Independent Study:
The Doctrine of Command Responsibility

By Request of the Office of the Prosecutor for War Crimes in the Former Yugoslavia

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Independent Study
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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This memorandum will analyze the doctrine of command responsibility as it relates to the prosecution of individuals by the Office of the Prosecutor for the Yugoslavia War Crimes Tribunal. Although command responsibility has been defined as the liability of commanders when their subordinates commit war crimes,¹ the doctrine is not limited to military personnel. However, in the past, the doctrine has been used almost exclusively against military leaders.

The memorandum explores the extent to which international law may provide the Yugoslavia Tribunal a means to prosecute persons both within and outside the military command structure, who ordered the commission of war crimes and other atrocities, or who knew about plans to commit them, and either failed to prevent their commission, or failed to punish those responsible after the fact.

In the first section, this memorandum will briefly review the evolution of the doctrine of command responsibility. In the second section, it will explore the modern application of command responsibility, primarily as it applies to military defendants, both through international conventions and statutes, and through judicial decisions. To the extent that precedent is available, this memorandum will also analyze non-military applications of

the doctrine. In the third section, this memorandum will discuss other international and national legal principles which may apply to the Yugoslavia War Crimes defendants, such as conspiracy, accessory liability, and respondeat superior.

II. FACTUAL BACKGROUND

In 1991, each of the nations existing within the region formerly known as Yugoslavia declared their independence. In 1992, several of those countries declared war with one another, and a civil war began in Bosnia. Between 1992 and 1993, the resulting violence in Bosnia became more widespread, spilling over to the civilian sector, and killing thousands of innocent noncombatants. UN and media observers, as well as other victims and witnesses have reported systematic and widespread atrocities. Many of the observers consider the atrocities to be the result of an effort to destroy the Muslim Serb population in the region. The situation has been likened to Hitler’s extermination of Jews during World War II. After World War II, attempts were made to punish the individuals responsible for the atrocities. The trials that ensued covered a range of criminal activities, and ended with varying degrees of success.
III. ANALYSIS

A. HISTORICAL BACKGROUND

The doctrine of command responsibility has been developing since ancient times. In 1621, the Articles of War, written by Gustavus Adolphus of Sweden, recognized a commander's responsibility for the actions of his troops. Around this time, Hugo Grotius was also articulating a view of command responsibility that is close to the modern doctrine. According to his view, superiors "may be held responsible for the crime of a subject, if they know of it and do not prevent it when they could and should prevent it."4

1. Application of Command Responsibility Before Treaties

Until the war crimes trials after World War II, the doctrine had been applied reluctantly. For example, in 1689, rather than invoking a harsher penalty, exiled leader James II reprimanded and relieved Count Rosen of his military duties after he failed to seize Calvinist Londonderry.5 James II was angered not by

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2 See, e.g., SUN TZU, THE ART OF WAR 9 (L. Giles trans. 1944). Commanders were punished for the failures of their subordinates. Swift and severe punishment of commanders motivated them to train their soldiers well.

3 See WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 910 App. III. (2d ed. 1988).


Count Rosen’s failure, but by his troops’ needless murder of innocent civilians during the conflict.\(^6\)

After the American Revolutionary War, authorities planned to apply the doctrine to a British Lieutenant Governor who allowed atrocities to be committed by his agents.\(^7\) Lt. Henry Hamilton was taken prisoner for war crimes he allegedly permitted and failed to punish. As did other British commanders in America, Lt. Hamilton had hired Indians to engage the American troops, and thereby divert their attention from British forces. The practice among other British commanders was to encourage the Indians to attack armed soldiers.\(^8\) Hamilton provided no incentive to the Indian mercenaries in his employ, and they attacked unarmed, innocent civilians instead of American troops.\(^9\) Lt. Hamilton was charged with war crimes under a theory of command responsibility, but was never brought to trial. Instead, he was returned to the British in a prisoner of war exchange.\(^{10}\)

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\(^6\) Id.

\(^7\) Coil, War Crimes of the American Revolution, 82 Mil. L.Rev. 171, 193-98 (1978).

\(^8\) Id. at 193 (citing T. ANBUREY, WITH BURGOYNE FROM QUEBEC 93 (1963)).

\(^9\) Id. at 194.

\(^{10}\) Id. at 197.
2. Early Attempts to Apply Command Responsibility

In 1863, American President Abraham Lincoln promulgated the Lieber Code.\textsuperscript{11} It ordered the punishment of a superior officer who himself "intentionally inflict[ed] additional wounds on an enemy already wholly disabled, or kill[ed] such an enemy" or if he "order[ed] or encourage[d]" subordinates to do so.\textsuperscript{12} After the Civil War, the Lieber Code was used to prosecute and convict Captain Henry Wirz for the torture and maltreatment of prisoners at the Confederate prisoner of war camp which he commanded.\textsuperscript{13}

In 1907, the Hague Convention codified the notion of command responsibility.\textsuperscript{14} Under the treaty, in order for a combatant to be protected by the laws of war, he must be a lawful belligerent.\textsuperscript{15} One requirement of a lawful belligerent is that he "be commanded by a person responsible for his subordinates[.]."\textsuperscript{16} After World War I, the Commission on the


\textsuperscript{12} Id. at art. 71.

\textsuperscript{13} The Trial of Captain Henry Wirz, 8 American State Trials 66 (1865), reprinted in 1 L. FRIEDMAN (ed.), THE LAW OF WAR: A DOCUMENTARY HISTORY 783-98 (1972).

\textsuperscript{14} See Laws and Customs of War on Land, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, art. 1, reprinted in CRIMES AGAINST HUMANITY, supra note 11, at 638.

\textsuperscript{15} Id.

\textsuperscript{16} Id.
Responsibilities of the Authors of War attempted but failed to try political and bureaucratic leaders before the tribunals under the doctrine of command responsibility, largely because of Japanese and United States dissent to the provisions that would have imposed command responsibility on these leaders. 17

B. MODERN CONVENTIONS AND APPLICATION THE DOCTRINE OF COMMAND RESPONSIBILITY (POST-WORLD WAR I)

1. International Conventions

   a. Versailles Treaty

   Customarily, persons accused of committing war crimes were charged and tried by courts of their own countries. 18 In 1919, the Versailles Treaty established a five member international tribunal to try the former German Kaiser, William II of Hohenzollen, "for a Supreme offense against international morality and the sanctity of treaties." 19 The treaty also established international tribunals to try other accused war criminals.


18 Parks, Command Responsibility for War Crimes, 62 Mil. L.Rev. 1, 2-3 (1963) [hereinafter Parks].

19 Treaty of Peace Between the Allied and Associated Powers and Germany, Versailles, 28 June 1919, reprinted in CRIMES AGAINST HUMANITY, supra note 11, at 551-52.
criminals for widespread offenses.\textsuperscript{20} Also, the Commission on the Responsibilities of the Authors of the War outlined the list of crimes to be punished.\textsuperscript{21} Moreover, although the provision was weakened by the dissenting reports,\textsuperscript{22} the Commission asserted that anyone, including heads of state, could be prosecuted for those crimes.\textsuperscript{23}

b. Post-World War II Documents

Based on the treaties developed since the atrocities of World War II, international law clearly supports the doctrine of command responsibility, and extends it to non-military as well as

\textsuperscript{20} Id. at art. 228.

\textsuperscript{21} The list included:

\begin{itemize}
  \item[(1.)] Murders and massacres; systematic terrorism.
  \item[(2.)] Putting hostages to death.
  \item[(3.)] Torture of civilians.
  \item[(4.)] Deliberate starvation of civilians
  \item[(5.)] Rape.
  \item[(6.)] Abduction of girls and women for the purpose of enforced prostitution.
  \item[(7.)] Deportation of civilians.
  \item[(8.)] Internment of civilians under inhuman conditions.
  \item[(9.)] Forced labour of civilians in connection with the military operations of the enemy. . .
  \item[(14.)] Confiscation of property.
\end{itemize}


\textsuperscript{22} See Dissenting Reports, supra note 17 and accompanying text.

\textsuperscript{23} Peace Conference, supra note 21.
military leaders. In the aftermath of World War II, the Allied Powers again attempted to punish those who committed atrocities. The London Charter sought to establish and codify international legal principles to be used by war crimes Tribunals. It precluded the "waging of wars of aggression . . . or participation in a common plan or conspiracy for the accomplishment of [war crimes or crimes against humanity]."

The London Charter was established after World War II, and annexed to the London Agreement. The London Charter defines war crimes as "violations of the laws and customs of war." This definition includes acts such as murder and generally, "devastation not justified by military necessity." Crimes against humanity include "murder, extermination . . . and other

24 Charter of the International Military Tribunal, Annexed to the London Agreement, 8 August 1945, reprinted in CRIMES AGAINST HUMANITY, supra note 11, at 583.

25 Id. at art. 6(a).


27 London Charter, supra note 24, at art. 6(b). See also, Far East Tribunal, Excerpts from the Judgment in the Tokyo War Crimes Trial, 12 November, 1948 [hereinafter Far East Tribunal], reprinted in CRIMES AGAINST HUMANITY, supra note 11, at 614-17.

28 London Charter, supra note 24, at art. 6(b).
inhumane acts against any civilian population, before or during
the war[].”29

Provisions establishing liability of commanders who order or
allow their subordinates to commit atrocities are included in
several post-World War II documents. For example, Allied Control
Counsel Law No. 10 was developed in order to prosecute those who
committed crimes against peace, war crimes and crimes against
humanity.30 The statute asserted that “[t]he official position
of any person, whether as Head of State, or as a responsible
official in a Government Department, does not free him from
responsibility for a crime or entitle him to mitigation of
punishment.”31

The Geneva Conventions did not include command
responsibility provisions. However, they established crimes
against humanity as international crimes.32 For example, the
Convention Relative to the Treatment of Prisoners of War states
that “[a]ny unlawful act or omission by the Detaining Power
causing death or seriously endangering the health of a prisoner

29 Id. at art. 6(c).

30 Allied Control Council Law No. 10, Punishment of Persons
Guilty of War Crimes, Crimes Against Peace and Against Humanity,
20 December, 1945 art. II(1)(a),(b),(c), reprinted in CRIMES
AGAINST HUMANITY, supra note 11, at 590-95.

31 Id. at art. II(4)(a).

32 See, e.g., Convention Relative to the Treatment of
Prisoners of War, Geneva, August 12, 1949, 75 U.N.T.S. 135, 6
U.S.T. 3316, T.I.A.S. No. 3364, reprinted in CRIMES AGAINST HUMANITY,
supra note 11, at 652.
of war in its custody is prohibited and will be regarded as a serious breach of the present convention."\textsuperscript{33} It further states that "[p]risoners of war are entitled in all circumstances to respect for their persons and their honor."\textsuperscript{34}

The Additional Protocol to the Geneva Convention, adopted by consensus after the Nuremberg trials, more specifically addressed the issue of command responsibility.\textsuperscript{35} The Commission of Experts stated that the doctrine applies to "military superiors whether of regular or irregular armed forces, and to civilian authorities."\textsuperscript{36} This is also the position of the United Nations Human Rights Commission.\textsuperscript{37}

\textsuperscript{33} Id. at art. 13.

\textsuperscript{34} Id. at art. 14.

\textsuperscript{35} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 86 [hereinafter Protocol I], reprinted in MORRIS, SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, VOL. 1 99, n.310 (1995) [hereinafter INSIDER’S GUIDE].

\textsuperscript{36} Id.


[All persons who perpetrate or authorize crimes against humanity and other violations of international humanitarian law are individually responsible for those violations, and those in positions of authority who have failed adequately to ensure that persons under their control comply with the relevant international instruments are accountable together with the perpetrators).}
The Genocide Convention of 1948 established the intentional destruction of a group as a violation of international law. It includes several crimes in its definition of genocide. This treaty states that genocide is an international crime whether committed during wartime or peace. It also permits imposing command responsibility on guilty parties, "whether they are constitutionally responsible rulers, public officials, or private individuals."
c. Statute of the International War Crimes Tribunal for the Former Yugoslavia

The Statute of the International Tribunal was formed pursuant to U.N. Security Council Resolution 827. It imposes three types of individual criminal responsibility: (1) individual responsibility; (2) head of state; and (3) command responsibility. According to the Statute, the defense that a commander did not actually commit atrocities is unavailable. Moreover, beyond issuing orders, commanders may face liability if


44 Statute, supra note 42, at art. 7, (stating:

2. The official position of any accused person, whether as head of state or Government, or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate such punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof).
they knew or had reason to know atrocities were committed.\textsuperscript{45} The Commission of Experts outlined several criteria a reviewing body might use to determine whether a commander knew or should have known of atrocities committed by his subordinates.\textsuperscript{46}

As the above conventions make clear, international law approves imposition of command responsibility on military and political leaders. Moreover, the prosecution of military leaders by the Nuremberg and Tokyo Tribunals established command responsibility as a customary international law concept.\textsuperscript{47} However, with the possible exceptions of the Yamashita

\textsuperscript{45} Id.

\textsuperscript{46} INSIDER'S GUIDE, supra note 35, at 101, n.316 (citing Final Report of the Commission of Experts, at 17. Those criteria are:

(a) the number of illegal acts;
(b) the type of illegal acts;
(c) the scope of illegal acts;
(d) the time during which the illegal acts occurred;
(e) the number and type of troops involved;
(f) the logistics involved, if any;
(g) the geographical location of the acts;
(h) the widespread occurrence of the acts;
(i) the tactical tempo of operations;
(j) the modus operandi of similar illegal acts;
(k) the officers and staff involved;
(l) the location of the commander at the time).

\textsuperscript{47} See Burnett, Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra, 107 Mil.L.Rev. 71, 98-121 (1985) [hereinafter Burnett].
Tribunal,48 and the Nuremberg Tribunal’s trial of certain high ranking defendants,49 no judicial body has applied the doctrine to political leaders.

2. Post-World War II Judicial Decisions

Two major tribunals heard war crimes cases in the aftermath of World War II: ‘Nuremberg and Tokyo. These tribunals were preceded by the United States of America v. Tomoyuki Yamashita.50 Yamashita has served as a guide for tribunals that followed and developed international standards for criminal and command responsibility.51

a. Yamashita

In 1945, a United States military tribunal decided Yamashita. General Yamashita was the acting military governor during Japan’s occupation of the Philippine Islands.52 He had tactical control of the Japanese Army and Navy units in the area,


49 See Burnett, supra note 47, at 101.

50 Yamashita, supra note 48; see also, In Re Yamashita, 325 U.S. 1 (1945).

51 See e.g., Parks, supra note 18, at 36, 37; see also, Burnett, supra note 47, at 98.

52 Burnett, supra 47, at 87 (citing P. PICCIGALLO, THE JAPANESE ON TRIAL - ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-51, at 49 (1979)).
as well as command control of the Army units under him.\textsuperscript{53} As Military Governor, he was the civilian leader of the Philippines. This fact distinguishes Yamashita from many other war crimes trials of defendants who possessed only military leadership. As Allied forces advanced on the occupied area, widespread atrocities against citizens and prisoners were committed by Japanese troops under General Yamashita's command.\textsuperscript{54}

After hearing the evidence, the Yamashita Tribunal found the general guilty under a theory of command responsibility.\textsuperscript{55} The holding stated:

(1) That a series of atrocities and other high crimes had been committed by members of the Japanese armed forces under [Yamashita's] command against the 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 noncommissioned officers; (2) that . . . [Yamashita] failed to provide effective control of [his] troops as was required by the circumstances.\textsuperscript{56}

In a review of the trial, the Staff Judge Advocate noted that General Yamashita had a duty as highest commander to protect

\textsuperscript{53} Id.

\textsuperscript{54} U.N. War Crimes Commission, 4 Law Reports of Trials of War Criminals 3-4 (1948) [hereinafter Law Reports].

\textsuperscript{55} Yamashita, supra note 48, at 3654-56.

\textsuperscript{56} Id. at 4059-63.
the Philippines, and he instead issued orders to destroy them.\textsuperscript{57} “The pattern of rape, murder, mass execution and destruction of property is widespread 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.”\textsuperscript{58} Moreover, the Tribunal rejected Yamashita’s assertion that he had lost communication with Japanese forces, which made him unable to know of atrocities committed by troops under his tactical command.\textsuperscript{59}

The opinion reaffirms the duty of a commanding officer to protect civilians and prisoners of war, and identifies two elements needed to apply the doctrine against a commander. First, atrocities must have been committed against persons the accused had a duty to protect.\textsuperscript{60} Second, the accused must have approved of or known about the crimes, and failed to intervene.\textsuperscript{61}

Yamashita’s precedential value is limited for several reasons.\textsuperscript{62} First, the tribunal was made up of military

\textsuperscript{57} Burnett, supra note 47, at 93 (citing The Yamashita Case, 1945-46, Decision of the United States Military Commission at Manila, at 1597 [hereinafter Military Commission]).

\textsuperscript{58} Yamashita, supra note 48, at 4059.

\textsuperscript{59} Military Commission, supra, note 57, at 1597-98.

\textsuperscript{60} Burnett, supra note 47, at 98 (asserting a theory of limited liability for a commander who has an affirmative duty to prevent or punish the commission of war crimes by his subordinates).

\textsuperscript{61} Id.

\textsuperscript{62} Id.
personnel, not judges, and the decision has been criticized for a lack of clarity.\textsuperscript{63} Second, there were serious questions about fairness and due process raised by members of the United States Supreme Court, who heard General Yamashita’s appeal.\textsuperscript{64}

b. The Nuremberg and Tokyo Tribunals

The Nuremberg and Tokyo precedents, when analyzed together highlight several important concepts in the doctrine of command responsibility. First, commanders must strike a balance between achieving their military objectives and the duty to avoid and punish the commission of war crimes. The balance is affected by the commander’s place in the chain of command as well as his authority over troops.\textsuperscript{65} This memorandum refers to the first concept as a sliding scale approach.\textsuperscript{66} Second, non-military commanders into this balancing, or sliding scale approach. Third are the requirements of command responsibility articulated by the

\begin{itemize}
\item \textsuperscript{63} Id. (stating that it “is muddled, to a degree, by a confusing aggregation of facts and legal pronouncements”).
\item \textsuperscript{64} \textit{In Re Yamashita}, 325 U.S. 1, 28 (1945)(Murphy, J., dissenting).
\item \textsuperscript{65} See, e.g., Burnett, supra note 47, at 114.
\item \textsuperscript{66} Id. Burnett’s article refers to a balancing between a military commander’s military objectives and humanitarian objectives. \textit{Id.} This memorandum refers to the balance as a sliding scale, because as individuals move along the chain of command, their objectives slide either toward or away from these objectives.
\end{itemize}
Tokyo Tribunal.\textsuperscript{67}

i. The Sliding Scale Approach

First, deciding whether to impose command responsibility requires a balance between military necessity and upholding the principles of humanity.\textsuperscript{68} Also, to a certain degree, the higher a commander's position, the greater is his responsibility to control the actions of his subordinates.\textsuperscript{69} However, there is a certain point where the opposite becomes true. High commanders have certain strategic responsibilities that remove them from daily contact with troops.\textsuperscript{70} In this situation, commanders priorities slide toward military necessity, with the obligation to ensure compliance with international humanitarian law shifting to subordinate commanders in the field. However, humanitarian responsibilities continue to pull commanders in the other direction, requiring them to maintain some contact with and supervision over the activities of their subordinates.\textsuperscript{71}

ii. The Sliding Scale Concept and Extension of Command Responsibility to Non-Military Authority

The second concept involving command responsibility which flows from the Nuremberg and Yamashita precedents, is that the doctrine applies to leaders who exercise military, as well as

\textsuperscript{68} See Burnett, supra note 47, at 114.
\textsuperscript{69} Id. at 101 (citing 12 Law Reports, supra note 54, at 76).
\textsuperscript{70} Id.
\textsuperscript{71} Id.
non-military, authority. For example, General Yamashita was appointed the acting governor of the Philippines which was a civilian post. Therefore, the Yamashita Tribunal convicted a commander who was both a military and a civilian leader.

More important is the conclusion of the Nuremberg Tribunal, which considered the military/civilian distinction in the High Command Case: "The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-extensive."\(^72\) In order to illuminate the balance between a commander’s humanitarian duty and military necessity, the Nuremberg Tribunal used a familiar non-military commander:

The President of the United States is Commander and Chief of its Military Forces. Criminal acts committed by those forces cannot in themselves be charged to him on a 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.\(^73\)

### iii. Requirements Established by the Tokyo Tribunals

Third, the Tokyo Trial established three requirements as precedent for future tribunals.\(^74\) First, international law imposes a duty on governments to prevent war crimes against

\(^{72}\) *Id.*


\(^{74}\) *Tokyo War Crimes Trial*, *supra* note 67, at 1029-1040.
innocent noncombatants.\textsuperscript{75} This burden is placed “on its human instruments.”\textsuperscript{76} Second, commanders charged with caring for civilian detainees and prisoners of war have a duty to establish a system to insure their continued protection.\textsuperscript{77} Third, even if the first two requirements are met, the “knew or should have known” standard still applies.\textsuperscript{78} If a commander had knowledge of war crimes committed by subordinates, and failed to intervene, he is deemed responsible for those crimes.\textsuperscript{79}

b. The Nuremberg Tribunals

The Nuremberg Tribunals were established after World War II in order to try accused German war criminals. The two most prominent cases are Case No. 12, The United States v. Wilhelm von Leeb, et al. (The High Command Case), and Case No. 7, The United States v. Wilhelm List, et al. (The Hostages Case).\textsuperscript{80}

\textsuperscript{75} \textit{Id.} at 1033-34.
\textsuperscript{76} \textit{Id.} at 1038-39.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 1039-40
\textsuperscript{79} \textit{Id.} at 1039.

\textsuperscript{80} \textit{See United States v. List (Hostages Case)}, 11 \textsc{Trialsof War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10 757, 1255-56 [hereinafter T.W.C.].
i. The High Command Case

This trial had a total of 14 defendants. The principal defendant was Field Marshal Wilhelm von Leeb. His case involved two orders which came directly from Hitler's headquarters, the Commissar Order, and the Barbarossa Jurisdiction Order.

The Commissar Order was distributed by General Warlimont, directly from Hitler. It was distributed to commanders in chief of the armies and air fleet chiefs, with instructions to inform other commanders by word of mouth. The order instructed German officers to execute all captured political commissars affiliated with the Soviet Army who were suspected of resisting the German forces. Moreover, it protected officers who were told by their superiors to commit these killings.

One month before the Germans invaded Russia, and two weeks before the Commissar Order was issued, the Barbarossa Jurisdiction Order was drafted and issued by defendants Warlimont and Lehmann. It was for the armed forces commanders, and

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81 10 T.W.C., supra note 80, at 10.
82 12 Law Reports, supra note 54, at 29-31.
83 11 T.W.C. supra note 80, at 1054-59.
84 Id. at 1055.
85 Id. at 1057.
86 Id. at 1058 (The order expressly excepted from prosecution subordinates who killed Russian Commissars).
87 Id. at 1112-18.
instructed officers to execute any Russian commissars known or suspected of resisting the advance of the German armed forces.

Von Leeb: As for defendant von Leeb, his case concerned the commander in chief’s power over troops in the field, and his duty to civilians and prisoners. The standard for holding a commander in chief liable for war crimes committed by his subordinates was both knowledge of the criminal activity and a connection to the criminal acts, “either by way of participation or criminal acquiescence.” Von Leeb was acquitted for participating in the distribution and carrying out of the Commissar Order, because he proved sufficient opposition to the order, and that he had warned his subordinates to comply with the laws of war when carrying the order out. Regarding the Barbarossa Jurisdiction Order, he was found not to have protested or qualified the order as he did for the Commissar order. He was found guilty.

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88 Burnett, supra note 47, at 102-03.
89 11 T.W.C., supra note 80, at 555.
90 Id. at 557-58.
91 Id. at 560-61.
92 Burnett, supra note 47, at 104.
ii. **Strict Liability Rejected by The Tribunal**

During the *High Command* trial, the prosecution called for a theory of strict liability for acts of subordinates based upon an expansive interpretation of the *Yamashita* decision. The Tribunal rejected that theory, concluding that *Yamashita* did not stand for the proposition that officers are to be held strictly liable for the acts of their subordinates. The Tribunal did impose liability on responsible commanders who knew or should have known of war crimes committed by their subordinates.

Based on its reading of *Yamashita*, the Tribunal asserted that even if General Yamashita did not know of the atrocities committed in his area of command, he should have known. Thus, the element of knowledge was established, and the Tribunal was not required to consider strict liability.

iii. **The Constructive Knowledge Standard**

Constructive knowledge is distinguishable from strict liability, which imposes liability regardless of any factual circumstances that may establish a commander's lack of knowledge.

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93 12 Law Reports, supra note 54, at 76.

94 *Id.*

95 *Id.* at 77.

96 *Id.*
and culpability. The Nuremberg Tribunal also distinguished Yamashita and the Hostages Case, because in the latter case, the orders were passed down to the accused. By contrast, General Yamashita personally gave the orders. The Tribunal found that although an occupational military commander does not have absolute control over the forces in his area, he may not set aside duties that result from the presence and behavior of troops from his own state.

iv. The Hostages Case

The Hostages Tribunal also considered constructive knowledge. In this trial, including Field Marshal Wilhelm List, ten defendants were found guilty for various war crimes. The case concerned atrocities committed against prisoners during the German occupation of Albania, Greece, Norway and Yugoslavia. List re-addressed and forwarded to his subordinates, an order to

97 "If one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact." BLACK'S LAW DICTIONARY 314 (6th ed. 1991). See also, Burnett, supra note 47, at 118-19 (constructive knowledge is attributed when, considering a great and widespread number of offenses, the only conclusion a reasonable observer can make is that the accused knew of the offenses).

98 12 Law Reports supra note 54, at 76.

99 Id.

100 Id. at 76-77.

101 8 Law Reports, supra note 54, at 34.

102 Id. at 34-36.
kill 50-100 communists for every one German soldier killed by insurgents.\textsuperscript{103} He received periodic reports from subordinates about these reprisal killings.\textsuperscript{104}

\section*{v. Defenses Used by List}

List used three defenses at trial. The first was military necessity.\textsuperscript{105} The second defense was that he was merely distributing the orders of his superiors.\textsuperscript{106} Third, he argued a lack of knowledge, as he was not at his headquarters when the reports of the executions arrived.\textsuperscript{107}

\textsuperscript{103} See 11 T.W.C, supra note 80, at 971-72 (partial translation of Document NOKW-258, Prosecution Exhibit 53, Keitel Order, 16 September 1941, Concerning Suppression of Insurgents in Occupied Territories, Subject: Communist Insurgent Movement in the Occupied Territories, para. 3.b., stating:

In order to stop these intrigues at their inception, severest measures are to be applied immediately at the first appearance, in order to demonstrate the authority of the occupying power, and in order to prevent further progress. One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case the death penalty for 50 to 100 Communists must in general be deemed appropriate as retaliation for the life of a German soldier. The manner of execution must increase the deterrent effect).

\textsuperscript{104} Burnett, supra note 47, at 111.

\textsuperscript{105} See 11 T.W.C., supra note 80, at 1255-56. See also, Martins, "War Crimes" During Operations Other Than War: Military Doctrine and Law Fifty Years After Nuremberg--and Beyond, 149 Mil. L.Rev. 145, 148 (1995) [hereinafter Martins].

\textsuperscript{106} 11 T.W.C., supra note 80, at 1269.

\textsuperscript{107} Id. at 1271.
The Tribunal rejected the first defense based on the facts. Killing some 2100 unarmed civilians as reprisal for the deaths of 22 German officers did not constitute necessity.\textsuperscript{108} List attributed his lack of knowledge primarily to a communication breakdown with his officers in the field.\textsuperscript{109} He distributed the orders to his subordinates without amplification or clarification, and he was unaware of his subordinates' progress reports detailing the executions.\textsuperscript{110} The tribunal rejected List's defenses, stating that "[a]n army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit."\textsuperscript{111} Furthermore, "[i]f he fails to require and obtain complete information, the dereliction of duty rests upon him and he is not in a position to plead his own dereliction as a defense."\textsuperscript{112} The Tribunal established a presumption that the commander received the reports, and he will be "responsible in the absence of special circumstances."\textsuperscript{113}

\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Burnett, supra note 47, at 110.
\textsuperscript{111} 11 T.W.C., supra note 80, at 1271-72.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 1260.
vi. Responsibility for Non-Subordinate Units in a Commander's Area of Control

As in Yamashita, the question of whether criminal liability will attach to the commander for non-subordinate units in his area arose. According to the Tribunal, the answer depends upon whether the unit is under his tactical or occupational control. If he is the tactical commander, he is responsible for all units within his area, whether they are under his direct command or not. The Tribunal also stated that a commander's guilt or innocence requires "proof of a causative, overt act or omission from which a guilty intent can be inferred[.]" Under the doctrine of command responsibility, the Tribunal found that List's distribution of the orders resulted in thousands of deaths of noncombatants.

vii. Distinguishing Between Military and Political Leaders

The Hostages Case indirectly addressed another important question. That is, whether a civilian commander should be held to the same degree of responsibility for war crimes committed by

114 Id.
115 Id. See also, Burnett, supra note 47, at 110.
116 Id.
117 Id. at 1274, 1318.
troops as a military commander. The answer depends where along the sliding scale the political leader is located.\textsuperscript{118}

For example, in addition to his title as Field Marshall, Wilhelm Keitel was one of the highest ranking career military leaders in Hitler’s power structure. It was Keitel who issued the 100 to 1 order.\textsuperscript{119} His primary defense was that Hitler had given him a direct order. His choice was to follow or disobey. After the Tribunal heard massive evidence against Keitel, it found him guilty.\textsuperscript{120}

As one of two dozen career military high commanders with direct communication between Hitler and troop commanders in the field, Keitel may be more appropriately considered a civilian as opposed to a military commander.\textsuperscript{121} Likewise, Hitler’s Nazi government with its policy of aggressive, “total warfare,” was, by comparison with most peacetime governments, more military than civilian.\textsuperscript{122} Peacetime governments are typically concerned with

\begin{footnotes}
\textsuperscript{118} See Burnett, supra note 47, at 114.
\textsuperscript{119} See 11 T.W.C. supra note 80, at 971-72.
\textsuperscript{120} Id.
\textsuperscript{121} See Martins, supra note 105, at 147, n.4 (citing 1 Law Reports, supra note 54, at 68-69, Appendix A: “The roles of these men in the Nazi Party and their lack of connection to the Waffen-SS [Hitler’s army of regular soldiers] identify them as political rather than military figures.”).
\textsuperscript{122} See, e.g., Matthew Lippman, War Crimes Trials of German Industrialists: The "Other Schindlers," 9 Temp. Int'l & Comp. L.J. 173, 175 (1995) (citing Hitler’s Speech to Cabinet of February 8, 1933 [hereinafter Other Schindlers], reprinted in 1
the efficient running of the government. For example, heads of state, who often are considered the Commander in Chief of their government’s armed forces in wartime, generally would be able to defend against charges of command responsibility under the sliding scale concept.¹²³ Although high ranking civilian commanders have additional responsibility as high commanders and policy makers, as they travel up the administrative scale, they necessarily move farther from troops in the field, and to a lesser extent, the commanding officers in the field. Depending on factual circumstances, certain policy makers and civilian bureaucrats can show they had no knowledge of and no attendant responsibility to intervene where crimes were committed by troops. By contrast, wartime governments, and societies governed by military leaders, may devote more of their policy making and daily activities to such conflicts. In such a situation, a non-military commander may have a greater awareness of troop activities, and exert a greater degree of command and control over troops.

The Statute of the Yugoslavia War Crimes Tribunal, as well as other pertinent international instruments, includes both military and non-military leaders when considering questions of

¹²³ See Burnett, supra note 47 (citing 12 Law Reports, supra note 54, at 76).
command responsibility.\textsuperscript{124} Even heads of state are not immune from criminal prosecution under the doctrine.\textsuperscript{125} Moreover, as noted previously, Keitel and others were high ranking military leaders in a society at war. However, their distance from the actual conflict as well as Nazi Germany's preoccupation with the war effort favor the view that they were civilian leaders in charge of the military.

c. The Tokyo Trial

A total of 10 military defendants were tried before the International Military Tribunal for the Far East, for a number of wartime offenses.\textsuperscript{126} The defendants were accused of violating the laws and customs of war, and ignoring their duty to maintain control of the troops under their command.\textsuperscript{127}

i. Systems to Ensure the Safety of Civilians and Prisoners of War

The Tribunal announced the standard for civilians and prisoners of war under military supervision. It placed an affirmative duty on both military and nonmilitary leaders to exercise command responsibility and to protect civilians and

\textsuperscript{124} Statute, at art. 7; see also, INSIDER'S GUIDE, supra note 35 (citing Resolution 1994/77, supra note 37).

\textsuperscript{125} Id.

\textsuperscript{126} The Tokyo War Crimes Trial, supra note 67, at 1029, 1031.

\textsuperscript{127} Id. at 1029.
prisoners in their care. \textsuperscript{128} Commanders must do this by establishing a system that ensures the safety of these persons. \textsuperscript{129} The commander is responsible if he (1) fails to establish such a system, or (2) fails to ensure the existing system's "continued and efficient working." \textsuperscript{130} The tribunal asserted that "[e]ach of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible." \textsuperscript{131} It also noted: "Any Army Commander or a minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of orders he has issued on matters of the first importance." \textsuperscript{132}

\textit{ii. The Knew or Should Have Known Standard}

One of the defendants, General Heitaro Kimura, Commander in Chief of the Burma Area Army, asserted as his defense the fact that he had ordered troops not to commit atrocities. \textsuperscript{133} The Tribunal found that his order for troops to conduct themselves properly and refrain from mistreating prisoners was insufficient

\textsuperscript{128} Far East Tribunal, supra note 27, at ch. 1(b), \textit{reprited in Crimes Against Humanity}, supra note 11, at 612, 614-15.

\textsuperscript{129} \textit{Id.} at 615.

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.} at 616.

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} Tokyo War Crimes Trial, supra note 67, at 1039-40.
because he still failed in his duty to make sure the orders were carried out.\textsuperscript{134}

If a proper system is in place, the commander may still be held responsible for war crimes committed by his subordinates if (1) he had knowledge of crimes being committed, and in spite of that knowledge, “failed to take such steps” to prevent future crimes, or (2) the failure “to acquire such knowledge” was the commander’s fault.\textsuperscript{135} Also, the fact “[t]hat crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.”\textsuperscript{136} Convicting General Iwane Matsui, the Tribunal held that the “Rape of Nanking,” in which over 100,000 were killed by Matsui’s troops, was a scenario where “notorious, numerous and widespread” atrocities gave rise to an inference of knowledge.\textsuperscript{137}

The Tokyo Tribunal established this “knew or should have known” standard, against which the defendants were tried.\textsuperscript{138} At trial, the Tokyo defendants argued the exigency of the wartime situation destroyed the command and control structure.\textsuperscript{139}

\begin{footnotes}
\footnote{134}{Id.}
\footnote{135}{Id. at 1039.}
\footnote{136}{Id.}
\footnote{137}{Id. at 1141.}
\footnote{138}{Burnett, supra note 47, at 117, (citing Tokyo War Crimes Trial, supra note 67, at 1039).}
\footnote{139}{Id. at 117-18.}
\end{footnotes}
Defendant Yamashita also made this argument, and the Yugoslavia defendants may attempt to as well. However, as the Tokyo Tribunal and the Yamashita Court held, evidence of systematic acts of rape, murder and other atrocities caused by the defendants' subordinates militate against those contentions.\textsuperscript{140}

iii. The Toyoda Trial; Clarification of Yamashita and Requirements for Command Responsibility

Admiral Toyoda was tried by a seven member Allied Military Tribunal. The trial lasted almost one year, and ended in Toyoda's acquittal on 86 charged offenses.\textsuperscript{141} At the time, Toyoda was the Commander in Chief of the Japanese Combined Fleet, the Combined Naval Forces, and the Naval Escort Command. He later served as the Chief of the Naval General Staff.\textsuperscript{142} Under a theory of command responsibility, Toyoda was tried for a wide range of atrocities, such as "ordering, directing, inciting, causing permitting, ratifying and failing to prevent" abuse, maltreatment, torture, rape and other atrocities.\textsuperscript{143}

The Toyoda trial is an important precedent for two reasons. First, the Tribunal used this trial as a mechanism to resolve

\begin{itemize}
  \item \textsuperscript{140} Id. (citing Parks, supra note 18, at 67).
  \item \textsuperscript{141} 19 United States v. Soemu Toyoda 5011 (Official Transcript of Record of Trial).
  \item \textsuperscript{142} Parks, supra note 18, at 69.
  \item \textsuperscript{143} Id. at 70.
\end{itemize}
questions about Yamashita. It supported the holding of the previous tribunal, and in “a more-carefully worded judgment” concluded that General Yamashita was the commander of the combined Japanese forces during the “Rape of Manila”, and was thus responsible under the doctrine. Second, the judgment clearly defined the elements of command responsibility in a military setting. They are:

1. That atrocities were committed by troops under the defendant’s command.
2. The troops were ordered to commit the atrocities.

If proof beyond a reasonable doubt that such orders were issued is unavailable, then the following elements are required:

1. That atrocities were committed by troops under the defendant’s command.
2. The commander’s notice of the atrocities. Notice may be either,
   a. Actual (either observed by the commander, or if the commander was informed soon after the fact); or
   b. Constructive (such a great number of atrocities occurred that a reasonable man may only conclude that they occurred, or that an understood and acknowledged routine for their commission existed.
3. Power of Command. The defendant must have authority over the actor(s), and be capable of issuing orders not to commit atrocities, and punish their defiance.
4. Failure to take appropriate steps within his command to control subordinates and prevent the

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144 Id.
145 Id.
146 Toyoda, supra note 141, at 5011-13.
147 Parks, supra note 18, at 72, (citing Toyoda, supra note 141, at 5005-06).
commission of atrocities, or

5. Failure to punish offenders after the fact.\footnote{148}{Id.}

An important addition provided by this Tribunal to the elements of command responsibility was the "reasonable man" standard.\footnote{149}{Id. at 118.} This standard imposed an objective view of the accused commander's constructive notice.

iv. Incitement of Subordinates and The Objective "Reasonable Man" Standard

Two other post-World War II trials considered important command responsibility issues. The first raises the issue of incitement,\footnote{150}{To incite is "[t]o arouse; urge; provoke; encourage; spur on; set in motion; as, "to incite" a riot. Also, generally, in criminal law, to instigate, persuade, or move another to commit a crime; in this sense nearly synonymous with 'abet.'" \textbf{BLACK'S LAW DICTIONARY}, 762 (6th Ed. 1991).} and the second elucidates the reasonable man standard.\footnote{151}{Burnett, supra note 47, at 119.} In the Essen Lynching Case, German Captain E. Heyer gave instructions to a prisoner escort not to interfere with angry mobs of people who were expected to attack three Allied prisoners he was transporting.\footnote{152}{1 Law Reports, supra note 54, at 88.} The escort, charged with care of the prisoners, stood by while a mob of civilians killed them.\footnote{153}{Id.} Heyer, who had also previously expressed to subordinates...
either the expectation or desire that the prisoners be shot, was sentenced to hang for the crime of incitement.\textsuperscript{154}

The second case was heard before a British Military Tribunal in Germany. The Defendant was Major K. Rauer, the commander of a German aerodrome.\textsuperscript{155} This case concerned three separate shootings of allied prisoners of war.\textsuperscript{156} The prosecution never showed that Rauer had ordered the shootings. However, Rauer had made hostile remarks about the prisoners.\textsuperscript{157} Applying the objective reasonable man standard to the Rauer case, the Tribunal acquitted the commander for the first killing.\textsuperscript{158} However, for the second and third killings, Rauer was convicted.\textsuperscript{159} The Tribunal reasoned that by the time the second killing had occurred, Rauer had sufficient notice that war crimes had been committed by his subordinates.\textsuperscript{160} The first report of a prisoner killed while trying to escape, should have prompted a reasonable man under similar circumstances to investigate the prisoner’s death.\textsuperscript{161}

\textsuperscript{154} Id. at 88-91.

\textsuperscript{155} 4 Law Reports, supra note 54, at 113-14.

\textsuperscript{156} Id.

\textsuperscript{157} Id.

\textsuperscript{158} Burnett, supra note 47, at 120

\textsuperscript{159} 4 Law Reports, supra note 54, at 114, 117.

\textsuperscript{160} Id.

\textsuperscript{161} Burnett, supra note 47, at 120.
Under the doctrine, it was Major Rauer's duty to intervene, and his failure was the breach of that duty. \(^{162}\)

b. Further Development of the doctrine of command responsibility during the Vietnam War - the Son My village massacre

i. The Requirements of Command Responsibility after Vietnam

The war crimes trials, through the Vietnam, Son My Village Massacre, established four basic requirements which must be present for liability under the doctrine. \(^{163}\) Those requirements are:

1. command and control;
2. knowledge on the part of the commander;
3. the subordinate's knowledge of war crimes (established by):
   (a) the discovery by a commander of a crime in progress or being planned;
   (b) the discovery by a commander that subordinates are engaged in a criminal policy or organized routine;
   (c) awareness that crimes are likely to occur in the future;
4. the commander's duty to intervene. \(^{164}\)

The predominant position in customary international law is that a commander must take such measures as are within his power and appropriate to the circumstances, without any express

\(^{162}\) Id.

\(^{163}\) Note, Command Responsibility for War Crimes, 82 Yale L.J. 1274, 1276-77 (1973) (labeling the requirements: (1) command and control, (2) the mental standard, (3) the subordinate's mental object, (4) the commanders duty to intervene).

\(^{164}\) See Burnett, supra note 47, at 132 (citing Command Responsibility For War Crimes, supra note 163, at 1276-77).
reference to an objective, reasonable man test. However, the Toyoda trial, and the proceedings following the Son My incident, especially as it concerned General Koster, suggest that the duty to intervene should be determined by a reasonable man standard.

ii. First Lieutenant Calley and Captain Medina

On 16 March 1968, American Troops in South Vietnam, under the command of Captain Medina, moved through the Son My village, randomly killing innocent, unarmed civilians. United States military personnel were charged and tried in an American Military Court Martial, for their roles in the slaughter. First Lieutenant Calley was convicted for his role in the killings. The doctrine did not play a part in his conviction because as a platoon leader, he participated directly in the atrocities. Captain Earnest Medina, Calley's immediate commander, was charged as a common law principal for premeditated murder. The

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165 Id. at 134.
166 Id. at 121.
169 Id. at 7-8.
prosecution in Medina's case could not prove that Medina ordered Calley or others to murder the civilians.\textsuperscript{170}

Regarding the issue of constructive knowledge, the prosecution used Medina's assertion that he ordered a cease fire as a means to show constructive knowledge. The fact that he ordered the cease-fire proved that he knew of the atrocities.\textsuperscript{171} Given that Medina had some knowledge of the atrocities, the question turned on whether he knew they were being committed far enough in advance of the cease fire order to impose responsibility on him for failure to stop them when they were occurring.\textsuperscript{172}

\textbf{iii. Jury Instructions at Medina's Trial}

The jury instructions outlined the elements of command responsibility prosecutors must prove.

(1) "That an unknown number of Vietnamese persons, not less than 100 persons, are dead;" \textsuperscript{173}

(2) the deaths resulted from commander's failure to

\textsuperscript{170} Id.

\textsuperscript{171} Id. at 19.

\textsuperscript{172} Howard, supra note 167, at 8.

\textsuperscript{173} Burnett, supra note 47, at 123-24 (citing Telford Taylor, The Course of Military Justice, N.Y. TIMES, Feb. 2, 1972, at 39: "A higher degree of culpable omission [than simple negligence], one that is accompanied by a gross, reckless, deliberate, or wanton disregard for the foreseeable consequences of that omission").
exercise control over his subordinates once he knew they "were killing noncombatants;" 174

(3) "that this omission constituted culpable negligence;" 175

(4) that the defendant "[o]rdered the killing . . . by subordinates of the accused and under his command, was unlawful." 176

Rather than explaining the concept of constructive knowledge to the jurors, the trial judge distinguished between direct and circumstantial evidence. 177 He reasoned that if the commander received a report of the atrocities, and his normal practice was to read reports provided him, this was circumstantial evidence of knowledge. 178 Instructing the jury to weigh circumstantial evidence eliminated the need to consider the element of

\[\begin{align*}
174 \text{Id.} \\
175 \text{Id.} \\
176 \text{Id.} \\
177 \text{Id. at 124-25.} \\
178 \text{Id. at 125.}
\end{align*}\]
constructive knowledge. The jury acquitted Medina of all charges.

iv. General Koster

General Koster was the Commanding General of the 23d Infantry (American) Division to which Captain Medina’s Company was attached. There was no indication that he ordered or allowed killings of the Son My villagers. However, four irregularities should have spurred him to call for a more thorough investigation. First, 128 enemy were reported dead, against only two dead and 11 wounded American soldiers, and only three enemy weapons were recovered. A casualty ratio of 128 to two was unusual. Also, a report of the incident would

179 Id. After the trial, Medina’s judge asserted that his reason for not issuing a should have known instruction to the jury was because this would only be appropriate where knowledge of the commander is in question. The fact that Medina’s reporting procedures were never questioned by the parties was sufficient to impute actual knowledge. Moreover, since the cease fire was ordered after the massacre had begun, this was additional evidence that Calley actually knew.


181 Burnett, supra note 47, at 125.

182 Id.


184 See Burnett, supra note 47, at 125 (citing Koster, 685 F.2d at 409).

185 Id.
typically reflect close to as many enemy weapons recovered as casualties. Second, Koster received a report of 20 civilian deaths from American artillery fire. This was an unusually high number as well. Third, a helicopter pilot flying in the area of the Son My village had observed Medina’s troops apparently firing indiscriminately on villagers. Fourth, Viet Cong propaganda leaflets reported that some 500 civilians were killed around the Son My village in mid-March.\textsuperscript{186}

In particular, the helicopter pilot’s report of random gunfire prompted General Koster to order a brief investigation by Medina’s brigade commander.\textsuperscript{187} Although this investigation was possibly biased, it resulted in no finding of criminal conduct by Medina.\textsuperscript{188} Koster was charged after a Military Board of Inquiry reviewed his role in the My Lai incident, however, he was never tried for committing atrocities against the Vietnamese.\textsuperscript{189} Koster was later censured for accepting a report that did not reflect an adequate investigation of the incident.\textsuperscript{190}

In a subsequent review of Koster’s case, the Secretary of the Army stated that while a commanding officer is not personally

\begin{itemize}
\item \textsuperscript{186} Id.
\item \textsuperscript{187} Supra note 153, My Lai Report, supra note 183, at 10-36 to 10-66.
\item \textsuperscript{188} Id.
\item \textsuperscript{189} Koster, 685 F.2d at 409.
\item \textsuperscript{190} Burnett, supra note 47, at 126 (citing W. Peers, The My Lai Inquiry 221 (1979)).
\end{itemize}
responsible for all the criminal acts of his subordinates "[a] commander clearly must be held responsible for those matters which he knows to be of serious import, and with respect to which he assumes personal charge."\(^{191}\) He also stated that "General Koster may not have deliberately allowed an inadequate investigation to occur but he let it happen, and he had ample resources to prevent it from happening."\(^{192}\) Although the Secretary was acting in an administrative and not a judicial capacity, he "clearly espoused a duty on the part of a military commander to investigate adequately reports of possible war crimes, a necessary component for the effective enforcement of the law of war."\(^{193}\)

v. Four Factors that Established General Westmoreland's Lack of Command Responsibility

General William C. Westmoreland was the Commander, Military Assistance Command, Vietnam, and the Commanding General, U.S. Army, Vietnam, at the time of the My Lai massacre.\(^{194}\) The Secretary of the Army dismissed all formal charges against

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192 Id.

193 Burnett, supra note 47, at 127.

194 Id. at 128.
General Westmoreland. He found that reasonable precautions had been taken to prevent atrocities.

Four factors support Westmoreland's not guilty finding under the doctrine of command responsibility. First, his command directives appear to have been written in order to insure that "war crimes were properly reported, investigated, and processed to action[]." Second, the My Lai massacre was an anomaly. Third, under the available evidence, Westmoreland appeared not to have known of the atrocities and subsequent cover-up. Fourth, "many American servicemen were tried, convicted, and punished for crimes in Vietnam which constituted violations of the law of war."

C. OTHER LEGAL CONCEPTS RELATED TO THE DOCTRINE OF COMMAND RESPONSIBILITY

In addition to extending liability to military and non-military leaders under the doctrine of command responsibility, international law also considers other methods. Two of those methods are conspiracy to commit genocide and accessory liability. After World War II, these theories were used to

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195 Id.
196 Id.
197 Id.
198 Id.
199 Id. at 128-129.
200 Id. at 129.
prosecute German industrialists who assisted the Nazis, as well as those who commanded and staffed concentration camps.\textsuperscript{201} Also, environmental protection interests have recently turned to international criminal prosecution of private and public leaders whose actions violate human rights.\textsuperscript{202} Also, international law may consider utilizing national civil and common law concepts such as respondeat superior.\textsuperscript{203}

1. Post-World War II Trials and Conventions
   a. Conspiracy to Commit Genocide

In addition to prosecuting the major war criminals through a traditional command responsibility approach, American and British Tribunals tried civilians and individuals in military roles for offenses such as conspiracy to commit genocide.\textsuperscript{204} Conspiracy is defined at common law as "an agreement between two or more people

\textsuperscript{201} See, e.g., Trial of Martin Gottfried Weiss and Thirty-Nine Others, 11 Law Reports, \textit{supra} note 54, at 5, 14 (U.N. War Crimes Comm'n., U.S. Mil. Gov't Ct., Dachau, Germany, 1945).


\textsuperscript{203} See, e.g., \textit{CRIMES AGAINST HUMANITY}, \textit{supra} note 11, at 65, 393-95. According to Bassiouni, international law has included only military leaders in the application of command responsibility, leaving prosecution of civilian leaders to the applicable national law. \textit{Id.} at 393. However, he notes that "since international norms and standards of 'command responsibility' penetrate national laws, they should logically extend to all branches of national laws whether they are applicable to military or civilian personnel." \textit{Id.} See also, Gray, \textit{supra} note 202, at 266.

\textsuperscript{204} 11 Law Reports, \textit{supra} note 54, at 5, 14.
to commit an unlawful act."\textsuperscript{205} Egyptian law defines conspiracy as "the connivance of several persons to commit a crime, whether the crime was successful or not."\textsuperscript{206}

In the Dachau Concentration Camp Trial, forty defendants were convicted for "knowingly participat[ing] in a common enterprise to abuse, starve, torture, and murder" inmates at the concentration camp.\textsuperscript{207} The Belsen Trial prosecutor noted that a conspiracy may be proved by the actions of the accused persons, stating that it is possible for a conspiracy to "arise between persons who had never seen each other and had never corresponded together."\textsuperscript{208}


\textsuperscript{206} Id.

\textsuperscript{207} Matthew Lippman, The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later, 8 Temp. Int'l & Comp. L.J., 1,40-41 (1994) [hereinafter Crime of Genocide] (citing, Sixth Committee Report, supra note 205, at 5, 8). See also, Trial of Joseph Kramer and Forty-Four Others (Case No. 10), 2 Law Reports, supra note 54, at 1, 121 (U.N. War Crimes Comm'n, Brit. Mil. Ct., Luneburg, Germany, 1945). Both of these trials included concentration camp administrators as well as staff members who were convicted for the deliberate practice of starvation, torture, and murder of prisoners. Id.

\textsuperscript{208} 2 Law Reports, supra note 54, at 139.
In 1948, the Draft Convention on the Crime of Genocide included "preparatory acts" in its definition of genocide. Preparatory acts contemplated in the Draft Convention were "issuing instructions or orders and distributing tasks with a view to committing genocide."  

b. Cultural Genocide

Cultural genocide is a result from genocide which causes "great losses to humanity in the form of cultural and other contributions represented by the persecuted group." This idea seeks to extend the protection of international law over the group's culture, as well as its physical integrity. For example, a prosecutor could craft a cultural genocide argument where under a defendant's command and/or complicity, soldiers committed widespread, systematic and repeated rape of female prisoners. Proving that one purpose of the attacks was to dilute the purity of a religious or ethnic group might establish sufficient evidence for a tribunal to find a conspiracy to commit cultural genocide.


210 Id. at art. II(I)(2)(c).


212 Crime of Genocide, supra note 207, at 36.
Code of Crimes Against the Peace and Security of Mankind.\(^{217}\) The Code of Peace and Security includes many of the offenses in the Nuremberg Charter, but does not limit liability to crimes against peace, or war crimes.\(^{218}\) This approach notes that the domestic laws of many countries "attribute criminal responsibility to corporations and other private and public enterprises and institutions through 'public welfare offenses' of strict liability; the \textit{respondeat superior} theory, under which officers' and employees' actions are taken to be those of the organization; and the 'organizational fault' concept.\(^{219}\) These national crimes have not yet received widespread international support, but may as the common and civil law systems continue to influence the development of international law.\(^{220}\)

\textbf{IV. CONCLUSION}

As the above memorandum demonstrates, international law supports the punishment of war criminals under the doctrine of command responsibility, both through judicial decisions and through treaties. The doctrine has developed since the post-


\(^{218}\) Gray, supra note 202, at 263.

\(^{219}\) Id. (citing Josephine Kelly, Address at the Australian Centre for Environmental Law (Sept. 1, 1993), reprinted in \textit{ENVIRONMENTAL CRIME} 165 (Neil Gunningham, et al. eds., 1995)).

\(^{220}\) Id. at 266.
World War II trials of war criminals, and the international community has shown a willingness to prosecute commanders who order or allow atrocities to be committed by their subordinates. The treaties which contemplate command responsibility clearly consider and condemn leaders who are guilty of ordering or allowing atrocities by their subordinates.

Moreover, the post-World War II judicial decisions and treaties support the prosecution of leaders exercising military authority, non-military authority, and civilian authorities. This support is clearly stated in the Statute of the International War Crimes Tribunal for the Former Yugoslavia, which calls for the prosecution of anyone guilty of war crimes, whether a civilian head of state, or a military leader.

Finally, even if the Yugoslavia Tribunal refused to apply the doctrine of command responsibility against non-military leaders, other alternatives are available to the Office of the Prosecutor. These alternatives include theories of conspiracy and accessory liability, both of which were used successfully against civilian defendants after World War II. Also, as scholars note, international law develops through the laws of nations. Civil law and common law nations have recently used the doctrine of respondeat superior to criminally prosecute private executives who promulgate policies, or allow their companies to commit environmental harm that causes injuries to people.