlessly imposed and that their well-being is of primary concern to him.

262 Articles 146-148, Geneva Convention Relative to the Protection of Civilians: Articles 129-131, Geneva Convention Relative to the Treatment of Prisoners of War; Articles 49-51, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; and Articles 50-52, Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

A commander who is shown to have knowledge of offenses which have occurred within his command may be found responsible to some degree for those offenses where he has manifested acquiescence in their commission. Responsibility may vary from that of a principal to dereliction of duty; the degree of culpability will be correlative to the degree of acquiescence, or better said, to the degree of manifestation of intent to join or assist the principals in perpetration of the primary offense. There is little difficulty with the situation where the commander takes no action, or where by his action he clearly manifests an intent to aid the commission of the offense after the fact; the difficulty lies in establishing a causal connection where acquiescence is due to dereliction of duty rather than a manifestation of specific intent. The commander is deemed to share responsibility where he has knowledge of an offense and fails to take reasonable corrective action. Assuming the principal offense and the commander's knowledge thereof are established, the commander would be responsible if (a) he took no action, either intentionally or through personal dereliction; or (b) the action taken is within the control of the commander and is patently disproportionate to the offense committed as to result in acquiescence therein.

Thus a commander would not be responsible if an accused is referred to a general court-martial for murder of a noncombatant and is either acquitted or receives what on its surface appears to be a light sentence, unless there is established a pattern of such trials which would indicate that they have been no more than a sham or facade; but the commander who punishes the same accused through nonjudicial punishment (given circumstances indicating guilt of the offense charged) would be no less responsible than the one who awards no punishment. Any such acquiescence must be blatant in character rather than speculative "second guessing" after the fact.

Field Manual 27-10 fairly states the commander's duty relative to this point: "Commanding officers . . . must insure that war crimes committed by members of their forces . . . are ***promptly*** and ***adequately*** punished." [263]

While this represents a statement of the commander's ***duty,*** in seeking an answer to any question of a commander's ***acquiescence*** a reverse tack is required. Current British military law states this point by considering a commander to have

263 [Emphasis supplied.] Paragraph 507 (b) strangely urges *prompt* and *adequate* punishment of war crimes committed against *enemy personnel* only; the admonishment applies regardless of the victim.

acquiesced in an offense "if he fails to use the means at his disposal to insure compliance with the law of war;" [264]in comment it continues:

> The failure to do so raises the presumption - which for the sake of the effectiveness of the law cannot be regarded as easily rebuttable - of authorisation [sic], encouragement, connivance, acquiescence, or subsequent ratification of the criminal acts.[265]

Field Manual 27-10 similarly provides that a commander may be responsible under a theory of acquiescence "if he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violations thereof." [266]Both the British "means at his disposal" test and the "necessary and reasonable" language of FM 27-10 suggest that, rather than establishing an absolute norm, the actions of the commander under the circumstances extant at the time of the discovery of the offense will determine whether he is deemed to have acquiesced in the offense.[267] To the commander whose forces are heavily engaged in an intense operation or pitched battle, no reasonable means may exist to secure prompt punishment of an offense prior to conclusion of that engagement; absent disengagement, there would come a point where some action must be taken against an alleged perpetrator of an offense regardless of the circumstances of the campaign, *or* where there has been sufficient disengagement from the campaign for the commander to turn his attention to matters other than

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264 *Supra* n. 58 at paragraph 631.

265 *Id.* at n. 1. The note continues (after citing *Yamashita* as the principal case on acquiescence) :

The principle has also been recognized in the legislation regarding war crimes of some countries. However, it is probable that the responsibility of the commander goes beyond the duty as formulated above. He is also responsible if he fails, *negligently or deliberately,* to ensure by the means at his disposal that the guilty are brought to trial, deprived of their command or ordered out of the theater of war, as appropriate. [Emphasis supplied].

266 Para. 501, FM 27-10 (1956).

267 The French and Luxemborg criteria of "tolerated" used immediately after World War I1 would seem to be in agreement with the British and United States views, while the Netherlands criteria of that period ("deliberately permitted") appears higher. *Cf.* the Netherlands proposed standard in n. 296 *infra.* The Republic of Zaire, in its Code of Military Justice of 1972, provides at Paragraph 502 that "(S)uperiors can . . . be considered accomplices to the crime to the extent that they organized or tolerated the (war) crimes of their subordinates." Article I1 of the Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity (U. N. G. A. Res. 2391 [XXIII] December 9, 1968) provides that " (T) he provisions of this Convention shall apply to representatives of the state authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the state authority who tolerate their commission."

tactics.[268] Put another way, the theory of prompt investigation, trial and punishment will be more stringently applied to a commander in a static tactical situation than one in a very fluid, fast-moving situation requiring complete devotion to accomplishment of the mission at hand.'[269]

C. COMMAND AND CONTROL

The post-World War II tribunals concluded that responsibility for *control* of a unit existed with *command* of that unit, for example, the commander had the duty to control those troops and units subordinate to him in his command. These tribunals found that identification with and responsibility for certain units by particular commanders was not always clearly defined.

The tribunals in their examination of this point in *Yamashita, Von Leeb,* and *List* are in agreement that where a commander exercises executive power over occupied territory, he is responsible for acts committed within his area of responsibility regardless of whether a unit is subordinated to his command or not, As the commander bearing executive power, he is charged with responsibility for

268 This is particularly true today with the staff support which the commander receives. In proceeding against a member of his command accused of war crimes, there are few matters which require the personal attention or decision of the commander. With judge advocates assigned as special staff officers down to and including brigade or regimental level (the Marine Corps has non-lawyer legal officers at battalion level), and assuming adequate investigative services are available, it would seem that the tactical circumstances would most affect the company grade commander. Availability of staff assistance is perhaps most illustrative of the "means at his disposal" test.

269 Care should be exercised in reading the preceding statement, as it addresses only the subjective standard to be utilized in weighing a commander's conformance with the laws of war; it in no way suggests that under any circumstances are those standards decreased. Within individual units, the tactical situation may fluctuate rapidly and unexpectedly. Allied commanders on D-Day, June 6, 1944, were of necessity completely involved in mission accomplishment; thereafter their responsibility for prompt investigation, trial and punishment of any alleged offense became of more paramount concern. Initiation of the German Ardennes Counteroffensive on December 16, 1944, affected the commander's ability to obtain prompt investigation, trial and punishment of an accused as well as his personal ability to concentrate his attention on disciplinary matters. A similar reasonable shifting of priorities would be exemplified by the United States Marine amphibious assault at Inchon, Korea, on September 15, 1950; the subsequent strategic withdrawal from the Chosin Reservoir, commencing December 1, 1950; as compared with the relatively stable six-month-period from October 1952 to March 1953 when Marine units formed a part of the United Nations Command line. The preoccupation of the commander with strictly tactical matters in the first two instances is much more significant than in the latter.

maintaining peace and order within the area over which his executive authority extends, and the duty of crime prevention rests upon him.[270]

In *List* the Tribunal deftly avoided the question of responsibility of the commander possessed solely of tactical command, noting in such case that the "matter of subordination of units as a basis for fixing criminal responsibility becomes important."[271] No difficulty in ascertaining responsibility exists where the tactical commander exercises both operational and administrative control; all authority and responsibility is vested in the single command. The question raised, but unanswered in *List,* addresses the splitting of operational and administrative control – tactical control reposed in one commander, with the authority to punish in another, as alleged in *Yamashita* regarding the atrocities committed by naval troops in Manila. Setting aside the responsibility of the tactical commander in whom executive authority also was vested, to what degree can a commander be said to be responsible for the acts of subordinate units over which he exercises only operational control? The Supreme Court in *Yamashita* discussed responsibility for failure of a commander to take such measures as were within his *power* rather than his authority. [272]The Tribunal in *Toyoda,* all professional military officers, did not view any such division of authority as realistically giving rise to any control problems:

> The responsibility for discipline in the situation facing the battle commander cannot, in the view of practical military men, be placed in any hands other than his own. Whatever theoretical division of such responsibility may have been propounded, it is, in fact, impossible for delineation in the heat of "trial by fire."[273]

Thus, where a tactical commander has only operational control of a subordinate unit and not the authority to relieve or punish the subordinate commander, he will be expected to take such measures as are within his physical power under the circumstances to prevent or stop war crimes by that subordinate commander. It is the commander's responsibility to take all measures possible to prevent the commission of war crimes by subordinates; lack of administrative control and hence normal administrative remedies does not foreclose or preclude use of other measures.

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270 This responsibility is not exclusive but concurrent with that of unit commanders, whether tactically subordinate to the area commander or not, and under normal circumstances would be superior in authority to that of those unit commanders.

271 *Supra* n. 195 at 1260.

272 *Supra* n. 107 at 15.

273 *Supra* n. 231 at 5012.

For example, assume an infantry battalion is operating with an artillery battery attached. Because of operational exigencies, the battery is under operational control of the infantry battalion but under administrative control of its parent (artillery) battalion. The battery commander is authorized to fire only those missions requested by the supported unit. The battery commander receives a fire mission from another unit or from his parent artillery unit which is patently in violation of the rules of engagement or otherwise violates the laws of war, and the battery commander indicates he will fire the mission. On monitoring of that message in the supported infantry battalion's fire support coordination center by the infantry battalion commander or his representative, there is no question that he has the *duty,* the *authority,* and the *power* to prevent the perpetration of that offense. While certainly this example is more easily solved under our bureaucratic command system than the pluralistic system of the Third Reich, and less complex than that with which General Yamashita was confronted, it nevertheless seems to be the only reasonable result or conclusion which can be reached. It seems unconscionable in the example given that the infantry battalion commander could forego his responsibility by pleading a lack of administrative authority over the attached battery so long as he has the means of preventing perpetration of the offense.[274]

Other situations pose similarly perplexing problems. Assume a commander is assigned a tactical area of operation over which he exercises no executive authority. Other forces – whether allied forces from a third nation, forces of the host nation, or other United States forces - enter that area obviously bent on the commission of war crimes, for example, announcing openly the taking and execution of hostages. Certainly a duty exists to exercise those means within his control to prevent the intended acts, even if those means are limited to notification of his superiors in an effort of reaching a common commander with authority to prevent the offense, or to report those offenses if unsuccessful in their prevention; yet the degree of duty and commensurate liability for violation thereof, particularly where allied troops are involved, is not clearly defined. Article 1 of the Geneva Conventions of 1949 requires that all signatories thereto "respect" and "ensure respect" for the Conventions "in all circumstances." This language has been determined to be permissive rather than mandatory,

274 Responsibility in this case would not be exclusive. Where the requested fire mission comes from a separate unit, the artillery battalion commander has a two-fold responsibility (assuming he has knowledge before the mission is fired) : (a) to use all means reasonably available to prevent the firing of the mission, and (b) to punish those responsible in the battery for commission of the offense.

however.[275] While Articles 13 and 16 of the Geneva Civilian Convention, taken together, require a signatory nation to assist, protect and respect, as far as military considerations allow, "persons exposed to grave danger," it has been said that Article 4 of the Convention emasculates any duty of the individual commander to intervene by suggesting that any intervention be conducted through normal diplomatic channels.[276] Insofar as that duty exists with regard to other American units, Field Manual *27*-10 provides that:

> The commander is . . . responsible if he has actual knowledge, or should have knowledge . . . that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war . . . .[277]

Combining this definition with the previously-cited British "means at his disposal" test, it would seem the commander with means of controlling the commission of war crimes has a duty to do so, not only within his own command but within his area of operations and command. While not a commander, an adviser to an allied unit may be said to have a duty to prevent the commission of war crimes by the unit to which he is assigned because of his unique position within that unit. If, for example, an advisor should come upon a situation in which members of his advisee unit were about to commit a war crime, while lacking the authority to control the conduct of those forces, his means of otherwise preventing the commission of the offense are not entirely foreclosed. After protesting to the unit commander (assuming without success), he has the means to notify his next higher command by separate radio net - again in hopes of reaching a common senior headquarters that can prevent the offense. If the offense occurs, he has the limited means of preventing its reoccurrence by (a) reporting its occurrence and (b) seeking relief from his role as adviser to that unit, should the circumstances warrant. The latter suggestion not only follows the alternatives proposed in the *Tokyo* and *Von Leeb* trials, but would appear to be the practical solution where the rapport between the adviser and the advisee unit commander has been seriously jeopardized by their clash. The circumstances for relief as well as any question of acquiescence on the part of any adviser who remains with the unit would depend entirely on the circumstances and severity of the incident, however. The situation is not unlike that which the Tokyo Tribunal

275 IV PICTET, COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 16 (1958); PAUST, *Supra* n. 4 at 57 MIL. L. REV. 157.
276 PAUST, supra. n. 4 at 57 MIL. L. REV. 158.
277 *Supra* n. 57 at para. 501.

found in convicting Lieutenant General Akira Muto of war crimes perpetrated as General Yamashita's Chief of Staff: while not in the precise position in which the adviser finds himself, he was found criminally responsible inasmuch as he was deemed to have had the means to influence substantially command decisions; thus failure to utilize all means available to prevent the perpetration of war crimes may legitimately raise questions of criminal responsibility.

D. KNOWLEDGE

Given the established duty of a commander to control the conduct of his subordinates, responsibility for such conduct exists where the commander has or should have had knowledge of offenses and fails to act. Because of *Yamashita,* or what might be called the "popular" view of what *Yamashita* purportedly represents, this has been a point begging resolution. It is submitted that the difficulty lies not with *Yamashita* but in what a minority with vested interests claim *Yamashita* represents.

This so-called popular view, based on the writings of General Yamashita's defense counsel, Frank Reel, and the current writings of Telford Taylor, is that a commander may be convicted for the war crimes of a subordinate on the basis of *respondeat superior,* without any showing of knowledge. As previously noted, this theory was argued unsuccessfully by Telford Taylor at Nuremburg and was also rejected by the Tokyo Tribunal. The theory ignores the basic charge against General Yamashita that he

> . . . unlawfully disregarded and failed to discharge his duty to control the operation of the members of his command, ***permitting*** them to commit brutal atrocities and other high crimes . . .; and he thereby violated the laws of war.[278]

By definition, "permitting" implies knowledge of that which is permitted and acquiescence therein, which would suggest that the standard in *Yamashita* - of either knowledge or, possessing knowledge, of a failure to carry out the commander's duty to act -- is no less nor more than that stated in the *High Command* case ". . . a personal neglect amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence." [279]

278 *Supra* n. 71.
279 XI TWC 543-44.

A recent discussion of *Yamashita* can be found in Professor Arthur Rovine's writings on command responsibility in *The Air War in Indochina.*[280] In reviewing the Supreme Court's opinion in *Yamashita,* Professor Rovine stated :

> Our view is that the Yamashita decision does not carry the weight assigned to it by ardent supporters or critics. At no point did the military commission or the Supreme Court hold that knowledge was irrelevant. It is true that the original decision by the commission did not make a specific finding of knowledge, it did quote from and apparently accept prosecution evidence but it did quote from and apparently accept prosecution evidence "to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused."
>
> The Court refused to deal with the evidence on which General Yamashita was convicted; and did not deal with the question of knowledge one way or the other.
>
> The Court did decide that the precise substantive question before it was whether the laws of war imposed on a military commander an obligation to take such appropriate measures as are within his power to control the troops under his command for the prevention of war crimes. The Court cited several provisions of conventional law to demonstrate the existence of an international legal obligation for the defendant amounting to an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.
>
> The proposition of law which General Yamashita was held to have violated was thus formulated in a rather elliptical manner that avoided the element of knowledge while leaving it as a variable for consideration by the court of first instance. Given the significance of the issue and the punishment of death, it is regrettable that the Supreme Court did not present a full-scale analysis of the legal significance of a commander's knowledge, or lack of knowledge, of war crimes committed by his troops. But the unsatisfactory nature of the Court's opinion in 1946 is certainly not to be taken as a clear statement that there is command responsibility for crimes of which a commander has ***no*** knowledge.[281]

After summarizing the *High Command* case, Professor Rovine concludes :

> We think the *High Command* ***Case*** is far preferable to the Yamashita holding, because it deals clearly with a crucial issue – knowledge-- rather than avoiding it, and because the doctrine it evokes appears to be more equitable and better law. Further, as an expression by an international tribunal rendering judgment in one of a large series of war-crimes trials, its legal weight is probably greater than a judgement (sic) even of the U.S. Supreme Court, at least in terms of formulating rules of international law. And, ironically, it is far more likely than the Supreme Court ruling to win acceptance in the United States, among lawyers, the public, and government and military decision makers. [282]

280 THE AIR WAR IN INDOCHINA (Rev. ed. R. Littauer and N. Uphoff 1972).
281 *Id.* at 140-1.
282 *Id.* at 141.

Professor Rovine's comments lament the same point noted previously in this article - in rushing to try Generals Homma and Yamashita in order to placate his Filipino constituency, General MacArthur committed an equally great injustice to international law by failing to appoint a law member to those military tribunals. The resulting credence given the opinion of a lay jury is unprecedented and disproportionate in light of the number of high-ranking officers tried by tribunals whose membership included members of the bar.

Obviously, all trials will not deal with the question of knowledge to the degree that *Yamashita* did. Where knowledge is obvious, given the failure to act, the commander will be deemed responsible. In other cases, knowledge may be reasonably imputed. Thus, in *List* the Tribunal imputed knowledge to a commander where reports were received by his headquarters, stating as to General List :

> Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.[283]

Similarly, of General von Kuechler in the *High Command* case the Tribunal stated "It was his business to know, and we cannot believe that the members of his staff would not have called these reports to his attention had he announced his opposition to the [Commissar Order] ."[284]

These Tribunals, and it is submitted the Tokyo Tribunal in convicting General Muto and the Military Commission in convicting General Yamashita, further asserted that a commander may normally be presumed to have knowledge of offenses occurring within his area of responsibility while he is present therein. In addressing this point in the *Hostage* case, the Tribunal observed :

> It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such Occurrences result occasionally because of unexpected contingencies, but they are unusual.[285]

The Canadian rule of 1945 reflects this.[286]

283 *Id.* at 203.
284 *Id.* at 151.
285 *Id.* at 199.
286 *Supra* n. 65. Canadian rule 10(4) provides:

In discussing the responsibility of General von Roques for crimes committed within his area of responsibility, an area over which he also had executive power, the Tribunal in *von Leeb* placed this in perspective, quoting from *List:* " **[A** commander] cannot ignore obvious facts and plead ignorance as a defense."[287]

This is not a presumption to be rebutted by the commander, but a subjective element which the court in its discretion may consider. Where the commander denies actual knowledge of the offenses alleged, it is an imputation of *constructive knowledge* where it is established that under the circumstances he *must have known.* Other subjective elements will weigh heavily on the value placed on this factor in considering whether the commander so accused has been derelict in the performance of his duties, for example, in obtaining knowledge, and under the circumstances to what degree he shares the guilt of the principal accused.

The standard to this point may be stated as follows: **A** commander may be liable for the actions of his subordinates if: (a) he has actual knowledge that an offense has occurred, and he fails to punish the perpetrators of the offense or take reasonable preventive measures within his power to prevent reoccurrence; or (b) he failed to exercise the means available to him to learn of the offense and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction; or (c) there is sufficient evidence to impute knowledge.

E. SUBJECTIVE FACTORS

One author has suggested that (b) and (c) be ascertained by a "reasonable commander" standard.'[288] The difficulty with this suggestion is just as there is no such thing as a "reasonable man," there is no such thing as a "reasonable commander"; and that the variable of the circumstances of command are too great to be considered in one "pat" test. Rather than attempt to define the elusive, it is asserted that a number of subjective criteria be recognized and considered in ascertaining and imputing knowledge and responsibility. Although these criteria may also be considered in determining any question of acquiescence, they are

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Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as *prima facie* evidence of the responsibility of the commander for those crimes.

287 Supra note 184.

288 O'Brien, The Law of War, Command Responsibility and Vietnam, 60 GEO. L.J. 605, 629 (1972).

considered here only with regard to resolution of any question of knowledge. These criteria include :

(1) *The rank of the accused.* This may serve as a two-edged sword, for while rank is gained through experience it also serves to isolate the commander from the everyday events of the battlefield,

(2) *Experience of the commander.* Ideally officers of equal rank are equal - in authority, responsibility, ability, and experience. Realistically nothing could be further from the truth. In the simplest of examples, a rifle company may be commanded by a captain with up to twelve years' commissioned service -- experienced as a platoon leader, company executive officer, with additional professional schooling, and several years of experience as a company commander. The adjacent company may be commanded by another captain who by virtue of accelerated promotions in time of war may have only two years commissioned service, half of which was spent in training; or by a second lieutenant who joined the company, his first assignment, the day before as a platoon leader and who after a heavy assault finds he is the surviving officer in that company. Leadership comes not only from training but from experience; with it comes a sixth sense, an ability to anticipate problems before they arise as well as being cognizant of a greater variety of means or methods for dealing with or preventing them. Thus in the trial of General Yamashita the Commission specifically recognized the extensive and broad experience of the accused throughout the world in war and peace, in rejecting his plea of lack of knowledge[289] Similar consideration would be given to the personal and professional qualities of the commander - his intelligence, his education, the amount of time spent in staff duties as opposed to command positions, or vice-versa, as well as the charisma of the commander. The last point is most important, however much a will-o'-the-wisp it may be; the commander whose troops will follow him to hell and back certainly has greater means of knowledge, as well as control, simply by virtue of the personal dedication to him by his subordinates than the commander who lacks the ability to lead his troops to the chow line. Thus given like facts in all other factors a court in one case may find a commander should have had knowledge simply because he was a better commander than his acquitted counterpart in another case.[290]

289 *Supra* note 64 at 4060-1.

290 The result of this conclusion is that it encourages mediocrity, an argument which the author is hard pressed to refute. The result in actuality, however, is that while a higher

(3) *The duties of the commander* by *virtue of the command he held.* These considerations will extend not only to the type of command held by the commander but also to the operational commitments of that command, Thus it may be reasonable to conclude the commander of a stable support command should have had knowledge of an offense more readily than the infantry commander of a highly mobile and widely deployed unit. Similarly, the commander operating, for example, a battalion with supporting arms in general and even direct support is operating in a less complex environment than his counterpart operating with the same forces attached.

(4) *Mobility of the commander.* What the advent of the helicopter the commander has extended his means of knowledge. Yet a disparity exists from unit to unit. The commander of an air cavalry unit with a seeming overabundance of helicopters may be deemed to have a greater means of knowledge than his airborne counterpart who after initial deployment finds he is limited to the infantryman's traditional means of transportation -- foot. While personal inspection of units certainly increases a commander's means of knowledge, the development of effective communications may have limited any argument of lack of mobility as a viable defense. It is nevertheless a point which deserves some consideration.

(5) Isolation of the commander. This concept goes hand-in-hand with its predecessor, the obvious example being the case of Admiral Toyoda, who was relegated to commanding a vast force covering the Pacific from a flagship anchored in home waters. In contrast commanders in Vietnam, if not actually on the ground with their command, hovered overhead in constant observation of the tactical situation. Isolation and mobility were usually capable of correction by a fifteen-minute helicopter flight, yet that same commander could be virtually as isolated from his command as Admiral Toyoda by adverse weather conditions.

(6) *The "sliding probability ration" of unit/incident/command.*

There certainly exists a sliding probability ratio, that is, the greater the size of the offense and/or the unit involved, the higher in the chain of command knowledge may be subjectively imputed. Obviously any one soldier can go out in

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standard of *expected* performance of duty may be considered in the case of a superior commander, the high standard prescribed by precedent may never be lowered to accommodate the mediocre performance of a less capable commander. The same encouragement of mediocrity exists under the "reasonable commander'' rule, if not more so. Utilization of the subjective standards diminishes the likelihood of culpability turning on the one point.

a combat environment and murder an unarmed belligerent or non-combatant without anyone knowing otherwise. The introduction of each additional person, whether co-participant, observer, or victim, increases the likelihood of discovery of the offense; and the greater the number of participants or victims, the higher in the chain of command that information is likely to reach - or the more likely that a court will impute knowledge to the accused commander. It is conceivable that a small patrol could commit murder and the information not reach above the platoon leader; in such case, involving one or two deaths, it would be difficult to impute knowledge to the division commander absent a showing of offenses systematic in nature. Yet if that patrol walks into a village and executes fifty non-combatants, or if a platoon or company is witness to the murder of one non-combatant, or if a platoon or company murders fifty non-combatants, it would be reasonable for a court to conclude that a division commander and intermediate commanders between the platoon or company and the division knew or should have known of the offenses. Dereliction in failing to learn of the isolated offense may thus be imputed only to those commanders at lower levels in direct contact with the situation; but a commander's duties include as part of the exercise of command supervision of subordinates to insure that orders are carried out fully and properly. Hence the greater the severity of the offense or the frequency of offenses, the higher up the chain of command knowledge may be imputed because of the commander's failure to carry out his supervisory responsibilities.

(7) *Size of the Staff of the Commander.* While the size of the staff directly affects the commander's means of knowledge, and while a court may give this consideration in imputing knowledge, a Commander may not "shrink" his staff to avoid learning about activities. He cannot avoid that which is his duty.

(8) *Comprehensiveness of the Duties of the Staff of the Commander.* Depending on circumstances, the duties of the staff may vary considerably in their comprehensiveness, thereby varying the means of gaining knowledge. Thus the commander and his staff engaged in a complex amphibious operation will have less opportunity for gaining knowledge than they would during a sustained land campaign. This does not permit a commander and his staff to operate in a vacuum, however, ignoring the obvious.

(9) *Communications Abilities.* While arguments were made in the *Hostage Case,* the *High Command Case, Yamashita,* and by General Muto before the Tokyo Tribunal that inadequate communications were the cause of each accused's lack of knowledge, there was sufficient evidence to the contrary in each

case for the court to reject this as a valid defense. Few commanders will permit their subordinates to lose contact with the command; and while communications (and hence the means of knowledge) may diminish, seldom will they cease. There is a disparity among units of equal level as well as units of different levels, however, and these variations in means should be taken into consideration by a court.

(10) *Training, Age and Experience of the Men Under His Command.* General Douglas MacArthur, in his *Annual Report of the Chief of Staff of the Army,* 1933, stated "In no other profession are the penalties for employing untrained personnel so appalling or so irrevocable as in the military." [291]

Even earlier, General W. T. Sherman had said of the value of experience :

> It was not until after Gettysburg and Vicksburg that the war professionally began. Then our men had learned in the dearest school on earth the simple lessons of war. Then we had brigades, divisions and corps which could be handled professionally, and it was then that we as professional soldiers could rightly be held to a just responsibility.[292]

Lack of training and experience is no excuse for the commission of war crimes, yet it may serve in the way of explanation should they occur and the commander argue his ignorance of their occurrence. This lack of training and experience may be deemed to put the commander on notice as to his additional responsibility of controlling untrained troops, for part of the identified responsibility of the commander is knowing his command, its capabilities and limitations.'!' [293]

(11) *Composition of Forces Within the Command. Yamashita* emphasized one point: the joint or combined force is more difficult to control than the unified command, simply because of interservice or international rivalries. Things are done differently; hence just as a commander may be limited in his control of such an "allied" force, so may his means of knowledge be similarly limited in scope.

(12) *Combat Situation.* The extremes are obvious, one being the relatively stable combat environment as opposed to the fluid, rapid-moving situation. Consideration must be given to these degrees of engagement as they have perhaps the greatest effect on the commander's ability to obtain knowledge and hence the ability to control his subordinates.

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291 HEINL, *supra* n. 15 at 329.
292 *Id.* at 108-9.
293 *See* n. 261, *supra.*

F. THE STANDARD OF KNOWLEDGE

Almost universally the post-World War I1 tribunals concluded that a commander is responsible for offenses committed within his command if the evidence establishes that he had *actual knowledge* or *should have had knowledge,* and thereafter failed to act. This remains the standard today. Field Manual 27-10 states that:

> The commander is . . . responsible, if he had *actual knowledge* or *should have had knowledge,* through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to use the means at his disposal to insure compliance with the law of war.[294]

Available information indicates the *knew or should have known* test was used by the Soviet Union in their war crimes trials after World War I1 and remains the Soviet standard of command responsibility."[295]; The Netherlands has proposed that the *knew or should have known* test be codified as the international standard for responsibility."[296]

G. *THE DEGREE* OF *NEGLIGENCE: ENOUGH, TOO MUCH, OR TOO LITTLE?*

While there appears to be agreement on the general acceptability of the *knew or should have known* test, the difficulty lies in establishing the point at which criminal liability attaches. In the words of the *High Command Case,* at what point has a commander been guilty of "a personal neglect . . . amounting to acquiescence?" In the absence of an international definition, examination of municipal standards is required.

In order to determine the degree of negligence required for culpability, a review of the possible offenses is in order. Under Article 130 of the 1949 Geneva

294 *Supra* n. *57* at para. 501 (emphasis supplied).
295 Harbridge House Study, *supra* n. 6 at 22.
296 By CE/COM IV/45 the Netherlands recommended that the following paragraph he added to Draft Article *75* of International Committee of the Red Cross Draft Additional Protocol to the Four Geneva Conventions of August 12, 1949:
2. [The civilian and military authorities] shall be criminally liable for any failure on their part to take all those steps within their power to make an end to breaches of the laws of war which were, or ought to have been, within their knowledge.

Convention Relative to the Treatment of Prisoners of War grave breaches of the Convention are described as

> . . . *wilful* killing, torture or inhuman treatment, including biological experiments, *wilfully* causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or *wilfully* depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.[297]

Article 147 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War similarly defines grave breaches as

> . . . *wilful* killing, torture or inhuman treatment, including biological experiments, *wilfully* causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or *wilfully* depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and *wantonly.*[298]

Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field contains similar language to the preceding provisions. Such grave breaches are punishable by a sentence up to and including a sentence of death.

The 1949 Conventions thus codify the apparent degree of negligence used in the *High Command* Case: ". . . a personal neglect amounting to *wanton,* immoral disregard of the action of his subordinates amounting to acquiescence."[299]

Thus precedent and present Conventions appear to indicate that in order to hold a commander responsible for grave breaches of these Conventions or of war crimes tried before an international tribunal, absent actual knowledge there must be either (a) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences; or (b) an imputation of constructive knowledge, that is, that despite pleas to the contrary under the facts and circumstances of the case the commander must have known of the offenses charged and acquiesced therein.[300] The question remains,

297 Treaties and Other International Acts Series 3364 (Emphasis supplied)
298 Treaties and Other International Acts Series 3365 (Emphasis supplied)
299 XI TWC 543-544 (Emphasis supplied).
300 Professor O'Brien, *supra* n. 288 a t 649, utilizes an indirect/direct liability theory rather than the legal concept of imputed or constructive knowledge :
. . . if . . . violations are such as to reveal demonstrable direct or implied negligence on the part of the relevant commanders. Command responsibility dictates indirect liability for the crimes. If it can be shown that the commanders must have been aware that torture and

particularly in light of the severity of the penalty for commission of a grave breach, if the standard should be lower.

Under domestic law, there exist three degrees of negligence:

(1) *Wanton:* This degree of negligence involves the doing of an inherently dangerous act or omission with a heedless disregard of the probable consequences.

(2) *Recklessness,* Gross *or Culpable Negligence:* Culpable negligence is a degree of carelessness greater than simple negligence.[301] It is a negligent act or omission accompanied by a culpable disregard for the foreseeable (but not necessarily probable) consequences to others of that act or omission.

(3) *Simple Negligence:* Simple negligence is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances.

It is submitted that only where there is a showing of *wanton* negligence has the commander manifested the *mens rea* to be held criminally responsible for the primary offense, that is, he has through his dereliction sufficiently aided and abetted the principals thereto as to make himself a principal or an accessory after the fact.

Article 77, Uniform Code of Military Justice, defines a "principal" as :

> Any person . . . who-
> (1) commits an offense . . ., or aids, abets, counsels, commands, or procures its commission; or
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.[302]

In discussing Article 77 the *Manual for Courts-Martial* states :

> To constitute one an aider and abettor under this article, and hence liable as a principal, mere presence at the scene is not enough nor is mere failure to prevent the commission of an offense; there must be an intent to aid or encourage the

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mistreatment were regularly practiced, . . . they become participants with direct responsibility added to their indirect liability.

301 Para. 198b, MANUAL FOR COURTS-MARTIAL, 1969 (REV. ED.) [hereinafter cited as MCM, 1969 (Rev. ed.)].

302 10 U.S.C. § 877.

> persons who commit the crime. *The* aider *and* abettor must share the *criminal* intent *or* purpose of the perpetrator.[303]

Article 78, UCMJ, Accessory after the Fact, states that

> Any person . . . who, knowing that an offense . . . has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.[304]

In discussing Article 78, the *Manual* states that in addition to having actual knowledge that an offense has occurred "mere failure to report a known offense will not constitute one an accessory after the fact." [305]

Yet such failure to report will give rise to other liability, at least at the domestic level. Article 1139, Navy Regulations, states :

> *Obligation to* Report Offenses. Persons in the Department of the Navy shall report to the proper authority offenses committed by persons in the Department of the Navy which come under their observation.[306]

Likewise, Military Assistance Command, Vietnam, Directive 20-4 [307] required that any allegation of a war crime be reported not only to the next higher headquarters but directly to MACV headquarters in Saigon, bypassing the regular chain of command and communication channels.

Violation of either of these orders constitutes a violation of Article 92 of the Uniform Code of Military Justice,[308] either as a violation of a lawful general order or as an act which constitutes dereliction of duty. In the former charge, where there is a more substantial question of criminal intent, the maximum sentence is a dishonorable discharge (dismissal for officers) and confinement at hard labor for two years. In the latter case, where commission of the offense may occur through an act of simple negligence, the maximum punishment is three months' confinement.[309]

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303 Para. 156, MCM, 1969 (Rev. ed.).
304 10 U. S. C. § 878.
305 Para. 157, MCM, 1969 (Rev. ed.).
306 United States Naval Regulations, 1973. These regulations apply to all members of the United States Navy and Marine Corps, active or reserve, and to Coast Guard units and personnel when attached to the Navy.
307 MACV Directive 20-4 (20 April 1965). This requirement was in effect throughout the period of major United States' involvement in Vietnam, being republished in all subsequent editions of MACV Directive 20-4 (25 March 1966; 10 July 1970; and 2 March 1971).
308 10 U. S. C. § 892.
309 A commissioned officer additionally may be punished by punitive separation from the service, *i.e.* dismissal, when convicted by a general court-martial of any offense in violation

Where there exists the necessary *mens rea,* something more than a mere failure or refusal to disclose an act and some positive act of concealment, the person so acting is guilty of misprision of a felony, a violation of Article 134,[310] for which the maximum punishment is a dishonorable discharge (dismissal for officers) and confinement at hard labor for three years. Any greater degree of intent would place the individual charged within the realm of the previously-discussed area of principal or accessory after the fact. Thus the degree of negligence is in direct relation to the degree of liability, and under either domestic law, charging one as a principal or accessory after the fact to murder, or international law, charging one in essence as a principal or accessory after the fact to a war crime, there exists a requirement that the negligence of the commander be so great as to be tantamount to the possession of the necessary *mens rea* to so become such an active party to the offense. Only upon a showing of this degree of negligence can there be imposed the maximum penalty of death. Thus in the *Pohl* trial, SS Standartenfuehrer (Colonel) Erwin Tschentscher was charged with war crimes committed by members of his battalion in the first Russian campaign from the first of July until December 31, 1941. The court noted that there was some evidence that he had constructive knowledge of the participation of members of his command, but no evidence that he had actual knowledge of such facts. Rejecting any strict liability theory although quoting *Yamashita* the court did not believe the participation was of sufficient magnitude or duration to constitute notice to Colonel Tschentscher, and thus to give him an opportunity to control the actions of his subordinates."[311] Had this been a court-martial, either of an individual normally subject to the Uniform Code of Military Justice or of a foreign officer being tried for war crimes pursuant to Article 18,[312] the prosecution could have proceeded under multiplicious charges and theories concerning the degree of negligence, absent actual knowledge and liability; as a minimum, given the Tribunal's judgment, Colonel Tschentscher would have been guilty of dereliction of duty. The standards of punishment parallel the standards of responsibility and proof under either domestic or international law;

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of the Uniform Code of Military Justice. Para. 126*d*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, (REV. E D .)

310 10 U. S. C. § 934.

311 V TIVC 1010-12. Colonel Tschentscher was found guilty of other charges and sentenced to ten years' imprisonment.

312 10 U.S.C. 818. While a foreign officer would normally be charged with the commission of a war crime, Paragraph 12 Appendix 6a, Manual for Courts-Martial, United States, 1969 (Revised edition), states that there is no jurisdictional error in the erroneous designation of a specification as a violation of an article of the Uniform Code of Military Justice.

just as the Tribunal stated with regard to Colonel Tschentscher, proof of constructive knowledge under the Uniform Code of Military Justice does not constitute a showing of actual knowledge.[313]

Where domestic law exists. however. charges against United States personnel should normally be drawn under that law rather than under the general "war crime" offense.".'[314] No nation is going to charge its own citizen with the commission of a war crime for obvious political reasons. There certainly exist psychological reasons why such charges would be drawn alleging specific offenses rather than the commission of a war crime – a result of the heinous connotation of those words and, as a result, perhaps a greater reluctance by a court to convict an accused. A parallel to the *Tschenstcher* case would serve to illustrate this point.

The accused was a company commander in Vietnam. His company occupied a night defensive position with another company. During the night one of several enemy prisoners taken during the action of the preceding day was shot and killed. Although the offense occurred within his perimeter and within sixty feet of his position, the accused did not investigate; he did, however, receive a report that one of the prisoners had grabbed a weapon and shot the victim. He neither investigated the offense further nor did he report the offense in accordance with existing directives.[315] He was charged with and convicted of failure to obey a lawful general order and dereliction of duty, both offenses under Article 926.[316] While the evidence was sufficient to sustain a conviction under the charged domestic offenses,[317] it is arguable whether a conviction could have been obtained had the accused been charged with the commission of a war crime. As in *Tschentscher,* the appellate opinion declined to address the international *should have known* test, leaving to a commander some area in which he is permitted to

313 United States v. Curtin, 9 USCMA 427, 26 CMR 207 (1958). There is no *per* se equation of the "should have known" test except through the previously-cited and discussed standards of negligence as applied to the individual case and its facts.

314 Paragraph 507b of FM 27-10 states:

b. Persons Charges With War Crimes. The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law (see paras. 505 and 506).

315 USARV Reg 335-6 (24 June 1967), which served as an implementing instruction for all United States Army Forces in Vietnam for the previously cited MACV Directive 20-4.

316 10 U. S. C. § 892.

317 United States v. Golden, 43 C.M.R. 710 (ACMR 1970).

exercise his personal judgment as to the necessity for further investigation; absent some serious personal dereliction manifesting some degree of *mens rea* the commander must be presumed to have acted in good faith, given all circumstances, unless the facts become so overbearing as to point an accusatory finger at him. These circumstances again require an examination and balancing of the subjective criteria previously discussed.

IV. SUMMARY

Out of the ashes of World War I1 there rose a desire to further define the responsibility of a commander for war crimes committed by his subordinates, a responsibility recognized by the earliest military scholars. Although the Tribunals after World War I1 sought to establish an international norm, there was of necessity much reliance on domestic standards in resolving questions of knowledge, responsibility, and negligence; and while the post-World War **I1** trials from a legal point of view purportedly have no precedental value, the codification of many of the principals contained therein by the 1949 Geneva Convention would indicate that from a practical standpoint the standards formulated are recognized as international norms. All of the law of war is the formal expression of the principle of restraint; and it is to the commander, particularly the commander in the field, that the responsibility for exercise of restraint is most directed, inasmuch as he has control of both the means of destruction and the means of restraint. Throughout the history of warfare the commander has received the glories of victory and the burden of defeat, whether deserved or not.[318] The role of the commander is a lonely one; its authority may be delegated, but never its responsibility. In accepting the position of commander, an officer accepts massive responsibility - responsibility to see that his troops are fed, clothed, and paid; responsibility for their welfare, morale, and discipline; responsibility for his unit's tactical training and proficiency; responsibility for close coordination and cooperation with adjacent and supported or supporting units; and responsibility for accomplishment of his mission. He is no less charged with the responsibility to accomplish that mission within the limitations of the laws of war, and to exercise due control over his subordinates to insure their compliance.

318 General Joseph Joffre, who led the French Army in repulsing the German offensive at the battle of the Marne in 1914, was once asked who had won that battle-he or his subordinate commander, Ferdinand Foch. General Joffre replied that he did not know who had won the battle, "but if it had been lost I know who would have lost it." A. VANDEGRIFT ONCE A MARINE 9 (1964).

In order to find a commander responsible, the acts charged must have been committed by troops under his command. Normally this refers to troops of his unit or of another unit over which he has both operational and administrative control; but absent either he may still be responsible if he otherwise had a duty and the means to control those troops and failed to do so. If he has executive authority over a specified occupied territory, he is responsible for all illegal acts occurring within that territory, or at least for controlling or preventing their occurrence. While exclusion of any one of these factors may excuse him from liability under international standards, he may nonetheless be held responsible under domestic standards if he knows of an offense and, possessed of the duty to respond, fails to do everything within his power to prevent or report that offense.

In controlling his men, the commander has a *duty* to utilize all means available to him to know of and prevent the occurrence of war crimes within his command. In particular, he cannot shun or ignore the obvious and plead ignorance as a defense in an effort to escape liability.

The commander who directly orders the commission of a war crimes shares the guilt of the perpetrator of the offense. So, too, does the intermediate commander who receives an order patently illegal on its face who passes that order to subordinates for execution, although the plea of superior orders may be heard in mitigation, A commander may also be held responsible where he does not necessarily order certain illegal acts but is shown to have encouraged their perpetration or incited his men to act. Where he has neither ordered nor incited his men to carry out war crimes, he may be deemed responsible if by his acts he has acquiesced therein. Only the degree of culpability may distinguish the commander from the actual perpetrators in the instances cited above.

Essential to any allegation of command responsibility is the element of knowledge, either *actual knowledge* or the *means of knowledge* which the commander failed to exercise. Actual knowledge may be presumed in two instances: (a) where the commander has executive authority over occupied territory, and the offenses occur within that territory; and (b) where reports of offenses are made to his command, the presumption being that such reports are made for the benefit of the commander. These presumptions may be rebutted, for example, by a showing of absence from the command at the time of the offense or its report, or by illness; but this rebuttal is temporary in nature, extending only for the period of the absence or illness. Any inaction upon

resumption of command raises a presumption of acquiescence, knowledge again being presumed.

No theory of absolute liability has found acceptance in either international or domestic law. No man, whether commander or the lowest private, is held responsible for the acts of another absent the establishment of some sharing of the *mens rea.* The absolute liability theory has been expressly rejected in every case in which it was argued. Only where there has been wanton, immoral disregard amounting to acquiescence in the offense has criminal responsibility attached. The conduct - a wanton disregard of the occurrence of offenses - must be such as to support a finding that the commander is an accomplice in the sense that he shared the criminal intent of his subordinates and that he encouraged their misconduct through a failure to discover and intervene where he had a duty to prevent their action. Absent actual knowledge there must be either (1) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences; or (2) an imputation of constructive knowledge, that is, despite pleas to the contrary the commander under the facts and circumstances of the particular case must have known of the offenses charged and acquiesced therein.

In determining whether the commander either should have known or must have known of the occurrence of the offenses charged, certain subjective criteria may be considered in an effort to determine his means of knowledge: (a) the rank of the commander; (b) the experience of the commander; (e) the training of the men under his command; (d) the age and experience of the men under his command; (e) the size of the staff of the commander; (f) the comprehensiveness of the duties of the staff of the commander; (g) the "sliding probability ratio" of unit-incident-command; (h) the duties and complexities of the commander by virtue of the command he held; (i) communications abilities; (j) mobility of the commander; (k) isolation of the commander; (1) composition of forces within the command; and (m) the combat situation.

In holding a commander responsible under international standards, the commander's acts of commission or omission must be tantamount to "wanton, immoral disregard" of the acts of his subordinates. This international standard is consistent with municipal standards for which the same maximum penalty of death may be imposed. Where lesser penalties may be exacted, such as for a negligent failure to discover or report an offense, lesser standards of negligence - either culpable or simple – are provided. There municipal standards are defined

by the Uniform Code of Military Justice and by duties imposed by existing orders and regulations; international standards are defined by existing treaties and conventions, in particular the 1949 Geneva Conventions which require wilful and wanton conduct in order for there to be a grave breach of those Conventions. Any further definition must depend on the facts of the particular case and the previously-discussed subjective criteria rather than a precisely-defined international definition. The duty is well established, the responsibility well-defined.

A contemporary Marine Corps recruiting poster asserts the principle :

Some men accept responsibility; others seek it,

Neither the principles of command nor the law of war can expect, nor accept, anything less.

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